A GUIDE TO LEGISLATION AND REGULATION FOR REWILDERS

In partnership with

the Lifescape project

INTRODUCTION

Rewilding is a pioneering movement that's pushing our knowledge and understanding of natural processes, interactions, our environment, ourselves and policy.

As a result, there are often questions from the rewilding community around whether we're opening ourselves up to liability, what the law says, and how we can safely allow people onto land without fear of reprisals.

Because rewilding does not yet have specific laws or policies dedicated to it, we need to work with existing laws to enable rewilding projects in Britain. That's why we've partnered up with legal experts at the Lifescape Project to bring you a set of practical briefing notes which will help you make sense of how the law could affect your rewilding project.

We hope this guide can act as a starting point to get you thinking about how legislation and regulation across Britain could apply to your rewilding project. In the briefing notes we've included fictional scenarios to help you to interpret what the legislation is saying, as well as useful links to signpost you to relevant regulations.

Please be aware that these (date stamped) notes require regular updates and, depending on when you are reading this, may not reflect the latest developments. And most importantly, we must point out that these notes, as comprehensive as they are, don't replace the need for specific legal advice, and we would always recommend that you seek legal advice in relation to your project and any of the relevant topics included here as necessary. **Nothing contained within these notes constitutes or is intended to constitute legal advice.**

MAIN CONTENTS

ENGLAND AND WALES

1. Conservation covenants and legal protection of wild land
2. Invasive and protected plants
3. Liability for damage caused by animals
4. Liability to individuals on land
5. Liability to neighbouring landholders
6. Planning permission
7. Protected areas
8. Public access
9. Reintroductions
10. Subsidies under CAP
11. Subsidies after CAP
12. Tax

SCOTLAND

1. Conservation burdens and legal protections
2. Developing land
3. Invasive and protected plants
4. Liability for damage caused by animals
5. Liability to visitors and neighbours
6. Protected areas
7. Public access
8. Reintroductions
9. Subsidies
10. Tax

WHO'S BEHIND THIS GUIDE

This guide is one of a series of handbooks produced by Rewilding Britain that provides practical guidance to rewilders. They're designed to help rewilders across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers, and local groups – offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this guide useful, please do consider joining the network, where you can explore these issues further with others in the same boat.

The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.

HOW TO GET THE MOST OUT OF THIS GUIDE

The briefing notes have been structured to allow you to find out information specific to your legislative or regulatory issue. As environmental law is often devolved, we've produced the notes at a national level for ease of use (grouped as England and Wales, and Scotland).

Together, the briefing notes cover four main themes:

- **Tax and subsidies.** It's an ever developing subject, but we've aimed to provide the latest information on inheritance tax and subsidies across the nations.
- **Access and liability.** These notes consider questions such as 'What liability do you have for grazing animal conflicts with people?', 'What do you need to consider when inviting people to enjoy your project?', and 'How can you provide access whilst mitigating your overall liability and risk?'
- **Land use and planning.** Are you changing land use? What implications does that have and what do you need to consider? Our briefing notes cover these key issues.
- **Wildlife reintroductions and licensing**. From beavers to bison, find out more about the reintroduction process and your responsibilities from a legal compliance perspective.

THE LEGAL CONTEXT

Biodiversity loss has become increasingly recognised as an issue in international discussions. The agreement of a Global Framework (the 'Paris Agreement' on biodiversity) during COP15, in December 2022, will lead to significant changes in the way in which biodiversity is dealt with under national policy and law – and could be beneficial to rewilding projects.

Because rewilding is a new and evolving movement in Britain, with projects on the ground testing innovative approaches to nature restoration and land management, rewilding projects are often pushing the boundaries of land management approaches. Legislation and regulations may need to be adapted and tested to accommodate this. Certainly, we will be updating these notes as new legislation and case law is developed.

REWILDING IS A NEW AND EVOLVING MOVEMENT PUSHING THE BOUNDARIES OF LAND MANAGEMENT APPROACHES

KEY ISSUES IN A NUTSHELL

Here's a brief summary of the key issues explored in this guide

TAX AND SUBSIDIES

Having left the EU, each of the four UK national governments is now free to set its own agricultural policy to replace the EU's Common Agricultural Policy. Agriculture subsidies in England, Wales and Scotland are now in the process of being reformed, and will focus strongly on increasing biodiversity and conserving the landscape. The UK Government's vision for post-Brexit centres on creating a food production system that works alongside environmental protection and restoration measures.

In England, the Environmental Land Management (ELM) scheme is replacing the Basic Payment Scheme (BPS), which has now been discontinued. The ELM scheme moves towards results-based payments for actions that benefit the environment.

Wales is also developing an amended agricultural scheme, where legislation obliges the Welsh Government to promote sustainable development and biodiversity. Proposals are in the pipeline to reward farmers for producing public goods such as healthier soils, clean air, clean water and improved biodiversity under a single Sustainable Farming Scheme. Roll-out is intended for 2025, and in the interim the current subsidy framework in Wales will continue.

In Scotland, the Scottish Government and Scottish Green Party shared a draft policy programme setting an aim for Scotland to be a global leader in sustainable and regenerative agriculture. The Agricultural Bill is currently going through the parliamentary process, and aims to provide a plan which delivers for food, nature and the climate.

TAX CONSIDERATIONS

For tax purposes, it can be beneficial for land to be considered 'farmland', given the favourable inheritance tax treatment (where Agricultural Property Relief or Business Property Relief applies) and the availability of certain capital gains tax reliefs (in the form of Business Asset Disposal Relief and rollover relief).

Case law and legislation to date has treated 'farming' as including some form of tillage of the soil or use of the land by livestock for food or other produce. Historically farming has also been found to include diverse activities such as bread-making, homespun cloth and home-brewed ale. However, whether rewilding will qualify for various farming tax reliefs will depend on the degree of the activity, and this will likely be determined on a case by case basis. This is an important consideration for many rewilders, who want to ensure that they can leave their landholdings to the next generation.

Those considering rewilding will need to consider carefully what their current tax position is (from both an income/ capital perspective and for estate planning purposes) and then seek to understand the potential impact of rewilding on that status. The various relationships between the available tax reliefs is complex, and accounting will be key for evidential purposes.

The briefing notes provide a breakdown of the new agricultural schemes currently being developed by the UK Government and the devolved nations, as well as how rewilding activities may affect landowners' tax circumstances.

ACCESS AND LIABILITY

Many rewilding sites are already open to public access, and many others would like to open their land to visitors. There are all sorts of benefits to encouraging access to nature, and this is a core principle of rewilding. Access may vary and can include public footpaths or permissive paths, or take the form of paid-for visits and safaris. Here, there's a need to ensure safe access to these areas, as well as minimising risk of liability for rewilders.

There are three broad questions a rewilder will need to consider when assessing their public access and landholder rights and responsibilities:

1. **What rights do people have to enter and/or use land?**
2. **What rights does a landholder have against trespassers?**
3. **What other responsibilities should a landholder consider?**

These three questions, together with some practical steps on how these rights and responsibilities can be created, changed or removed, are covered in the detailed briefing notes. Rewilders will also need to consider their potential liability around free roaming herbivores exhibiting natural behaviours, especially where public access is being granted.

WILDLIFE REINTRODUCTIONS AND LICENSING

Wildlife reintroductions are a key element of many rewilding projects, and we're seeing an increasing number of reintroductions across Britain. Some of these projects include the reintroduction of invertebrates and small mammals, however, others may involve larger species such as beavers or wildcats.

The UK law relating to species reintroduction is complex, and it can be difficult to navigate the legislation and understand when licences are needed. While some native species can be reintroduced without the need for a licence, consultation and assessments may still be needed. Rewilders must always be mindful of the ecological and social impacts of any proposed activity. The Dangerous Wild Animals Act in particular places further restrictions on the reintroduction of certain native animals including elk, bison, wild boar, lynx and wolves.

The detailed briefing notes provide guidance on when licences are required for reintroductions, as well as the likely legal conditions associated with these licences.

LAND USE AND PLANNING

From 'weed' species (such as ragwort) through to conservation covenants, rewilders must navigate a complex landscape of land use and planning legislation. A key purpose of many rewilding projects is to restore the land to a wilder state and in doing so, rewilders should be aware of various land use issues, particularly with regards to planning permission and environmental impact assessments.

The briefing notes on this theme give an overview of the established legislation around various land use regulations to help rewilders understand their responsibilities.

JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

Get in touch with us at:

Rewilding Britain: the Rewilding Network,
www.rewildingbritain.org.uk/rewilding-network

The Lifescape Project: Elsie Blackshaw-Crosby,
elsie.blackshaw@lifescapeproject.org

CONSERVATION COVENANTS AND LEGAL PROTECTION OF WILD LAND

CORE TOPICS:

- Conservation covenants: their use for rewilding and how they work.
- Private law protection of rewilding land.

KEY TAKEAWAYS:

- Without legal protection, the restoration of nature achieved by rewilding actions is at risk of being lost if new owners do not have the same vision and goals.
- Conservation covenants could be used to restrict how land is managed and used under current and future owners.
- Government guidance explicitly recognises the use of conservation covenants as part of biodiversity net gain schemes.
- To overcome inherent weaknesses in the conservation covenant regime, the Lifescape Project has developed a robust private law protection mechanism.

TABLE OF CONTENTS

1. Introduction

2. Conservation covenants

2.1 What are conservation covenants and how do they work?

2.2 Statutory Conservation Covenants under the Environment Act 2021

2.3 What obligations will the parties to a conservation covenant have?

2.4 What is the duration of a conservation covenant?

2.5 How can obligations be enforced?

2.6 Can covenants be modified or removed?

2.7 How can conservation covenants help rewilding efforts?

3. Private law mechanisms to protect rewilding land

3.1 Legal framework/applicable legal principles

3.2 Scope and advantages of private legal mechanisms

4. Further information

1. INTRODUCTION

Summary

This note discusses methods which can be used to preserve rewilding gains and conservation gains for the long-term. It may take many years for rewilding efforts to bear fruit, and it is therefore important to protect these efforts and ensure they continue even if the land is passed on to a new owner, whether that is within families or through the sale of the site in question.

Practical scenarios

This note considers the following practical scenarios and the application of the rules relating to conservation covenants thereto.

REWILDING PROJECT A

Landowner A is the freeholder of land they purchased 10 years ago, which includes a lake. As part of their rewilding efforts, Landowner A wants to protect the freshwater species in the lake. They have therefore stopped practices such as dredging so that those species can recover and flourish.

Landowner A is thinking of selling his freehold or passing it onto his children but wants to ensure that these practices continue to be restricted in order to protect freshwater species in the long-term.

REWILDING PROJECT B

Landowner B inherited the freehold interest in some land 5 years ago. This land has become the habitat of native bird species and Landowner B sees community engagement with the land as a very important aspect of his ownership. Landowner B actively encourages the community to enter his land for birdwatching and invites the community to participate in discussions and activities relating to the management of the land. Landowner B would like to demonstrate to the community that they are committed to this level of engagement and are not managing the land for their own benefit.

Landowner B wants to pass on the land to their children but wants to make sure that the land continues to be managed for rewilding, in perpetuity. Landowner B is also committed to ensuring that the current level of community engagement is continued in the future and that the community understands that this commitment has been made.

REWILDING PROJECT C

Landowner C is the freeholder of land they have been rewilding for 20 years.

Landowner C wishes to enter into a number of long-term contracts to sell the ecosystem services provided by their land. In particular, Landowner C has identified a local insurance company who would benefit greatly from the ongoing reforestation and peatland restoration on their site. The insurer can see that the reduction in the risk of flooding downstream of the site is likely to reduce its future liabilities during flooding events and is willing to pay for the benefit becoming a reality.

The two parties are negotiating an agreement for the provision of these ecosystem services to the insurer. The insurer has asked Landowner C to evidence their intention to continue to manage their land in a way which will continue to reduce flood risk into the future for the 50-year duration of the contract. The insurer is also concerned to ensure that such management will continue should ownership of the land change during the next 50 years.

Landowner C is investigating whether there are legal arrangements that could be put in place to satisfy the insurer's requirements.

2. CONSERVATION COVENANTS

2.1 What are conservation covenants and how do they work?

A conservation covenant is a private, voluntary agreement between a landowner and a "*responsible*" body, such as a conservation charity, government body or a local authority. A covenant sets out obligations in respect of the land which will be legally binding not only on the landowner but on subsequent owners of the land, meaning that they "*run with the land*". This means that conservation measures in the land will endure despite changes in ownership. It would therefore bind subsequent owners in Rewilding projects A and C, as well as the heirs of the landowner in Rewilding project B.

A conservation covenant could contain positive or restrictive obligations, or both. A positive obligation would require the landowner to do something, such as introducing or actively maintaining certain biodiverse features in the process of rewilding land. This is the case in Rewilding project B, where the landowners want to protect bird species and maintain biodiversity with positive actions such as vegetation removal and ensure community engagement. Any subsequent owners would then have to ensure they use the land in a manner which retains and encourages those biodiversity features and community engagement. A restrictive obligation would require the landowner not to do something, for example damaging / removing conservation value of the land. This is the case in Rewilding project A, where the landowner wants to make sure dredging no longer occurs in the land.

Conservation covenants are already used successfully in rewilding and conservation projects across the world; for example, by 2012 the Adirondack Park of New York State included 3 million acres of private lands with over 781,000 acres under publicly-held conservation easements[1].

Until recently, there were no such laws in England and Wales. However, on 30 September 2022, Part 7 of the Environment Act 2021 (the "**Environment Act**") came into force which provides for the introduction of conservation covenants (see following paragraph 2.2).

2.2 Statutory Conservation Covenants under the Environment Act 2021

The UK Government has introduced a new statutory scheme to allow the creation of conservation covenants in England and Wales in the Environment Act[2].

The landowners in Rewilding projects A, B and C may want to consider using conservation covenants to protect their land. In doing so, landowners will need to take into account Part 7 of the Environment Act which sets out the conditions that an agreement must meet for it to be a statutory conservation covenant. It must:

(a) be an agreement between a landowner and a responsible body. The landowner must be a freeholder, or have a leasehold estate of more than seven years;

(b) be made in writing and signed by the parties in the form of a deed[3];

(c) contain a provision that is of a qualifying kind, meaning it requires the:

   (i) landowner to do, or not to do, something on specified land in England or Wales or allow the responsible body to do something on such land; or

   (ii) responsible body to do something on such land;

(d) have a conservation purpose; and

(e) be intended by the parties to be for the public good.

The "*responsible bodies*" which are entitled to enter into conservation covenants under the Environment Act are the Secretary of State (the "**SoS**"), local authorities and other bodies designated by the SoS as suitable to act as responsible bodies. For bodies other than local authorities to be designated they must have some main function or activity which relates to conservation. The government is expected to publish guidance for how to become a responsible body by the end of 2022.

The definition of conservation purposes under the Environment Act is broad and includes conserving (i) the natural environment or natural resources of land, (ii) places of archaeological, architectural, artistic, cultural or historic interest, or (iii) the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.

The Lifescape Project intends to register as a responsible body once this is possible and would be interested in holding covenants in order to protect rewilding projects.

The government is developing guidance to assist the parties to conservation covenants, including on the definition of "*public good*". The first guidance was published in November 2022 and is available here. The guidance confirms that landowners can use conservation covenants to suit their individual circumstances, including to secure income and funding for conservation covenants, and that public access does not need to be a feature of a conservation covenant. Some of the examples given by the government in relation to the use of conservation covenants include:

(a) Managing land to conserve habitat for a rare species;

(b) Securing income and funding for conservation activities, for example where an environmental charity pays a landowner to manage land in a way that achieves long-term conservation results;

(c) Managing and conserving land, buildings or monuments;

(d) Refraining from using certain pesticides on native flora found on the qualifying estate; and

(e) Providing payment for ecosystem services and for biodiversity net gain.

It is strongly recommended that landowners and responsible bodies seek legal advice and engage a solicitor to draw up the conservation covenant agreement and ensure it meets all the statutory conditions.

EXAMPLE 1: REWILDING PROJECT A

Landowner A owns the freehold of his land and wants to work with a charity such as the Lifescape Project to protect their land against dredging should he sell it in the future.

The parties are considering entering into a statutory conservation covenant to achieve these goals. To be enforceable, the covenant will need to contain a provision (which for the sake of this illustration, we assume would be of a qualifying kind) specifying that the landowner (including future landowners following any sale) cannot dredge the lake, which (again we assume) falls under the requirement of being "*a conservation purpose*" as it aims to protect the "*natural resources of the land*", i.e. freshwater species. It would also need to be established that such protection of nature would satisfy the requirement to be for the "*public* good" and one must assume that the protection of nature satisfies the need to be for the "*public good*". As long as the charity has been designated by the SoS as a responsible body under the Environment Act, Landowner A and the charity will be able to put a conservation covenant in place which once registered (see below), will bind future owners of the land.

EXAMPLE 2: REWILDING PROJECT B

Landowner B owns the freehold of their land and wants to manage it for rewilding and demonstrate an ongoing commitment to community engagement, including when the freehold is passed onto her children.

A conservation covenant may be an attractive option as it may ensure these outcomes through an enforceable legal process whilst maintaining the freehold title for the benefit of her children. As above, Landowner B will need to ensure that the charity they are working with is a responsible body (a status that the charity could apply for if its main function is conservation work).

The parties will also need to draw up a written agreement in the form of a deed. This should meet the other conditions under the Environment Act if it (i) includes a provision of a qualifying kind requiring the landowner to do or not do some specified actions (which together amount to management for rewilding) on the land and engage the community in management decisions and activities relating to the land, (ii) specifies a conservation purpose for the land and ensuring community engagement, and (iii) if it qualifies under the definition of a public good. As there is very little guidance or case law on exactly what types of activities would satisfy each of these requirements, Landowner B and the charity appointed as the responsible body would need to consider very carefully with their lawyers the precise wording to be used in the covenant to ensure it satisfies the statutory requirements. For example, it would seem prudent for the covenant to be as specific as possible in describing what is meant by 'rewilding' and by 'community engagement', perhaps by referring to community engagement in the context of allowing access to the land and discussions relating to the management of the land.

Once signed, the covenant would then need to be registered as a charge in the land registry (see below).

2.3 What obligations will the parties to a conservation covenant have?

The intention of the Environment Act is that conservation covenants are flexible, allowing landowners and responsible bodies to negotiate terms to suit their unique circumstances. Parties to a conservation covenant will be free to negotiate all terms of the covenant, including the duration, the obligations owed and whether there are any upfront or ongoing payments to be made for the conservation of the land.

A landowner's obligation under a conservation covenant (e.g., to introduce keystone species, or to refrain from interfering with certain natural processes) is owed to the responsible body. This will bind the landowner and any subsequent successors of title (e.g., under-lessees if the land is held under a lease). In the reverse, an obligation of the responsible body (if any are included) will be owed to the landowner, or to any person who becomes a successor of the landowner under the covenant.

The Environment Act does not impose any statutory obligations on either party, with one exception: responsible bodies will be required to submit annual returns on the number of covenants they hold and the extent of land covered by those covenants to ensure public oversight.

The landowners in Rewilding projects A, B and C, who may want to benefit from drawing up conservation covenants under the Environment Act, will therefore be free to negotiate all the terms of their agreement.

EXAMPLE 3: REWILDING PROJECT A

The same requirements will apply to Rewilding project A. In this scenario, Landowner A will owe their obligations not to dredge the lake to the chosen charity. There is no need for the charity to have any corresponding obligations, but if they do, these will have to be set out in the written agreement and will be owed to Landowner A. As above, the charity will need to submit annual returns on this covenant and state the extent of the relevant land. Once Landowner A sells their land, the new owner will be bound by the same terms of the covenant, as will the charity.

EXAMPLE 4: REWILDING PROJECT B

The written agreement drawn up in Rewilding project B may contain terms stating what obligations each party owes, for example, it may contain a provision stating the conservation charity will conduct surveys of the land to gauge its ecological health at specified intervals. The landowner's obligation to manage the land for rewilding and ensure community engagement will be owed to the charity, and vice versa. The agreement might also include terms in relation to how the parties will act in certain circumstances, e.g., if a new species appears in the land in the process of rewilding. There are no other statutory requirements for the agreement, but the charity will need to submit annual returns on this covenant and state the extent of the relevant land.

Once Landowner B passes on the land to their children, the children will be bound by the same terms of the agreement, as will the conservation charity, i.e., the charity will still owe the heirs the duty to conduct surveys.

EXAMPLE 5: REWILDING PROJECT C

The same requirements will also apply to Rewilding project C. For this project, Landowner C's obligations will be owed to the charity. The charity may agree that its obligations include producing annual reports confirming that the land continues to be managed in a way which ensures the provision of the relevant ecosystem services. The insurer or other buyer of ecosystem services would not have any direct involvement, obligations or rights under the conservation covenant but would be able to take comfort from it (provided there is an agreement in place between the insurer and Landowner C) as a form of assurance that the land will continue to provide the relevant ecosystem services and that, subject to the terms of the covenant, this will continue should ownership of the land change in the future.

The landowner's obligations may also include monitoring any actions that the responsible body has agreed to do, although the responsible body will usually have the main monitoring role.

The guidance published by the government on 18 November 2022[4] includes some guidance as to the responsible body's role and responsibilities, which will include monitoring and enforcing the conservation covenant agreements.

It is important to note that conservation covenants do not override (i) pre-existing rights which bind the land, i.e. rights to use common law or provide common ways, (ii) statutory rights and obligations, (iii) private property rights, (iv) planning restrictions and/or (v) statutory designations, i.e. in relation to listed buildings. Landowners are advised to take legal advice if they are unsure whether there are any pre-existing matters affecting their estate.

2.4 What is the duration of a conservation covenant?

The parties to a conservation covenant agreement can negotiate the length of the covenant. If a period is not provided for in the agreement, the default period for the duration of a conservation covenant is indefinite (in the case of freeholds) and for the remainder of the term of the lease if the qualifying estate is held on a lease granted for more than seven years.

(a) Therefore, when drafting the agreement for Rewilding project A (in which the obligation is to continue for the long term, but not indefinitely), a provision will have to be included to ensure that the length of the conservation covenant is limited to, say, 30 years. Otherwise, the duration will be indefinite, as Landowner A owns the freehold of the land.

(b) This will however not be an issue for Landowners B and C, as they want the conservation covenant period to be indefinite. Landowners B and C can still choose to specify this as a provision in the agreement.

In order to be a statutory conservation covenant, it will have to be registered as a local land charge by the responsible body. Registering the covenant is vital; successors in title will not be bound by the conservation covenant if the land charge was not registered. Ideally registration should take place as soon as possible after the charge is created and legal advice should be taken on the requirements of registration given it is so central to ensuring the legal validity of any conservation covenant.

The government is expected to develop guidance for local authorities and responsible bodies to ensure consistency in registration by the end of 2022.

2.5 How can obligations be enforced?

A breach of a conservation covenant will occur when:

(a) a person bound by a negative obligation does something prohibited by the conservation covenant, or permits someone else to do such a thing, for example, if the landowner (including any future landowner) in Rewilding project A dredges the lake; and / or

(b) a person bound by a positive obligation does not carry out the promised performance, for example, if the conservation charity in Rewilding project B does not conduct the surveys specified in the agreement.

An aggrieved party will be able to apply to the courts to enforce any obligations under a conservation covenant. The available remedies include (i) specific performance, i.e., an order of the court compelling a party to perform their obligation; (ii) injunctions, i.e., an order of the court compelling a party to do or refrain from doing certain acts; (iii) damages; and (iv) orders for payment of an amount due under the obligation.

It is also worth noting that where a landowner breaches the covenant, the court can award "*exemplary*" damages to responsible bodies, meaning that a responsible body may receive damages in excess of the loss suffered[5]. This is to ensure that a landowner cannot profit from its breach of the covenant and effectively acts as a punishment.

There are a few defences available for parties that have breached a conservation covenant, i.e., that the breach was beyond the party's control. Parties should seek legal advice on this if necessary.

2.6 Can covenants be modified or removed?

Under the Environment Act, landowners and responsible bodies will also have the freedom to discharge or modify conservation covenants by agreement. For example, new landowners in Rewilding projects A, B and C may, in the future, decide that the conservation covenants in place no longer serve their purpose as the land has been rewilded to such an extent as to change the usefulness of the current agreement or they may wish to change the use of the land. The new landowners can approach the respective responsible bodies to change the conservation covenant by agreement. It is also recommended that the original agreements for conservation covenants themselves have provisions that govern how conservation covenants can be modified or discharged, to bring some certainty to this process.

Any changes to a conservation covenant must be made in a separate agreement, which must (i) be executed as a deed, (ii) specify the relevant land and obligations and (iii) specify the legal interest (the estate) the landowner or tenant has in the land. When modifying the agreements parties have to make sure the conservation covenant agreement still has a conservation purpose and is for the public good, and the changes cannot result in someone becoming a party to the agreement who is not the landowner or a qualifying tenant. The responsible body will be responsible for ensuring the local land charge register is updated if necessary.

If a conservation covenant agreement secures biodiversity gains in relation to a planning permission, it must not be ended unless another mechanism is in place for securing those biodiversity gains for the remaining time of the agreement.

The parties will also be able to apply to the courts, specifically the Upper Tribunal, to discharge or modify obligations under a conservation covenant, including where the parties are not in agreement about any amendment. The Upper Tribunal has the power to modify or discharge a covenant where it is reasonable to do so and in exercising its power it must consider whether there have been any material changes of circumstance since the covenant was created and whether the obligation still serves its intended conservation purpose and the public good.

For example, Rewilding project B aims to manage its land for rewilding and ensure community engagement. However, if climate change causes the habitat to change, so that it is no longer optimal to take the approach specified in the conservation covenant, the Upper Tribunal could decide to modify the conservation covenant as climate change has meant that actions have become redundant. It is also possible, however, that a future landowner in Rewilding project B could apply to the Upper Tribunal to discharge the conservation covenant simply because they felt it interfered with their use of the land. As conservation covenants are new and untested, we cannot know how the Upper Tribunal would respond to such an application although it will be required to act reasonably in all circumstances.

It is also worth understanding that as conservation covenants are created under public law, it is possible that in the future the regime established by the Environment Act may be altered by government, potentially strengthening or weakening its impact. Together with the ability of the parties to amend conservation covenants by agreement and for the Upper Tribunal to amend a conservation covenant for any reason on application of one party, this means that future strength and enforcement of a conservation covenant can never be absolutely certain.

2.7 How can conservation covenants help rewilding efforts?

Whilst it may sound onerous for landowners to enter into an agreement to do or not do something on their land, conservation covenants could be used to secure benefits in a variety of instances.

The most obvious advantage is that the landowners looking to take on rewilding projects on their land in Rewilding projects A, B and C can enter into agreements to ensure that these rewilding efforts continue on the land in perpetuity. Rewilding aims to revert land to its natural state, which is a gradual, long-term process. There is no endpoint for rewilding, and significant results are likely to occur only where the land is given time and space to recover and restore itself. Further, this nature-led approach will be dynamic and uncertain, and there is no way to precisely predict what outcome will be achieved, or when.

Therefore, it is key that rewilding efforts can continue in the long term and that any successive landowners who take over land which is in the process of being rewilded cannot take actions that would reverse this process, for example by failing to maintain the ecological disturbances in Rewilding project B and harming the habitat created for the native bird species which mimic large herbivore interactions (unless large herbivores return). This can be achieved through conservation covenants. Without putting in place conservation covenants or similar mechanisms (see below), there is little that can be done to stop successive owners of land from destroying rewilding efforts. For example, once Landowner A in Rewilding project A sells their land, absent a conservation covenant or other similar legal protection, they will have no say as to what the new landowners can do in the land, including in relation to disturbing freshwater species in the lake.

As demonstrated in Rewilding projects B and C, conservation covenants can also be useful in demonstrating important commitments to community engagement and as evidence that the land will continue to be managed in a way which provides ecosystem services.

However, Landowners A, B and C will also need to consider that agreeing to an onerous conservation covenant binding all successive owners could make it more difficult to sell their land or reduce its value. The government has stated it has no plans to change tax arrangements[6] i.e., to offset any loss of land value or management costs, to incentivise uptake of conservation covenants, and that landowners should seek tax advice from a financial adviser[7]. It is also unclear what impact profiting off land subject to a conservation covenant, for example by selling biodiversity credits, may have on the covenant itself although this purpose has been explicitly acknowledged and accepted by the government. Further, careful thought will have to be given as to the terms of the conservation covenant agreement in light of the uncertainty inherent in rewilding projects. It may be impossible to predict the outcome of a nature-led processes in Rewilding projects A, B and C from the outset, and the actions needed (if any) to support the land or the wildlife on it may change over time.

3. PRIVATE LAW MECHANISMS TO PROTECT REWILDING LAND

The utility of statutory conservation covenants is qualified by limitations inherent in their design; particularly the fact that these covenants can be modified / removed by the agreement between the parties or by courts and the wider legislative regime supporting them could be altered. Further, elements of the statutory conservation covenant scheme depend on government discretion (i.e., the list of organisations able to hold them), which may not always be exercised consistently or ultimately for the protection of nature.

Stronger alternatives are available to safeguard against these limitations. For example, a landowner can transfer the legal interest in their land to a charity, ensuring the long-term endurance of conservation gains. From a protection perspective this approach is ideal, however, it requires the surrender of the asset and is therefore unpalatable to some landowners.

To work around these weaknesses, The Lifescape Project has developed a "*Legal Mechanism*" which facilitates third party long-term protection of rewilding sites, whilst ensuring that the valuable, heritable interest in the land remains with the original owner.

The Legal Mechanism is based in private law and creates a structure whereby a guardian charity such as The Lifescape Project will be given the legal right to enforce obligations and restrictions regarding the management of the relevant land in the future, as designed and agreed between the current landowner and the guardian charity.

3.1 Legal framework/applicable legal principles

Two different structures are envisaged under the Legal Mechanism, both of which rely on long established principles of freehold and leasehold interest in land:

(a) The first requires the transfer of the freehold interest in the land to the guardian charity and the creation of a long-term leasehold interest in favour of the landowner. Under this structure, it will be the leasehold interest which is passed on to all future "owners", with the freehold interest being retained by the guardian charity;

(b) The second envisages the freehold interest staying with the landowner with the land leased to the guardian charity and then under-leased back to the landowner for a specified period. This second structure ensures that the freehold interest would come back to the landowner's successor in title at the end of the specified lease period.

Both structures allow the landowner (and any future landowners) to retain day to day control of management of the land within the agreed parameters (in the same way that many residential apartments are owned as leasehold interests with overriding rules about what leaseholders can and cannot do in the properties), with the guardian charity being able to enforce the agreed obligations as to the management of that land.

In either structure, the leasehold agreement between the landowner and the guardian charity will set out the obligations and restrictions applicable to either party for maintaining biodiversity etc., on the relevant land and restricting its future use. These terms are fully negotiable between the landowner and the guardian charity and do not need to meet any of the technical criteria required for statutory conservation covenants.

The Legal Mechanism would be applied to land using precedent legal documents developed by lawyers in cooperation with the Lifescape Project.

In much the same way as for conservation covenants the guardian charity (e.g., The Lifescape Project or another elected charity) would then enforce the agreed obligations and protections over the land in the future, particularly once the land has passed out of the original landowner's hands (e.g., by open sale or succession in title).

3.2 Scope and advantages of private legal mechanisms

Once established, the long-term leasehold interest may be passed on within families or sold to third parties. If and when land protected in this way falls into the hands of a new leaseholder, the original vision, obligations and constraints established in the lease documents remain as regards the management and use of the land.

As with conservation covenants, protection can be assured over time horizons ranging from decades to hundreds of years.

A key benefit of the Legal Mechanism is its reliance on private law which is much more established than the newly established statutory conservation covenants regime, giving greater certainty to its operation both now and in the future as governments are extremely unlikely to alter long established principles of property ownership.

Each of Landowners A, B and C would be able to achieve their objectives by using the Legal Mechanism and appointing a guardian charity such as The Lifescape Project. Compared to entering into a statutory conservation covenant, the Legal Mechanism will offer greater freedom to agree the terms of the protection without needing to consider whether the agreement meets the technical requirements of the Environment Act. The Legal Mechanism also offers greater certainty of future protection, both because it is harder to amend or overturn in the future but also because the underlying regime cannot be altered by future governments in the same way as statutory conservation covenants.

4. FURTHER INFORMATION

We encourage landholders who are interested in these two concepts to reach out to the Lifescape Project team to discuss the potential application of either of these two useful approaches. Please contact Elsie Blackshaw-Crosby at the Lifescape Project on **elsie.blackshaw@lifescapeproject.org**

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 8 December 2022.

ENDNOTES

1. US Department of Agriculture: https://www.fs.usda.gov/research/treesearch/49611
2. The Environment Act 2021 (https://www.legislation.gov.uk/ukpga/2021/30/contents/enacted).
3. Defra, Getting and using a conservation covenant agreement: How to create and implement a conservation covenant agreement to preserve your land in England, 18 November 2022. Available at: https://www.gov.uk/guidance/getting-and-using-a-conservation-covenant-agreement
4. Defra, Getting and using a conservation covenant agreement: How to create and implement a conservation covenant agreement to preserve your land in England, 18 November 2022. Available at: https://www.gov.uk/guidance/getting-and-using-a-conservation-covenant-agreement
5. Section 125(4) of the Environment Act.
6. https://www.gov.uk/government/consultations/conservation-covenants/outcome/summary-of-responses-and-government-response
7. Defra, Getting and using a conservation covenant agreement: How to create and implement a conservation covenant agreement to preserve your land in England, 18 November 2022. Available at: https://www.gov.uk/guidance/getting-and-using-a-conservation-covenant-agreement.

INVASIVE AND PROTECTED PLANTS

CORE TOPICS:

- Obligations to control the spread onto agricultural land of native plants that can be toxic to livestock or interfere with the growing of crops (including ragwort).
- Offences relating to growing certain non-native species in the wild.
- Protected species of plant and the implications for rewilders.

KEY TAKEAWAYS:

- You may need to consider whether there is a risk of invasive native species – such as ragwort – spreading to agricultural land and if so, which control methods are best aligned with the values of your rewilding project.
- There is no general duty to remove, eradicate, treat or report invasive non-native species – such as Japanese knotweed – that are present on land. However, it is an offence to plant or otherwise cause these plants to grow in the wild.
- Certain plants are protected and actions such as picking them or uprooting are unlawful unless you hold a relevant licence.

TABLE OF CONTENTS

1. **Introduction**
2. **Invasive native species of plants (INS)**
   - 2.1 Responsibilities and liability (INS)
   - 2.2 Offences and enforcement action (INS)
3. **Invasive non-native species of plants ("INNS")**
   - 3.1 Responsibilities and liability (INNS)
   - 3.2 Offences (INNS)
   - 3.3 Enforcement (INNS)
4. **Protected wild plants**
   - 4.1 Responsibilities and liability (protected wild plants)
   - 4.2 Offences and enforcement action (protected wild plants)

1. INTRODUCTION

This note provides a high-level overview of key legislation imposing responsibilities on rewilders in relation to plants. It is split into three parts, each describing the responsibilities (and liability), offences and enforcement action: (1) Invasive Native Species ("**INS**"); (2) Invasive Non-native Species ("**INNS**"); and (3) Protected Species.

2. INVASIVE NATIVE SPECIES OF PLANTS (INS)

2.1 Responsibilities and liability (INS)

The Weeds Act 1959 (the "**Weeds Act**") is the main legislation that compels an "*occupier of land*"[1] to control the spread of certain designated INS that may be harmful to grazing livestock or growing crops in Great Britain. These are:

- spear thistle (*Cirsium vulgare*);
- creeping or field thistle (*Cirsium arvense*);
- common ragwort (*Senecio jacobaea*);
- curled dock (*Rumex crispus*); and
- broad-leaved dock (*Rumex obtusifolius*).

Guidance published in 2019 from Natural England ("**NE**") and the Department for Environment, Food and Rural Affairs ("**Defra**") confirms that occupiers are permitted to have these INS growing on their land; however, they must:

- stop them from spreading onto agricultural land, particularly grazing areas or land used for forage; and
- select the most appropriate control method, if required.

The above guidance provides advice on control methods to stop the spread of INS onto agricultural land that is used for grazing livestock, producing forage or growing crops. These range from pulling up, digging up, cutting back, burning or spraying the plants with chemicals, to managing livestock so they do not overgraze and create bare areas where INS can grow. A rewilder, as an occupier of the rewilding land, may need to consider whether there is a risk of INS spreading to agricultural land and if so, which control methods are best aligned with the values of the rewilding project.

In relation to controlling ragwort specifically, the Code of Practice on How to Prevent the Spread of Ragwort (the "**Code**") is relevant and legally binding, insofar as it is admissible in court as evidence when considering a case related to the spread of common ragwort.[2] The Code acknowledges that common ragwort is a native plant which is very important to wildlife in the UK, and does not therefore seek to eradicate it, but only to control it where there is a threat to the health and welfare of animals. The Code aims to clarify what would be considered reasonable action to comply with an enforcement notice (there is more information on enforcement notices below). Ragwort treatment and removal should adhere to the Code as this will assist you, should you need to establish a defence to any legal action, including negligence.

All landholders, occupiers and managers are expected to co-operate and take collective action to control the spread of ragwort in accordance with the level of risk it poses. Rewilders should not let ragwort grow on land that they use for grazing horses or other animals (or feed/forage production), nor allow it to spread onto neighbouring land used for such purposes.

There is generally a "high risk" of it spreading where it is present and flowering/seeding within 50m of land used for grazing by horses and other animals or land used for feed/forage production. In such case you will need to take immediate action to control its spread. A "medium risk" applies when it is 50 to 100m from such grazing/feed or forage production land; and a "low risk" applies where it is more than 100m from such land. These distances are guidelines, and variations in local factors such as prevailing winds, topography, soil type and vegetation cover must also be considered when determining: (i) the risk of spreading onto land used for grazing and/or feed or forage production; and (ii) the most appropriate control methods, where required. This applies whether the land is public or private.

Where the risk level is high, warranting immediate action to control the spread, the Code contains a decision tree designed to assist you in selecting the most appropriate control method. Non-chemical methods such as land and pasture management, pulling out or biological control are favoured over the use of herbicides. The latter requires a risk assessment prior to any use and may additionally be subject to obtaining permission if the land is protected as e.g. a Special Protection Area or a Site of Special Scientific Interest.

These obligations, particularly in relation to INS control, require rewilding projects to strike a balance between letting nature take its course and complying with obligations to prevent the spread of INS onto agricultural land.

2.2 Offences and enforcement action (INS)

If a designated INS is growing on any land, the relevant Minister or delegated public body (NE in England and Natural Resources Wales ("**NRW**") in Wales) can serve a written notice on the occupier requiring them to take action to prevent it spreading.[3] Such enforcement notices may be issued following complaints to NE or NRW,[4] usually from an adjoining occupier and require occupiers to take action to prevent its spread, although neighbours should attempt to resolve the matter informally before contacting NE or NRW.

The authorities have complete discretion to investigate complaints, where there is a risk that INS might spread onto neighbouring land. Priority is given to investigating complaints where there is a risk of INS spreading to land used for forage production, grazing horses or livestock and other agricultural activities. They may, on producing their authorisation, enter the land for inspection, but not until written notice of the date of the inspection has been given to the relevant occupier. If an inspection results in an enforcement notice being served on the occupier, an unreasonable failure to comply with the notice would constitute an offence. Offending occupiers, on conviction in

the magistrates' court, are liable to pay a fine not exceeding level three on the standard scale (currently £1,000).[5]

An occupier is guilty of a further offence if they fail to remedy the breach within 14 days after the conviction.[6] NE and NRW also have powers devolved from the relevant Minister to remove INS where landholders fail to do so and to charge landholders the reasonable costs of doing so.

Finally, while non-compliance with the Code (as opposed to an enforcement notice) is not an offence, failing to follow the Code might lend support to a negligence or nuisance claim brought by a neighbouring landholder.

EXAMPLE 1

Rewilder A notices that ragwort is growing on their land within 50 metres of the boundary of a neighbour's property. Rewilder A decides to do nothing and the ragwort spreads across their land onto the neighbour's land.

If the neighbour's land is used for grazing animals or forage production, the Rewilder A should have taken immediate action to control the spread of ragwort using an appropriate control technique, taking account of the status of the land. This is because the ragwort was within 50 metres of the neighbouring land, so considered to pose a high risk of spreading onto the neighbouring land, requiring immediate action. Rewilder A must also prevent the ragwort from growing or spreading onto any of their own land that they use for feed/forage production or grazing horses and other animals (if applicable).

Rewilder A should review the Code to determine which control method, such as pulling and levering by hand or machine, burning, or as a last resort cutting or using herbicides, is most appropriate to control the spread. They should consider whether the rewilding land is a protected area. If so, permission may be needed before using certain control methods.

Since no notice has been served by the authorities, it would not be an offence for Rewilder A to take no action *at this stage* (although contrary to the Code). However, the fact that Rewilder A has not followed the Code could still be used as evidence in a private legal action against Rewilder A. If an enforcement notice is later served on Rewilder A by the relevant delegated authority, then the prescribed action *must* be taken, or Rewilder A may risk conviction in the magistrates' court and a fine (currently) of up to £1,000. Rewilder A's inaction may also lead to NE or NRW (as delegated authorities) facilitating the removal of the ragwort at Rewilder A's expense, if Rewilder A fails to remedy the problem within 14 days.

By contrast, if the neighbouring land is *not* used for grazing animals or forage production, then no action is required, unless an enforcement notice is served on Rewilder A.

3. INVASIVE NON-NATIVE SPECIES OF PLANTS ("INNS")

3.1 Responsibilities and liability (INNS)

As noted above in the key takeaways, the Wildlife and Countryside Act 1981 ("**W&C Act**") controls the spread of specific INNS, including knotweed, giant hogweed, floating pennywort, rhododendron, Himalayan balsam and New Zealand pygmyweed. Schedule 9, Part II of the W&C Act outlines the full list of these INNS that are already established in the wild in Great Britain, but which continue to pose a conservation threat to native biodiversity and habitats, such that the law seeks to prevent them spreading further.

There is no general duty to remove, eradicate, treat or report INNS that are present on land. However, a person is guilty of an offence[7] if (without a licence) they plant or otherwise cause to grow in the wild any of the plants listed in Schedule 9 of the W&C Act. Defra's 2021 guidance defines "*plants 'in the wild'*" as intentionally placing viable plant material in or on suitable medium so that it can grow.

Similarly, under the EU Invasive Alien Species Regulation (1143/2014), adopted in the UK as retained EU regulation,[8] rewilders must not intentionally release, keep, transport, breed or permit to reproduce or grow in the wild certain "*INNS of special concern*" which are listed in the Annex to the implementing Regulation.[9]

The risk of rewilders committing these offences seems low given it is unlikely that rewilders would intentionally plant or reproduce invasive non-native plants as part of their rewilding projects (which generally focus on bringing back native species). However, if a rewilder was aware that they had an INNS on their land, simply letting the INNS go to seed could fall within one of the offences. This is because "*otherwise cause to grow*"[10] and "*permit…to reproduce, grow*"[11] create wide restrictions, depending on the person's knowledge and intentions.

In addition, failure to take reasonable measures to control an INNS that is not in the wild, which results in it spreading into the wild, or being negligent or reckless as to its spreading, could amount to the offence of causing it to grow in the wild.[12]

Allowing INNS to spread onto neighbouring land might also result in common law private nuisance proceedings which could include a neighbour seeking compensation for loss of enjoyment or amenity, costs of removal, damage to land due to an uncontrolled INNS, a continuing injunction against reinfestation and/or requiring action to control the INNS. Even where there is no physical damage to the neighbour's property, the encroachment of an INNS such as Japanese knotweed could be sufficient for a claim to succeed.[13] Where this is the case, any occupier that allowed the INNS to spread to neighbouring land may be liable to pay damages and remediation costs. The Royal Institution of Chartered Surveyors has recently published revised guidance for surveyors who encounter Japanese knotweed when undertaking valuations or surveys of residential properties, which provides helpful information on the problem and management of this particular INNS, together with various links to further information on the topic.

3.2 Offences (INNS)

It is not an offence for INNS to be present on land, however, it is an offence to:

(i) plant or otherwise cause to grow in the wild any plant that is included in Schedule 9 of the W&C Act;[14] or

(ii) release, keep, transport, breed or permit to reproduce in the wild any INNS which features in the list[15] of "*INNS of special concern*".[16]

An occupier of land may be subject to a claim in nuisance for allowing an INNS to spread to a neighbouring property. Further information on actions related to nuisance can be found in the *Rewilding in England & Wales: Liability to Neighbouring Landholders* briefing.

When INNS are disposed of as part of the removal process (whether voluntarily or due to a complaint or enforcement action), they are likely to be classified as controlled waste. It is an offence to:

(i) deposit controlled waste (or knowingly cause or permit to be deposited) in or on any land without a permit from the Environment Agency, or in a manner likely to cause pollution;[17]

(ii) treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health;[18] or

(iii) to prevent the escape of the waste from the control of an occupier or of any other person.[19]

In particular, Japanese knotweed is designated as "*controlled waste*" that can only be removed and disposed of by licensed organisations.[20]

3.3 Enforcement action (INNS)

The offence of planting or otherwise causing to grow in the wild any plant that is included in Schedule 9 of the W&C Act[21] can result in punishments that range from a £5,000 fine and/or six months' imprisonment to an unlimited fine and/or two years' imprisonment.

A person guilty of intentionally introducing, keeping, selling or releasing "*INNS of special concern*" is liable to imprisonment for a term of up to six months and/or a fine (on summary conviction) or to imprisonment for a term of up to two years and/or a fine (on conviction on indictment).[22]

A person guilty of the disposal offences described in i) and ii) above could face a maximum imprisonment term of up to five years and/or an unlimited fine.[23] A person guilty of the disposal offence described in iii) above could be liable to pay an unlimited fine.[24]

A local authority can serve a notice on an occupier requiring it to remedy the condition of land adversely affected under the Town and Country Planning Act 1990, such as when there is an infestation of Japanese knotweed. This is a general power not solely related to land adversely affected by INNS. Failure to comply with such a notice can result in prosecution in the magistrates' court and a fine not exceeding level three on the standard scale (currently £1,000).[25] Local authorities are also permitted to undertake any necessary works and recover their reasonable costs from occupiers.

liabilities described in Section 3 (Responsibilities and liability (INNS)). Environmental authorities in England and Wales have the power to enter into voluntary species control agreements ("**SCAs**") with occupiers to control INNS and, if necessary, impose species control orders ("**SCOs**") on them too.[26] The "*owner of premises*" is defined as a freeholder, leaseholder or a person who exercises powers of management or control of the premises.[27] Therefore, an occupier such as a rewilder can be considered as the owner of premises for these purposes and as such be subject to SCAs or SCOs. For an SCO to be made, the INNS must have a significant adverse impact on biodiversity, environmental, social or economic interests, with no appropriate alternative way of avoiding that impact. SCOs compel occupiers to carry out control or removal operations or permit such operations to be carried out by the environmental authorities themselves. The use of SCAs and SCOs by environmental authorities is subject to complying with the Species Control Provisions Code of Practice for England and the Code of Practice for Species Control Provisions in Wales. Failure to comply with an SCO without reasonable excuse, or intentional obstruction of the operations required under an SCO, can result in a summary conviction to imprisonment for up to 51 weeks and/or an unlimited fine.[28]

The Home Office has previously acknowledged that the Anti-Social Behaviour, Crime and Policing Act 2014 is intended to be flexible and could also be used against an occupier who fails to clear an INNS such as Japanese knotweed. Such an occupier could be served with a community protection notice compelling them to take steps to rectify the situation, if it is deemed to be having a detrimental effect on the quality of life of those in the locality.[29]

EXAMPLE 2

Rewilder B is considering removing large swathes of rhododendron and Japanese knotweed from the rewilding land as it is outcompeting and displacing native plants to the detriment of local wildlife.

Rewilders are permitted to remove rhododendron and Japanese knotweed from their rewilding land although there is no specific legal requirement to remove them simply because they are INNS.

There are different disposal rules for Japanese knotweed when compared with rhododendron. As both plants are likely to be considered controlled waste, Rewilders should be extremely careful when disposing of them. In particular, Japanese knotweed can only be disposed of by licensed organisations and the disposal of rhododendron may also need a permit from the Environment Agency.

When removing these INNS, Rewilder B should take caution not to unintentionally plant or otherwise cause to grow these INNS elsewhere, as this is an offence. The offence could be triggered, for instance, by not properly disposing of the INNS.

We would recommend seeking specialist land management and legal advice if considering removing any INNS, particularly considering punishment for disposal offences includes imprisonment of up to five years and/or an unlimited fine.

4. PROTECTED WILD PLANTS

4.1 Responsibilities and liability (protected wild plants)

All the wild plant species outlined in Schedule 8 of the W&C Act are offered legal protection in England and Wales. According to the W&C Act, a "**wild plant**" means "*any plant which is or (before it was picked, uprooted or destroyed) was growing wild and is of a kind which ordinarily grows in Great Britain in a wild state.*" It is unlawful to intentionally pick, uproot or destroy any wild plant of a species listed in Schedule 8 of the W&C Act. This applies for both public and private land, and the plant will be deemed to be wild unless the contrary is shown. It is therefore worth checking whether a plant is listed in Schedule 8 of the W&C Act before removing or replacing it for any reason.

Liability under the W&C Act can be limited or discharged completely if the unlawful act concerning the protected wild plant:

(i) has been carried out under a licence obtained from the relevant authority;

(ii) was incidental to a lawful activity which could not reasonably have been avoided and, whilst carrying out that lawful activity, that person took reasonable precautions to avoid damage to the protected plant;[30] or

(iii) could not have been reasonably foreseen in the pursuit of the lawful activity.

4.2 Offences and enforcement action (protected wild plants)

Offences under the W&C Act include intentionally picking, uprooting, destroying or selling any of the wild plants listed in Schedule 8, including any seed or spore attached to the wild plant, unless it can be shown that the act meets one or more of the criteria that limit or discharge liability. Such offences carry a summary conviction of up to six months' imprisonment and/or an unlimited fine.

Offences under the Conservation of Habitats and Species Regulations 2017 (the "**Habitats Regulations 2017**") include deliberately picking, collecting, cutting, uprooting, destroying, having, transporting or selling any wild plant of a protected species on the list which has its natural range in Great Britain (set out in Schedule 5 of those regulations).[31] A person guilty of this offence is liable on summary conviction in the magistrates' court to up to six months' imprisonment and/or an unlimited fine. Despite similar punishments and requirements for attracting liability, this is a separate offence to that under the W&C Act outlined above.

EXAMPLE 3

Rewilder C wants to introduce different species of plants to boost the natural biodiversity of the rewilding land.

In the process of such (re)introduction, Rewilder C must ensure that they do not plant any of the INNS outlined in Schedule 9, Part II of the W&C Act. Failure to take reasonable measures to control INNS that results in the plant spreading into the wild, or being negligent or reckless about that occurring, could amount to an offence punishable by up to an unlimited fine and/or two years' imprisonment.

In the process of such (re)introduction, Rewilder C must also avoid picking, uprooting or destroying any of the protected wild plants listed in Schedule 8 of the W&C Act unless it is an activity carried out within one of the exceptions referred to above.[32] Committing such an offence would have serious consequences, including up to six months' imprisonment and/or an unlimited fine.

Rewilder C must also avoid deliberately picking, collecting, cutting, uprooting, destroying, having, transporting or selling any protected species of wild plant listed in Annex IV(b) of the Council Directive 92/43/EEC. This is an offence that is also punishable by up to six months' imprisonment and/or an unlimited fine.[33]

Given the severity of the possible enforcement action, it is advisable for a Rewilder to seek specific legal advice before such (re)introduction.

Although outside the scope of this note, Rewilders would need to also consider whether any licence would be required under section 16 W&C Act for any of their planned (re)introduction of plant species.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

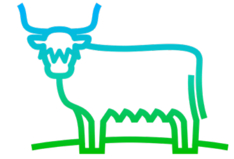
This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 15 July 2022.

ENDNOTES

1. An "*occupier*" can own land outright, or hold it (e.g, under a lease), or be a public authority responsible for a public road, so this can be a broader concept than "*rewilder*".
2. Ragwort Control Act 2003.
3. Section 1, Weeds Act.
4. Complaints of this kind are not usually directed to the Minister of Agriculture, Fisheries and Food.
5. Section 2, Weeds Act.
6. Section 2, Weeds Act.
7. Section 14(2), W&C Act.
8. Article 7(1), EU Invasive Alien Species Regulation (1143/2014), which is the EU legislation that applies in the UK following Brexit through Retained Regulation (EU) 1143/2014.
9. Annex to Commission Implementing Regulation (EU) 2016/1141.
10. Section 14(2), W&C Act.
11. Article 7(1)(g), EU Invasive Alien Species Regulation (1143/2014).
12. Section 14, W&C Act.
13. For example, Network Rail Infrastructure Ltd v Williams and Waistell [2018] EWCA Civ 1514.
14. Section 14, W&C Act.
15. Annex to Commission Implementing Regulation **(EU) 2016/1141.**
16. Article 7(1), EU Invasive Alien Species Regulation (1143/2014), which is the EU legislation that applies in the UK following Brexit through the Retained Regulation (EU) 1143/2014.
17. Section 33, Environmental Protection Act 1990 ("**EP Act**").
18. Section 33, EP Act.
19. Section 34, EP Act.
20. Section 33 and 34, EP Act.
21. Section 14, W&C Act.
22. Article 20, Part 4 of the Invasive Alien Species (Enforcement and Permitting) Order 2019. (cf. Article 7(1), EU Invasive Alien Species Regulation (1143/2014), which is the EU legislation that applies in the UK following Brexit through the Retained Regulation (EU) 1143/2014).
23. Section 33(8), EP Act.
24. Section 34(6), EP Act.
25. Section 216(2), Town and Country Planning Act 1990.
26. Schedule 9A, W&CA as amended by Part 5, the Infrastructure Act 2015.
27. Section 4(2) of Schedule 9A W&CA as amended by Part 4, Infrastructure Act 2015.
28. Schedule 9A, W&C Act.
29. Section 43, Anti-Social Behaviour, Crime and Policing Act 2014.
30. Section 13, W&C Act.
31. Regulation 47, Habitats Regulations 2017 (cf. Annex IV(b), Council Directive 92/43/EEC, which is EU legislation that applies in the UK following Brexit).
32. Section 16(3), W&C Act.
33. Regulation 47(7), Habitats Regulations 2017.

LIABILITY FOR DAMAGE CAUSED BY ANIMALS



CORE TOPICS:

- Liability for damage caused by animals under common law and statute.
- Defences available to rewilders responsible for animals.

KEY TAKEAWAYS:

- If you own or are responsible for an animal, you should take steps to ensure it does not cause injury or damage to third parties (including employees) or their property.
- There are important practical steps that should be taken to avoid accidents in the first place and minimise the risk of liability when they do occur.
- Damage or injury caused by animals may result in civil or criminal liability.
- Liability will always be fact dependent and may arise under common law and different legislation.

TABLE OF CONTENTS

1. Introduction and practical steps to avoid liability
2. Liability under the Occupiers Liability Acts 1957 and 1984
3. Liability under the Health and Safety at Work Act 1974
4. Liability in common law nuisance
5. Liability under the Animals Act 1971

1. INTRODUCTION AND PRACTICAL STEPS TO AVOID LIABILITY

Animals play a vital role in many rewilding projects. As part of planning and managing a rewilding project which involves animals, it's important to appreciate the legal risks associated with them in circumstances where they injure third parties or cause damage to another person's property. By understanding these risks, practical measures can be put in place to minimise the risk of them occurring.

Practical steps to limit potential liability for damage or injury caused by animals

To reduce the risk of liability for animals occurring, a rewilder should:

- undertake regular and thorough risk assessments in relation to the risks posed to visitors by animals, taking into account areas of the project to which members of the public have access. The HSE has published importance guidance on the interaction between animals and public access which should be followed. Key examples from this guidance which relate to animals and public access are highlighted in the Rewilding in England & Wales: Public Access note. Acting in accordance with these risk assessments will help rewilders to demonstrate that they have acted in accordance with the duty owed to members of the public under the HSAW Act and also the Occupiers Liability Acts;
- ensure that they have the right insurance in place which covers any civil liability for damage or harm caused by animals;
- make explicitly clear, via signs or other notifications, whether the rewilding project is publicly accessible or not and that if it is accessible anyone accessing the site does so at their own risk, with regard to injury by any animals on the site. This is to reduce the risk of animals causing damage or injury to members of the general public, and to strengthen the argument that individuals were trespassing when they were injured by an animal and/or accepted the risk of injury when entering the land;
- erect/maintain fencing and/or other suitable barriers to ensure livestock, horses and other animals cannot escape and cause damage to neighbouring land or property or injury to third parties; and
- seek targeted legal advice when an animal causes damage or injury, including with respect to which defences may be available. This may also include seeking evidence from experts (biologists, veterinarians and other specialists) that can ascertain whether an animal belongs to a "dangerous species" or not.

2. LIABILITY UNDER THE OCCUPIERS LIABILITY ACTS 1957 AND 1984

Liability under the Occupiers Liability Acts 1957 and 1984 is civil liability which means that if found liable, a rewilder or other land manager responsible for animals on their land could be ordered to pay monetary damages to compensate for the damage or injury caused by the animal.

In reality, this type of potential liability should be covered by third party liability insurance.

A detailed analysis of when each of these Acts will apply and the duty of care owed to visitors is covered in the *Rewilding in England & Wales: Liability to Individuals on Land* note published in this series of briefings and applies to damage or injury caused by animals.

3. LIABILITY UNDER THE HEALTH AND SAFETY AT WORK ACT 1974

Under the Health and Safety at Work Act 1974 ("**HSAW Act**"), anyone undertaking rewilding as some form of business or operation which otherwise generates income (including on a self-employed basis), owes a duty of care to ensure that any person who may be affected by the rewilding activities is not exposed to risks to their health or safety.

Liability under the HSAW Act is criminal liability and is typically enforced by the Health and Safety Executive (the "**HSE**"). If an offence is established, the person found to be in breach could be ordered to pay a fine and/or face up to two years imprisonment.

Landholders including rewilders should be aware that the HSE regularly investigates incidents involving cattle and members of the public in England and Wales, with the two most common factors in these incidents being cows with calves and walkers with dogs. The HSE has also previously prosecuted farmers where a member of the public has been killed by livestock.[1]

Landholders including rewilders must undertake adequate risk assessments to ensure that their duty under the HSAW Act is complied with and follow this HSE guidance.

For further details on liability under the HSAW Act, please see the *Rewilding in England & Wales: Liability to Individuals on Land* and *Rewilding in England & Wales: Public Access* notes published in this series of briefings.

4. LIABILITY IN COMMON LAW NUISANCE

Nuisance can impose on landholders an obligation to take action to stop or prevent things from occurring on their land which adversely impact their neighbour's enjoyment of their own land. Such interference must be "substantial" or "unreasonable" and may or may not take the form of physical damage.

If animals kept by a rewilder are in some way adversely impacting a neighbour's enjoyment of their land and an amicable solution cannot be found, the neighbour could potentially bring an action in nuisance. This would be a civil claim and could lead to an order requiring the rewilder to stop the nuisance and/or to pay damages to the neighbour.

Further information about nuisance and its potential relevance to rewilders is provided in the *Rewilding in England & Wales: Liability to Neighbouring Landholders* note.

5. LIABILITY UNDER THE ANIMAL ACT 1971

The Animals Act 1971[2] (the "**Animals Act**") sets out certain circumstances in which the "*keeper*" of an animal can be held liable for damage or injury caused by animals – without any need for a finding of fault or breach of duty on their part.

Liability under the Animals Act is civil liability meaning that it could give rise to an order to pay monetary damages to the injured party. Rewilders should consider whether their third party liability insurance would cover the payment of such damages.

There are four broad questions a rewilder should consider when assessing liability under the Animals Act:

1) Who is the "keeper" of the animal (if anyone)?
2) Does the animal belong to a "dangerous species" or not?
3) Is a defence available?
4) Does the fact pattern fall within one of the specific scenarios covered in the Animals Act?

These four questions, together with some practical steps that can be taken to limit potential liability under the Animals Act, are covered below.

Who is the "keeper" of the animal (if anyone)?

Only the "*keeper*" of an animal may be liable for any damage caused by the animal, under the Act. The "*keeper*" is the person that, broadly speaking, "*owns the animal or has it in his possession*"[3]. Once someone is the keeper of an animal, they will remain so until someone else becomes the keeper, even if they abandon the animal in question.

It is possible for more than one person to be the keeper of an animal at the same time.

Determining who the keeper of an animal is can be a very fact-specific assessment. The key question seems to be whether the relevant individual has at least *some* degree of control over the animal. If no one has a degree of control over the animal and at no stage in the past has had a degree of control, it is likely that the animal is "*living wild*", does not have a keeper, and no liability under the Animals Act can arise if it causes damage.[4]

EXAMPLE 1

An area of rewilding land is left open and unfenced and wild animals are able to enter and exit the land as they see fit. A herd of wild deer that has been living on the land then roams onto a nearby road, and one hits and severely damages a passing car.

The deer that caused the damage is a wild animal and does not have a keeper. This means that no one will be liable under the Animals Act for the damage caused to the car.

If the deer were intentionally kept in a deer park and subsequently escaped, then it would not suddenly be "*living wild*" and the owner of the deer could potentially be held liable for the damage (subject to the other necessary elements to establish liability under the Animals Act being met).

Where a person has at least *some* control over the animal (e.g., because they introduced it into an enclosed rewilding project) or has erected fencing to keep the animal within the project grounds, they may well be considered as the keeper and be held liable for any damage.

The rewilder will, therefore, be the keeper of animals that they legally own or physically possess (but not legally *own*) – in which case they could, in principle, be liable for damage caused by that animal.

Does the animal belong to a "dangerous species" or not?

Once the keeper of the animal that caused the damage or injury has been confirmed, it must be established whether the animal belongs to a "*dangerous species*".

Under the Animals Act, all species are divided between those that are "*dangerous*" and those that are not. This distinction is important as it may change the degree to which the "*keeper*" is held liable. As to animals belonging to a "*dangerous species*":

- A "*dangerous species*" is a species which is not commonly domesticated in the British Islands and whose fully grown animals are, unless they are restrained, likely to cause severe damage[5]. Under the Animals Act 'species' is defined to include "*sub-species and variety*", meaning that this assessment may be done at this sub-species or variety level.
- Unfortunately, there is no set list of "*dangerous species*", and case law has generally focused on horses and cattle, many species of which are commonly domesticated in Great Britain (and therefore not "*dangerous species*"). But a rewilding project may involve animals that are not obviously "*commonly domesticated*"– e.g., certain breeds of historic breeds of cattle or Konik ponies – and that could cause severe damage, because of their temperament or their size. In that case, the animal could possibly be considered a "*dangerous species*" but it is unclear.[6]

The position of animals such as European bison (which have never been commonly domesticated in Great Britain) is much clearer and it is very likely that such animals would be classified as a "dangerous species" under the Act.

- Where an animal belongs to a "dangerous species" and causes damage, "any person who is a keeper of the animal is liable for the damage"[7]. Liability is "strict" in these cases, which means that it will not matter whether or not the keeper is at fault for the damage caused by the animal or whether or not they even realise that it belongs to a "dangerous species". There are, however, certain defences available (see practical example 4 below).

EXAMPLE 2

As part of a rewilding project large herbivores no longer commonly domesticated in the British Isles are reintroduced, to roam across a large, enclosed landscape, semi-wild, with very minimal human interference. One of the animals escapes the boundaries of the project, crosses a nearby road and is hit by a car, causing serious injury and damage.

These herbivores could arguably be a "*dangerous species*", as they are not commonly domesticated in the British Isles and could do severe damage, on account of their size. While the herbivores are living "*semi-wild*", the rewilder may have exercised *some* degree of control, by introducing them to the rewilding project– and could therefore be the "*keeper*" and strictly liable for the injury/damage caused (unless a defence applies).

However, this is not a clear-cut situation and case law does not offer much guidance here. The key question is whether a species that is no longer commonly domesticated is the same as a species that has never been commonly domesticated. This may be an issue that a court would need to clarify – unless the law itself is amended and clarified.

As to animals not belonging to a "*dangerous species*", the "*keeper*" will be liable for the damage caused by the animal, again on a strict liability basis – but only if *all three* of the following conditions are met[8]:

- the damage is of a kind likely to be caused by the animal in question unless restrained, or is likely to be severe if caused by the animal;
- the likelihood of the damage is due to characteristics which are not normally found in the species, or are not found except at particular times or in particular circumstances; and
- those characteristics were known to the keeper.

Livestock and other farm animals (including domestic cattle, horses, sheep, pigs, goats, poultry etc.) will in most cases not be animals belonging to a "*dangerous species*", as they are commonly domesticated. But this could be different for other animals that form part of a rewilding project. As noted above, this has not been considered in detail by the law or in any reported cases.

EXAMPLE 3

As part of a rewilding project highland cows are introduced. Fences are erected but one of the cows, which is known to misbehave and has escaped before, breaks through, wanders onto neighbouring land and severely damages crops and property.

Highland cows are unlikely to be "*dangerous species*" because they are commonly domesticated in Great Britain. And in this instance, as the cows are fenced in, the rewilder is clearly a "*keeper*".

If it can be established that it was known by the keeper that this particular cow was more likely to escape than an average highland cow and that the damage it would cause if it escaped was likely to be severe (e.g., on account of its size) or was likely to be of the kind suffered, liability could be established under the Animals Act, for the damage caused. This might either be under the general liability for damage caused by animals of which they are the keeper, or the more specific liability for straying livestock (please see Question 4 below), unless a defence applies.

Is a defence available to the keeper?

A keeper has three separate defences available in order to avoid being held fully liable for the damage caused by animals in the circumstances described above. These are the same for dangerous species and for non-dangerous species.

The three defences are that:

- The person suffering the damage is wholly or partly to blame for that damage. This could be the case where someone teases a dog and is then bitten (albeit it will be difficult to prove this if there are no other witnesses).
- The person suffering the damage voluntarily accepted the risk of it occurring. This, in brief, means that they appreciate the risk, but go ahead anyway[9].
- The person suffering the damage was trespassing. This generally means that the keeper of an animal will not be held liable for damage caused by that animal to a person that is not (explicitly or implicitly) invited onto the land on which the animal is kept[10].

See the "practical steps" box at the start of this note for discussion of practical steps that a rewilder may wish to take to increase their chances of being able to rely on one of these defences.

EXAMPLE 4

A rewilding project incorporates a private sanctuary into which European bison are introduced and allowed to roam. The sanctuary is fenced off with warnings against trespass. A passing walker ignores these and climbs the fence, then is injured by the bison.

The rewilder will be the "*keeper*" and the bison are arguably, but not definitively, "*dangerous species*". Irrespective of that, though, the sanctuary was fenced off and, in spite of being warned, the walker trespassed onto the land. The "*keeper*" will likely be able to rely on the trespassing defence and avoid liability under the Animals Act.

Do any of the specific scenarios apply?

There are also some more specific scenarios in respect of which liability for animals can arise, namely:

(a) Dog attacks:

- The Animals Act specifically makes the keeper of a dog liable if it kills or injures livestock[11].

- A rewilder/livestock owner can use the Animals Act to avoid being held civilly liable for killing or injuring a dog that is "*worrying or about to worry*" their livestock if certain conditions are met[12].

(b) Straying livestock (cattle, horses, sheep, pigs, goats, poultry, and deer not in a wild state):

- Where livestock strays onto land owned or occupied by another, or where horses are on land without lawful authority, the person to whom the livestock/horses belong[13] will be liable for damage caused to the land or property on it, as well as any expenses the rewilder or occupier of that land has had to incur in keeping the livestock or horses pending their return to the original owner[14].

  Note that the Act confirms that "*any livestock belongs to the person in whose possession it is*".

- That said, there are a few defences available to the person to whom the livestock/horses belong, in case a specific scenario applies, namely[15]:

  (i) if the person suffering the damage is to blame for it him/herself;

  (ii) if the livestock/horses strayed from a highway, where they had a right to be; or

  (iii) if the straying would not have occurred if the rewilder or occupier of the land had not breached a duty to put up fencing[16].

Conclusion regarding the Animals Act

It follows that, where a rewilding project involves animals, then it is likely that the rewilder will come under the definition of the "*keeper*" of those animals, to the extent that they retain some degree of control over the animals. In those circumstances, the rewilder must carefully consider whether those animals belong to "*dangerous species*" or not.

If they do, then the rewilder, as the keeper of those animals, will be strictly liable for any damage caused by those animals.

If they do not, then the rewilder may still be strictly liable, but only if the three additional conditions are satisfied – in essence if a particular animal has characteristics not common to the species which make it likely that it would cause severe damage or the type of damage suffered, and the keeper knew about these characteristics.

A rewilder can avoid liability if at least one of the three defences set out under section 3, above, applies.

Separately, a rewilder may be held liable for damage caused by straying livestock/horses, unless one of the three defences set out in under section 4 (b) (i)-(iii) is available.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

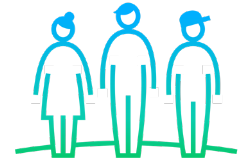
The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 15 July 2022.

ENDNOTES

1. See e.g., https://cqms-ltd.co.uk/farmer-sentenced-after-walker-killed-by-cattle/
2. Other animal-related legislation which may be of relevance to rewilders includes the Dangerous Wild Animals Act 1976, which regulates issues around licensing for "dangerous wild animals", and the Wildlife and Countryside Act 1981 (the "**W&C Act**"), which concerns potential liability for actions undertaken against a "*wild animal*" (e.g. hunting, trapping, capturing and killing). This note, however, focuses solely on liability under the Animals Act.

   Each of these Acts have specific definitions and may overlap with each other; a single animal may, depending on the circumstances of the case, fall under multiple pieces of legislation. A pheasant may, depending on how it is hatched, protected, kept etc. be a "*wild bird*" for the purposes of the "W&C Act", in which case no liability can arise for any damage it causes, or "*livestock*", in which case strict liability can arise for its keeper, under the Animals Act.
3. Section 6(3), Animals Act.
4. Note that a landholder could be liable under nuisance for damage caused to neighbouring land by wild animals on their land. If a rewilder is considering taking action *against* a wild animal they should consider potential liability for such action under the W&C Act. Rewilders are therefore advised to consider their position and, for instance, ensure that they have the right licence in place before pressing ahead with, for example, culling badgers.
5. Section 6(2), Animals Act.
6. In *Mirvahedy* v *Henley & Henley*, the Court hypothesised that tigers and Indian elephants would be "*dangerous species*"; the former because of their nature and the latter because of the damage they could cause, on account of their weight/bulk. In addition, neither species is "*commonly domesticated in the British Islands*". *Mirvahedy* v *Henley & Henley* [2003] UKHL 16, para 67 Hobhouse LJ.
7. Section 2(1), Animals Act.
8. Section 2(2), Animals Act.
9. See *Goldsmith* v *Patchcott* [2012] EWCA Civ 183 at para. 50, where the Court of Appeal held that the claimant, who had been thrown off a horse and suffered significant injuries, had been aware that there was a possibility of the horse bucking, but had accepted that risk and went ahead anyway. The fact that the horse had bucked more violently than the rider had anticipated, was immaterial.
10. It should be noted that in these circumstances the landholder could still be liable to the trespasser under the Occupier's Liability Act 1984.
11. Section 3, Animals Act. Under the Animals Act, "*livestock*" means cattle, horses, sheep, pigs, goats, poultry, and deer not in a wild state (see section 11, Animals Act).
12. Section 9, Animals Act. This exception applies where either (a) the dog is worrying or is about to worry the livestock and there are no other reasonable means of ending or preventing the worrying; or (b) the dog has been worrying livestock, has not left the vicinity and is not under the control of any person and there are no practicable means of ascertaining to whom it belongs.
13. This is a slightly narrower concept than "*keeper*", but includes anyone who is in possession of the livestock or horse.
14. Section 4, Animals Act.
15. Section 5(1) and 5(4)-(6), Animals Act.
16. See the *Rewilding in England & Wales: Public Access* briefing for information on when such a duty can arise.

LIABILITY TO INDIVIDUALS ON LAND



CORE TOPICS:

- Civil and criminal liabilities relating to individuals entering land.
- Discharging liability and defences for rewilders.

KEY TAKEAWAYS:

- Whether or not civil liability will arise will depend on the nature of the land, whether or not the injured person had permission to enter the land and any steps taken to prevent the injury or damage occurring.
- Employers and self-employed persons who conduct an undertaking, have to take steps to ensure that they do not expose employees and third parties to health and safety risks. Failure to do so may result in criminal liability.

TABLE OF CONTENTS

1. Civil liability

1.1 Overview of civil liabilities

1.2 Duty of care to visitors

1.3 Duty of care to non-visitors (including trespassers)

1.4 What duty of care is owed to individuals entering open access land?

1.5 What duty of care is owed to individuals entering the coastal margin?

1.6 Does the keeping of animals impact the duty of care?

1.7 Is there any additional duty of care for land which includes mines or quarries?

1.8 Can landholders exclude or discharge civil liability or rely on any defences?

2. Overview of criminal liabilities under the Health and Safety at Work Act “HSWA”

2.1 Scope of section 3 HSWA

2.2 What is an “undertaking” and when will HSWA apply to rewilders?

2.3 What is required to comply with section 3 HSWA duty?

1. CIVIL LIABILITY

1.1 Overview of civil liabilities

Relevant legislation

The two key pieces of legislation governing civil liability to individuals entering a landholder's land are:

- Occupier's Liability Act 1957 (OLA 57), which applies to lawful visitors entering or on the land (referred to in this note as "visitors"); and
- Occupier's Liability Act 1984 (OLA 84), which applies to all others entering or on the land, including trespassers.

Additionally, the Countryside and Rights of Way Act 2000 (CROW) and the Marine and Coastal Access Act 2009 (MCAA) can alter the duty and standard of care owed to visitors on open access land and the coastal margin, respectively.

This note considers an occupier's potential liability under OLA 57 or OLA 84. It does not consider common law negligence which regulates liability falling outside of an occupier's 'occupancy duty', such as accidents arising out of unsafe activities conducted on the land itself[1].

Summary

The following table serves as a summary guide to the issues of civil liability considered in this briefing. It considers the two main elements that influence the standard of care expected of you towards people entering their land under civil law: a person's entry status and the type of land in question. Other relevant factors can be found in the remainder of this note.

<table>
<tr><th></th><th>Visitor</th><th colspan="2">Non-visitor</th></tr>
<tr><td>Private Land</td><td>Standard:
Liability may be limited or reduced through prior agreement in some circumstances.</td><td colspan="2">Standard:
Duty arises only if requirements under Section 1(3) OLA 84 are satisfied.
Only applies to death or personal injury.</td></tr>
<tr><td>Public right of way*</td><td>Standard: N/A
People on public rights of way do not fall within the definition of lawful visitor because they are exercising a public right. Liability will fall on the local highway authority.</td><td colspan="2">Standard: N/A
The duty of care under OLA 84 towards non-visitors does not arise to those using public rights of way.
Liability will fall on the local highway authority.</td></tr>
<tr><td>Open access land*</td><td>Standard: N/A
People entering open access lands are normally regarded as non-visitors unless a specific invitation was made.</td><td>Natural features
Standard: N/A
An occupier owes no duty in relation to "the existence of any natural feature."</td><td>Manmade structures
Standard:
Lower standard due to added consideration not to overburden occupiers.</td></tr>
<tr><td>Coastal margins*</td><td colspan="3">Standard: N/A
An occupier owes no duty for any injury caused by "a risk resulting from the existence of any physical feature (whether of the landscape or otherwise)."</td></tr>
</table>

** Note that a duty can still be found on public rights of way, open access land and coastal margins if the occupier has the intention of creating a risk or is being reckless as to whether that risk is created[2]. They will not escape liability in such situations.*

1.2 Duty of care to visitors

The OLA 57 and OLA 84 only seek to replace the previous common law rules (e.g., case law) in relation to identifying the circumstances in which an "occupancy" duty of care may exist. The common law rules may still be relevant in identifying the person on whom the duty is imposed (the 'occupier') and the person to whom the duty is owed (either 'visitor' or 'non-visitor') under the Acts.

What is a "visitor" for these purposes?

A "lawful" visitor is either an individual who has express permission, implied permission, or a lawful right of entry. For example:

- Members of the public invited onto the rewilding land for educational or recreational purposes, such as wildlife safari tours (whether free or paid for).
- Contractors that require entry onto the land to carry out relevant works for rewilding projects.
- A police officer that enters the land in performance of their duties.
- A person on a public right of way does not fall within the definition of a lawful visitor because that person is exercising a public right[3]. Rewilders therefore do not owe a duty under OLA 57 to people using public rights of way across their land. Legal liability for accidents occurring on a public right of way will fall to the relevant authority. However, you should still act reasonably because a user of a right of way may still be able to claim at common law against an occupier who has been malicious or grossly negligent with the state of their land (see *Rewilding in England and Wales: Public access* note for information on a landholder's responsibility to keep public rights of way clear of obstruction).

What level of care is owed to visitors?

Occupiers of premises owe a duty of care to all visitors to take such care as is reasonable in all the circumstances to see that a visitor will be reasonably safe when on or using the premises for the purposes for which they have been invited or permitted. If an occupier has not acted reasonably in keeping their premises safe, visitors may be able to claim against the occupier for both personal injuries suffered, and/or the loss of, or damage caused to their property on the land.

When a duty of care is found, occupiers can discharge any possible liability towards individuals if they satisfy the standard of care expected of them. The standard of care is fact specific and may vary depending on the circumstances. For example:

- An occupier's standard of care will be increased when dealing with children, as the occupier must be prepared for children to be less careful than adults[4]. In light of this, it may be wise for an occupier to carry out a risk assessment to identify potential hazards for children specifically, if relevant. For example, if visitors are invited or permitted onto the land to forage for wild food, then it may be foreseeable that children will be less discriminating than adults about poisonous berries that the occupier knows or should know are growing on their land. The occupier must then ensure that the protection mechanisms adopted against a specific danger are sufficiently capable of protecting children if there are expected to be visitors. For example, a sign posted on the top of a fence may not serve any purpose in protecting a child who is unable to see and/or read it. As the risks associated with children are that much greater than adults, some rewilding projects have restricted the age of children permitted on the site.
- Conversely, an occupier's duty of care can be lessened when dealing with individuals on the land that are in the "*exercise of their calling*[5]", e.g., people carrying out their trade or profession. It is assumed that such visitors will have a greater awareness of the potential risks, dangers and associated precautionary measures. For example, a contractor hired to carry out works on the land is generally expected to be capable of ensuring their own safety when carrying out those works due to their experience in the field. However, an occupier will still need to act reasonably.

Who is an "occupier" and who owes this duty?

An "*occupier*" need not be the rewilder or freeholder, nor need they live at the premises; it is anyone with sufficient control over the land (which we assume to be the case for most rewilders). For example, a rewilder with permission to carry out rewilding activities on another person's land may still be regarded as the occupier. Note that "*premises*" in this context are broadly defined to cover land, water and buildings, as well as any fixed or moveable objects such as vehicles and scaffolding.

1.3 Duty of care to non-visitors (including trespassers)

Occupiers of premises may also owe a duty of care to "*persons other than his visitors*" ('non-visitors'), including people who enter the land without consent, although such individuals are generally said to enter premises at their own risk.

What does "trespass" mean?

"*Trespass*" has been confirmed to mean: (i) the lack of permission or invitation; and (ii) being in a location where one has no permission to be[6]. You do not need to expressly tell a person to keep off your land, and in fact need not even be aware of the person's presence on the property to make them a non-visitor[7].

However, the definition of "*trespass*" may vary in certain circumstances, depending on the individual's mental state and whether they reasonably ought to have known they were trespassing[8]. A person who enters a restricted area by mistake will not be a trespasser, and will likely be given "*visitor*" status unless captured by another category of "*persons other than visitors*"[9], such as lawful authorities. In contrast, an individual who enters a restricted area as

a trespasser but changes their mind and no longer intends to trespass, does not escape their trespasser status while still in the restricted area.

For example, trespassers include:

- A hunter that enters land to hunt without the permission to do so (this may also involve other poaching-related offences that are beyond the scope of this note).
- A visitor who wanders off a public right of way onto a different part of the land not covered by the right of access.
- A visitor invited onto the land for a specific recreational purpose (for example, bird watching) who then acts in a way that is far beyond anything that could be implied to be part of that purpose, such as cutting down a tree and lighting a fire.

What duty of care is owed to non-visitors / trespassers?

A duty of care towards non-visitors will arise if the occupier:

- is aware of a particular danger on the premises or has reasonable grounds to believe that it exists;
- knows or should know that people may be exposed to the danger; and
- is aware that the risk is one against which, in all the circumstances of the case, they may reasonably be expected to offer some protection[10].

If a duty of care is found, the occupier must **take such care as is reasonable in the circumstances** to ensure that the non-visitor does not suffer injury as a result of the relevant danger. However, the standard of care owed to trespassers is less onerous than the duty owed to visitors. Further, an injured trespasser can only claim for death or personal injury, and it does not apply to loss of, or damage to, property.

Does this duty of care arise in relation to public rights of way?

It is important to note that the duty of care under OLA 84 towards non-visitors also does not arise to those using public highways[11]. This includes members of the public making use of public rights of way, including footpaths, bridleways and byways. Any liability will fall on the relevant authority in such circumstances[12].

1.4 What duty of care is owed to individuals entering open access land?

Where individuals enter land designated as 'open access' land under CROW, they are not considered "*visitors*" and the higher standard of care does not apply, therefore reducing the burden for occupiers. Further, the question of whether or not the lesser duty of care owed towards non-visitors applies will generally depend on whether hazards found on the land are derived from natural features or are manmade. No duty of care is owed for risks that arise from the "natural features of the landscape".

However, if an occupier has the intention of creating a risk, or is reckless about whether that risk is created, this distinction will not apply and the occupier can be liable for injuries caused by both manmade structures and natural features.

Natural features

On open access land, occupiers owe no civil law duty in respect of risks arising from[13]:

- any natural feature of the landscape, including any tree, shrub or plant;
- any river, stream, ditch or pond, whether natural or not; and
- people passing over, under or through a wall, fence or gate except by proper use of the gate or stile[14].

EXAMPLE 1

A person enters rewilding land designated as open access and is injured by a falling tree branch.

As the land is designated as open access, a tree branch is included in the definition of a natural feature and there will be no obligation on you to put in place protection measures against this danger.

However, if you intentionally or recklessly exposed visitors to such danger (for example, recklessly permitting a half-sawn tree to stand without any protection measures) then, subject to any other relevant circumstances, they might still be found liable for the injury caused to the visitor.

Manmade structures

Occupiers may be liable for injury caused by manmade structures on open access land. Therefore, it may be beneficial from a liability perspective for occupiers with open access land to remove or make safe (as far as possible) man-made structures from their land.

PRACTICAL POINT

One of the key objectives of rewilding is to restore the environment's natural landscapes and processes over time. A common initial step involves removing man-made structures, followed by the reintroduction of natural processes. For example, the removal of dams can allow for aquatic life to move freely along the watercourse.

The removal of man-made structures, especially those that are disused, may be beneficial from a liability perspective as it potentially reduces man-made hazards to people entering the land, as well as the need to maintain such structures (which is helpful to demonstrate that rewilders have discharged their duty of care to take reasonable steps to ensure their premises are safe).

However, rewilders should also be cautious about hazards that can be created by the removal of man-made structures. For example, the removal of a dam may lead to a faster flowing river, which may make it unsafe for people to swim or cause an overflow of water into neighbouring land. In the latter situation, an action may arise in nuisance (see briefing on *Rewilding in England & Wales: Liability to Neighbouring Landholders*). Where appropriate, a detailed risk assessment of the consequences of removing man-made structures should be carried out, as well as identifying relevant remedial or mitigating actions.

For various reasons, it may not always be feasible for an occupier to remove all man-made structures on the land. Therefore, a risk assessment involving the identification of all remaining man-made structures left on the land and the evaluation of the extent of danger associated with each identified structure is important to assist you in determining the appropriate protection measures and to show that they have been acting reasonably.

If it is found that the occupier owes a duty of care and is potentially liable for injury incurred on open access land, when determining liability, a court will have regard to:

- the need to avoid over-burdening occupiers of open access land;
- the importance of maintaining the character of the countryside; and
- any relevant guidance given by Natural England (NE) and Natural Resources Wales (NRW) under CROW.

EXAMPLE 2

A person wanders off a designated pathway on rewilding land and injures themselves by falling into a hollow created by an ancient well.

The ancient well may fall under the definition of manmade structures (although this might be arguable depending on the circumstances) such that you should consider putting in place safety measures. However, on open access lands, the standard of care is lowered by the resourcing consideration, and you will not be required to go out of your way to protect against that danger.

As a practical point, rewilders should mention to their insurance broker any such characteristics of the land so that if appropriate, they may be specifically noted on the rewilder's public liability insurance policy.

Finally, it should be noted that if an occupier of open access land makes specific invitations to individuals onto the land, such as to bring school students onto the land to learn about rewilding, the occupier will be subject to the enhanced duty of care owed towards visitors.

1.5 What duty of care is owed to individuals entering the coastal margin?

Occupiers' liability along the coastal margin in England is governed by MCAA, and the duty of care towards the public is even more limited than on open access land. The 'coastal margin' is land identified from the England Coast Path and includes all land between the path and the sea, which may also extend inland from the path in some situations[15]. Guidance from Natural England clarifies that a rewilder or occupier is not liable for any injury caused on the coastal margin by any physical feature on the land, whether natural or man-made[16]. As such, an occupier of such land owes no duty to any person for any injury caused by *"a risk resulting from the existence of any physical feature (whether of the landscape or otherwise)"*[17].

However, as with open access lands, an occupier can still be subject to the enhanced duty of care owed towards visitors if they specifically invite individuals onto the land even on coastal areas.

1.6 Does the keeping of animals impact the duty of care?

As part of a rewilding project, a landholder may decide to keep or reintroduce key species of animals on their land. The risk of animals causing injuries to persons entering the land cannot be ruled out. If an individual sustains an injury caused by the animal(s), a potential cause of action can arise under OLA 57 or OLA 84 if it specifically relates to a rewilder's 'occupancy duty' where they have failed to take reasonable steps to keep the premises safe. However, claims are most commonly brought under the Animals Act 1971.

As discussed in the *Rewilding in England & Wales: Liability for Damage Caused by Animals* briefing, an occupier may be liable if an animal injures someone or causes damage, and the occupier was the 'keeper' of that animal and the other requirements for liability are established[18].

Although there are currently no reported cases of personal injury or damage caused to a member of the public by an animal from a rewilding project, there are numerous reported instances of farm animals causing such injury to members of the public. In some of these cases, the farmer has been found to be in breach of their health and safety obligations under the HSWA. This is considered in more detail under section 2 and is something that anyone keeping animals on their land should take particular notice of.

If an animal does escape from the project land and causes harm to neighbouring land, an action in nuisance may apply (see briefing on *Rewilding in England and Wales: Liability to neighbouring landholders*).

1.7 Is there any additional duty of care for land which includes mines or quarries?

Rewilders need to be aware of any disused mines and quarries on their land, especially where they are publicly accessible. Landholders owe a statutory duty to ensure that any abandoned and disused mine or quarry is securely fenced so that entry is restricted to prevent persons from accidentally falling in[19]. The duty to properly enclose an abandoned mine exists even if the public does not have

access to it. A person that accidentally falls into a mine or quarry and injures themselves due to a lack of proper enclosure may bring a claim in damages against you.

Occupiers undertaking rewilding projects that involve land with quarries or mines should obtain specialist advice where necessary.

1.8 Can landholders exclude or discharge civil liability or rely on any defences?

Excluding liability

An occupier may reduce their civil liability by way of prior agreement with visitors on their land. This can be done, for example, through tickets issued to visitors, the putting up of signs disclaiming liability at all entrances and terms and conditions being listed on their website. Whilst the possibility of limiting liability through prior agreement exists, it is by no means a guarantee that occupiers can avoid liability. Generally, the law expects occupiers to act reasonably in the circumstances; if their actions, or lack thereof, fall below the standard of reasonableness then they may be found liable for harm caused to individuals on their land. It is therefore advisable for occupiers to put in place sufficient measures to ensure visitors are safe on the land when using it for the purpose for which they have been invited or permitted to enter.

In this context, rewilders should be aware of the Unfair Contract Terms Act 1977 ("**UCTA**"). UCTA applies to business occupiers, such as those that charge for access onto their land. Where UCTA applies, rewilders cannot exclude their liability for death or personal injury resulting from negligence[20]. For other loss or damage suffered (such as property damage), you can only exclude or restrict your liability for negligence if you satisfy the requirement of reasonableness[21]. It should be noted that UCTA does not apply where access is granted to individuals for educational or recreational purposes that are *distinct* from the occupier's business[22]. However, as noted above, rewilders must act reasonably in the circumstances. Please seek advice from a legal professional if you are unsure as to the application and/or scope of UCTA.

The Consumer Rights Act 2015 ("**CRA 2015**") also bars exclusion or restriction of civil liability for death or personal injury resulting from the breach of the duty of care imposed by OLA 57. There is also an implied term that services are to be performed with reasonable care and skill. Please seek advice from a legal profession if you are unsure as to the application and/or scope of CRA 2015.

Examples of when you can or cannot limit your liability through prior agreement:

EXAMPLE 3

You invite people onto your land for free wildlife safari tours for educational purposes or for other recreational activities, such as bird watching. During the visit, a visitor trips and injures themself.

There is the possibility for you to limit your liability in such circumstances. Since the visit does not provide any commercial benefit to you, UCTA does not apply. Whether you can limit your liability will depend on the particular facts of the case. Limitation of liability may be achieved through, for example, the terms of the ticket issued to visitors, appropriate signage at land entry points and/or warnings of potential dangers listed on your website.

The methods described above demonstrate some of the ways that rewilders can help protect themselves from liability in certain circumstances and reduce the need for them to spend significant resources and effort on maintaining the premises, especially since a key step to rewilding involves leaving land untouched for long periods of time.

However, you should always act reasonably (for example, not intentionally introducing danger onto the premises).

Please see Part 2 for potential liability under section 3 HSWA, which will only apply where you are running a business or enterprise.

EXAMPLE 4

You invite people onto your land for yoga and charge for the activity. A participant is injured during the activity from a falling tree branch.

There is a commercial element involved and therefore UCTA applies – you are not able to limit or exclude liability for any death or personal injury suffered as a result of their negligence. Consequently, you may be liable for the failure to properly maintain trees in the vicinity where individuals are expected to be practising yoga, as this may fall below the standard of reasonableness.

Whilst limitation or exclusion of liability for death or personal injury as a result of the rewilder's own negligence is not possible, a rewilder using the land for commercial purposes can still seek to limit their liability for other forms of damage through the methods described in practical example 1 (e.g., through the terms of a ticket). Whether you are successful in doing so will depend on the particular facts and whether they acted reasonably.

You should also consider potential liability under section 3 HSWA (discussed in Part 2).

Discharging liability

The duty of care owed by an occupier towards people entering their land can be discharged (or reduced) if they take such steps as are reasonable to give suitable warning of the danger concerned or to discourage such individuals from incurring the risk. If fully discharged, the landholder is not liable for any harm that may be suffered by a person arising from the danger.

This section discusses discharging liability to both visitors and non-visitors. It is important to bear in mind when reviewing this section that since the standard of care owed to non-visitors is lower compared to the duty owed towards

lawful visitors, it will generally be easier for rewilders to discharge their duty against trespassers since, as previously discussed, trespassers enter premises at their own risk.

To sufficiently discharge this duty of care, occupiers must provide **"reasonable"** protection measure(s) and/or give people sufficient warning(s) proportionate to the degree of danger in question. "*Danger*" in this regard means "*dangers due to the state of the premises or due to things done or omitted to be done on them*[23]". For example, when determining the extent of an occupier's liability, a court will consider whether it was reasonable given the circumstances to provide a warning to visitors and whether any warning enhanced the visitor's safety, taking into account the extent of the warning and the level of danger.

When considering if an occupier has adequately discharged this duty, all the circumstances of the case will be considered, including:

- the purpose for which a visitor was invited onto the premises;
- the obviousness of the danger or risk (e.g., its location, visibility, signage, the frequency with which the area is visited etc.);
- the magnitude and likelihood of the risk, and the consequences of it occurring;
- the effectiveness of warning notices;
- the age and capacity of the person entering the land;
- the purpose of the visit and the expected conduct of the person entering the land;
- self-accountability (e.g., to what degree can or should the person entering the land be aware of obvious dangers and take care to avoid ordinary risks?);
- any processes and procedures the occupier has in place to assess and mitigate risk; and
- any defences available (see below).

EXAMPLE 5

A person is invited onto the rewilding land for foraging workshops and consumes some wild poisonous berries growing on the land, causing them to fall seriously ill.

A rewilder that invites visitors onto their land for foraging activities should ensure that they take reasonable steps to ensure visitors are reasonably safe. For example, they could adopt measures including:

- if practical, designating a specific land area for the activity that is free from poisonous plants;
- conducting briefings at the start of the activity and placing signs in prominent places, warning against the consumption of fruits and plants without appropriate supervision;
- if children are expected to participate in the activity, rewilders must expect them to be less careful than adults and therefore additional measures, such as mandating the need for them to be supervised at all times, should be implemented.
- If you fail to adopt reasonable measure(s) sufficient to protect individuals against the danger, they may fall below the reasonable standard of care expected of them and be found liable for harm suffered by visitors when partaking in the activity.
- For trespassers entering the land, the occupier has a lower standard of care to protect them from the danger. Some of the previously mentioned measures (for example, activity briefings) will also not be applicable.

Defences

In addition to the above, an occupier may be able to rely on certain defences to limit or discharge their civil liability in the event of harm caused to people entering their land. An occupier may argue that the visitor or non-visitor's own actions caused or contributed to the damage or injuries suffered if they have failed to take reasonable care. This defence is known as contributory negligence.[24]

The duty of care imposed on landholders including rewilders also does not extend to the supervision of activities carried out by people on their land. If a person voluntarily accepts an obvious risk while on the land, the occupier does not owe them a duty of care with regard to the self-inflicted injuries.[25] Therefore, people that carry out adventure sports such as rock climbing, mountain biking or horse riding in rewilded premises will be largely responsible for themselves since they have voluntarily chosen to participate in a risky activity and should themselves carry out the relevant risk assessments, such as to examine for the presence of loose rock and the suitability of any protection whether fixed or not.

You are also not responsible for any injuries sustained by a person carrying out activities that are prohibited on their land.

EXAMPLE 6

A person dives off a cliff into a lake within a rewilder's land and suffers injuries as a result.

An occupier's potential liability will depend on whether a particular action by a person is inherently dangerous. Here, it is unlikely that you will be found liable for the injuries suffered since it was the act of diving off the cliff that caused the injury rather than the cliff itself. Rewilders and land managers, including rewilders, are not generally liable for voluntary risks undertaken by people on their land.

However, if you are aware of visitors frequently jumping from the cliffs, you may wish to take steps to ward people off the area (for example, by putting appropriate warning signs in place). This can help the rewilder demonstrate that they have been acting reasonably in the circumstances to keep people reasonably safe on your land.

2. OVERVIEW OF CRIMINAL LIABILITIES UNDER SECTION 3 OF THE HEALTH AND SAFETY AT WORK ACT ("HSWA")

2.1 Scope of section 3 HSWA

In circumstances where rewilders carry out rewilding activities as part of a business or enterprise, there may be additional duties in the context of health and safety laws.

Whilst the HSWA is primarily concerned with the legal obligation of an employer towards its employees to safeguard their health and safety at work[26], section 3 of the HSWA also places an obligation on employers and self-employed persons for third parties (such as visitors) whose health and safety may be impacted by the activities of that business or enterprise. Employers or those that are self-employed are required to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that third parties who may be affected by their activities are not exposed to risks to their health or safety.[27] For section 3 to apply, there must be:

- a duty-holder – either an employer or a self-employed person;
- a risk to the health or safety of a person who is not the employee of the duty holder or the self-employed duty holder themselves; and
- that risk must arise from the conduct of the duty holder's undertaking.[28]

The scope of the duty under section 3 is very broad. The HSWA does not distinguish between visitors and non-visitors and applies generally to third parties. Therefore, employers and self-employed persons must take into account the health and safety of any individual regardless of whether they are invited onto the land. In certain high-risk industries, the duty to ensure individuals are not exposed to health and safety risks may present itself more readily. For example, where forestry work is involved, individuals have a responsibility to manage public safety such that rewilders and forestry works managers must plan and coordinate safety measures, and operators on forest sites must implement them – proximity areas, harvesting sites and haulage routes should be carefully considered.[29]

Note specifically that in the past, the HSE have prosecuted a farmer for breaching section 3 HSWA, following the death of a walker who was killed by cattle when on a public footpath situated on that farmer's field.[30]

The broad applicability of section 3 is balanced by a policy developed by the Health and Safety Executive (HSE), Britain's national regulator for workplace health and safety. The policy aims at guiding enforcing authorities to exercise their discretion by focusing on 'health and safety priorities', such as where there is a high level of risk involved (e.g., major hazards and construction) or whether enforcement would be in the interests of justice (such as those of the injured or bereaved)[31], and to give less priority in other areas.[32] In certain risk areas (e.g., reservoirs or where an adventure activity is undertaken), the HSE will generally not start to investigate injuries to non-employees, or complaints about risks to non-employees, unless the concerns highlighted in the preceding sentence are present.[33]

2.2 What is an "undertaking" and when will HSWA apply to rewilders?

An 'undertaking' in this context means an enterprise or business. In a rewilding context, rewilders that receive any commercial benefit from their activities (whether it be, for example, from running yoga retreats, wildlife safaris or farming) are likely to fall within the scope of this duty under the HSWA.

2.3 What is required to comply with section 3 HSWA duty?

Employers and self-employed persons must ensure, so far as is "*reasonably practicable*", that they do not expose third parties to health and safety risks. Such risks may encompass a broad range of issues relevant to land managers (such as rewilders) including injury caused by manmade or natural features of the land, injury caused by animals and other risks to individuals, such as water pollution. It is important to note that a third party does not in fact have to be harmed for an offence to be committed under HSWA – there only has to be a risk of harm for liability to be found.[34]

Appropriate risk assessments must be carried out to identify the risks to the health and safety of third parties as a result of an undertaking[35] and landholders should ensure that these are implemented / reflected in working practice and regularly updated. The risk assessment should include:

- identifying what could cause injury or illness in the business (hazards);
- deciding how likely it is that someone could be harmed and how seriously (the risk); and
- taking action to eliminate the hazard, or if this isn't possible, to control the risk.

Depending on the nature of activity being undertaken, there is guidance published by the HSE to assist individuals in complying with the standards required by the law to keep their land safe for others. Rewilders carrying out business activities should follow such guidance and establish a safety management system based on acknowledged good practice. Two particularly relevant guides for rewilders are the Agriculture Health and Safety Guidance Note[36] and the Cattle and Public Access in England: Advice for Farmers, Rewilders and Other Livestock Keepers note.[37]

To discharge the duty under section 3, the duty holder must act reasonably and balance the risk to others against the sacrifice (e.g., the money, time or resources) involved in taking the measures needed to avert the risk. If the risk is grossly disproportionate to the sacrifice, such as the risk being insignificant relative to the sacrifice, the duty holder is not required to take any further measures and so discharges the duty[38]. This is a balancing exercise and highly fact dependent. An example is explored under practical example 7 below.

A breach of the health and safety laws under section 3 can give rise to criminal liability, resulting in a fine not exceeding £20,000 and/or imprisonment for a term not exceeding 12 months (on summary conviction) or 2 years (on indictment)[39]. If you are intending on undertaking commercial activities on your land, please consult the relevant legal, industry and safety specialists for further advice.

EXAMPLE 7

A rewilder which undertakes his rewilding activities as part of a business carries out ground preparation work involving heavy machinery in preparing the land for rewilding.

Depending on the type of work being carried out, the land may be regarded as a hazardous worksite presenting health and safety concerns. Since the use of heavy machinery in ground preparation work is likely to create a hazard, the rewilder should undertake a risk assessment which could result in reasonably practical steps such as:

- informing the public about the nature of the works at the entrances to the site;
- applying for temporary diversion or closure of public footpaths;
- putting up warning and prohibition signs or barriers;
- using banksmen when working near areas of public access;
- implementing directional routes for timber movement, diversions and weight restrictions; and/or
- restricting road use[40].

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

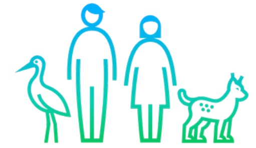
The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 19 December 2022.

ENDNOTES

1. In *Fowles v Bedfordshire County Council* [1995] PIQR P380, the Court of Appeal held that there was negligence on the part of the Defendant but that the OLA 57 did not apply because the accident, being the lack of supervision of activities on the land, did not arise out of the unsafe condition of the premises themselves.
2. Section 1(6C), OLA84.
3. *McGeown v Northern Ireland Housing Executive* 1994 3 All ER 53.
4. Section 2(3), OLA 57.
5. Section 2(3)(b), OLA 57.
6. *British Railways Board v Herrington* [1972] AC 877.
7. *Baldacchino v West Wittering Estate Plc* [2008] EWHC 3386 (QB).
8. *Ovu v London Underground Ltd* [2021] EWHC 2733 (QB).
9. Section 1, OLA 84.
10. Section 1(3), OLA 84.
11. Section 1(7), OLA 84.
12. However, an occupier should still act reasonably. A claim may still be brought under common law against an occupier who has been malicious or grossly negligent with the state of their land.
13. Section 13, CROW.
14. Natural England: Open access land: management, rights and responsibilities.
15. See for more details at NE: England Coast Path improving public access to the coast.

16. NE: Open access land and the coastal margin: how to restrict public access.
17. Section 1(6AA), OLA 84.
18. Section 2, Animals Act 1971.
19. Section 151, Mines and Quarries Act 1954.
20. Section 2(1), UCTA.
21. Section 2(2), UCTA.
22. Section 2, OLA 84.
23. Section 1(1), OLA 57 and OLA 84.
24. Section 1, Law Reform (Contributory Negligence) Act 1945.
25. Section 2(5), OLA57 and Section 1(6), OLA84.
26. Section 2, HSWA. The duty of employers to employees under HSWA is outside the scope of this briefing note.
27. Sections 3(1) and 3(2), HSWA. Please note that under section 3(2) self-employed persons have a duty to ensure that they themselves are not exposed to health and safety risks. The HSWA also sets out various other duties such as those owed by employers towards employees, employees towards themselves and to each other, and certain self-employed persons towards themselves and others. These duties are not covered by the scope of this briefing note. Please seek legal advice if needed.
28. Health and Safety Executive: Scope and application of section 3 HSWA.
29. Health and Safety Executive: Managing public safety. For further information, please see: https://www.hse gov.uk/treework/site-management/public-access.htm
30. Health and Safety Executive: Farmer sentenced after walker killed by cattle.
31. Health and Safety Executive: Priorities for enforcement of Section 3 of the HSWA 1974 - July 2003 (rev April 2015).
32. Health and Safety Executive: Guidance for FOD in responding to (non-construction) public safety incidents where Section 3 of HSWA applies.
33. Health and Safety Executive: Further information.
34. Health and Safety Executive: Health and safety at work: criminal and civil law.
35. The Management of Health and Safety at Work Regulations 1999, section 3
36. Health and Safety Executive: Agriculture health and safety.
37. Cattle and Public Access in England: Advice for Farmers, Rewilders and Other Livestock Keepers.
38. Health and Safety Executive: Proving the offence; Edwards v National Coal Board [1949] 1 KB 704, CA; Austin Rover Group Ltd v HM Inspector of Factories [1990] 1 AC 619, HL.
39. Section 33(1)(a) and Schedule 3A, HSWA.
40. Ibid, 35.

LIABILITY TO NEIGHBOURING LANDHOLDERS



CORE TOPICS:

- Potential liability to neighbouring landholders where rewilding activities damage or otherwise disturb their enjoyment of their land.

KEY TAKEAWAYS

- A landholder can be held liable for doing something on their land that interferes with a neighbour's land or their enjoyment of it.
- Neighbours adversely impacted may be able to claim damages and/or seek an injunction to stop the relevant activity.
- Landholders may be required to take action to stop or prevent things from occurring on their land if they are impacting their neighbours, including in relation to animals.
- Rewilders should check with their insurance broker the extent to which the risk of liability to neighbouring landholders is or can be covered by their insurance.

TABLE OF CONTENTS

Introduction

1. What constitutes nuisance?

2. Can a landholder be liable for hazards occurring naturally on their land?

3. Are there circumstances in which a landholder can be held strictly liable for damage caused by a hazard on their land?

4. What are the potential nuisances that could arise from rewilding activities?

4.1 Flooding and waterways
4.2 Fire
4.3 Subsidence and lanslides
4.4 Animals
4.5 Encroachment by trees and shrubs

INTRODUCTION

In the vast majority of cases, tensions that arise between neighbouring landholders[1] can be resolved amicably through agreement. However, should that not be possible, it is important to be aware of the potential for legal claims to arise in nuisance, as described in this note.[2]

This briefing note will: (i) cover the key aspects of nuisance; (ii) consider in more detail the circumstances in which landholders can be held responsible for damage caused by (natural and man-made) hazards occurring on their land; and (iii) apply the aforementioned to potential sources of nuisance in a rewilding context, including flooding, subsidence, and fire.

1. WHAT CONSTITUTES NUISANCE?

The law in this area can appear contradictory and is too complex to cover in full here. In brief, however:

- Nuisance is typically committed by the occupier of land (which could be the landowner, but also the tenant or other occupier(s) of the land). It occurs when an occupier carries out an act on their land which interferes with their neighbour's enjoyment of their own land.
- Interference could take the form of physical damage, but such damage is not a prerequisite to a claim of nuisance, and most actions for nuisance do not involve physical damage at all. The claimant also does not need to demonstrate that the value of their land has been impacted.
- The interference must be "*substantial*" or "*unreasonable*", meaning something an ordinary person could not be expected to put up with in the circumstances.[3] Location and context are important. Something that would amount to an unreasonable nuisance in an urban area may not do so in a rural area, for example. Physical damage will generally always amount to substantial interference, however.
- Whilst nuisance usually involves a continuous or recurrent interference, a one-off event can give rise to nuisance. An example of this is flooding.
- The affected party doesn't need to be the owner of the neighbouring land but must have a proprietary interest in it.[4] This includes tenants and other occupiers of the land.
- The occupier can be liable for nuisance caused by others on their land (including trespassers) if they "*adopt*" the nuisance by failing to take reasonable care to stop it once they are aware of it (or should reasonably be aware of it).

2. CAN A LANDHOLDER BE LIABLE FOR HAZARDS OCCURRING NATURALLY ON THEIR LAND?

As noted above, the landholder will be liable for a nuisance if they "*adopt*" it by failing to take reasonable steps to prevent it. As well as actions by others (such as visitors to or tenants on the land), this principle extends to hazards occurring on the landholder's land, both man-made and natural.[5]

Where such a hazard is present, the landholder will owe a "*measured duty*" to take "*reasonable steps*" to prevent or minimise the risk of it causing damage or harm to neighbouring land.[6] What constitutes reasonable steps here will depend on:

- what is fair, just and reasonable as between neighbouring landholders;
- both the claimant's and defendant's resources and abilities, including the availability and cost of preventive measures; and
- how reasonably foreseeable it was that the hazard would cause the damage if not dealt with.

3. ARE THERE CIRCUMSTANCES IN WHICH A LANDHOLDER CAN BE HELD STRICTLY LIABLE FOR DAMAGE CAUSED BY A HAZARD ON THEIR LAND?

By way of contrast to the situations of naturally occurring hazards above (where the landholder may be liable if she fails to take reasonable steps to prevent the damage occurring), there are other situations in which strict liability (i.e., liability irrespective of whether or not reasonable steps have been taken) will arise for the landholder. This arises where:[7]

- landholders accumulate something (such as water or a toxic substance) on their land which is likely to cause harm if it escapes (things which accumulate naturally without human intervention are not caught for these purposes);
- the above constitutes a "*non-natural*" use of the land (though not clearly defined, generally this means the use of the land must be extraordinary or unusual, rather than involving something man-made or artificial); and
- the thing escapes and the damage in question is a natural consequence of that escape.

This rule usually applies where there is an escape of something, such as water (where it accumulated unnaturally, e.g., through the construction of a dam) or a toxic substance, which spreads onto neighbouring land and causes substantial damage.

4. WHAT ARE THE POTENTIAL NUISANCES THAT COULD ARISE FROM REWILDING ACTIVITIES?

The application of the above principles can potentially expose those managing rural land (including rewilders) to liability to neighbouring landholders in a number of ways.

4.1 Flooding and waterways

EXAMPLE 1

A rewilding project decides to permit a small artificial lake to overtop its barrage at times of heavy rain (rather than using a sluice gate to manage the water level in the lake). The water mistakenly drains onto neighbouring farmland, spoiling the neighbouring landholder's crops.

Though the flooding was not deliberate, this may constitute an unreasonable interference by the rewilder with the neighbour's enjoyment of their land, and the neighbour could be successful should they seek damages by way of compensation.

The rewilder could also be held strictly liable for the damage (i.e., without any need to establish unreasonableness) if the creation of the lake constituted an extraordinary or unusual use of their land and, in the circumstances, it was likely that the escape of the water would cause harm.

Many rewilders will have bodies of water or watercourses on the land they are rewilding. For some, returning them to a more natural state will be a key component of the rewilding project.[8] Rewilding should, in theory, improve a landscape's natural defences against flooding by reducing peak water volumes and slowing run-off. Nevertheless, the possibility of alterations leading to flooding of neighbouring land (or, least, accusations of that being the case) cannot be ruled out. This could potentially see the rewilder facing a complaint of nuisance or even a claim for an injunction or damages from their neighbours, or receiving an order to remedy the cause of the flooding (e.g., by removing debris blocking the watercourse).[9]

The validity of the neighbouring landholder's claim in these circumstances will turn on the facts, but generally speaking:

- A landholder will be liable to their neighbour for physical damage and loss of enjoyment if they deliberately release a body of water onto their neighbour's land.[10]
- Where it is alleged that the flood damage was caused by the landholders's failure to prevent natural flooding (i.e., from extreme rain, or increased water flow from upstream) from occurring, it will be necessary to consider whether they did what was reasonably necessary in the circumstances.[11] This assessment will take into account:
  - (i) whether it was reasonably foreseeable that the flooding would occur;
  - (ii) the extent to which flood damage was foreseeable;
  - (iii) whether it was practicable to prevent or minimise the flood damage and, if so, the extent of work required; and
  - (iv) the financial resources of the rewilder (and of the neighbour).

Applying the above, if changes to rewilding land create an apparent risk of flooding to neighbouring land (e.g., because drainage features have been removed or allowed to be filled over time) and the landholder could reasonably be expected to maintain or retain those features, then there is a risk of the rewilder being liable to neighbouring landholders for any flood damage their property may suffer as a result.

EXAMPLE 2

A rewilder introduces beavers to their land in large enclosures. The beavers create a dam in a stream near the boundary of the property, which causes water to accumulate. Eventually, following heavy rainfall the dam causes water to run onto neighbouring land, in turn flooding the neighbour's barn and damaging goods they have stored there.[12]

In these circumstances, it might be open to the neighbouring landholder to argue that they are entitled to damages by way of compensation for the loss of enjoyment of and physical damage to their barn, as well as an injunction compelling the rewilder to clear the dam which caused it. The neighbour cannot, however, seek damages in nuisance for the damage to the goods in the barn.

Should any such claim make its way to court, the court would need to consider whether the rewilder had failed to comply with their measured duty to prevent the flood damage. This will turn on a factual assessment of how foreseeable it was that the beaver dam would lead to flooding impacting the neighbouring land. Consideration will also need to be given to how readily the rewilder could have removed the dam.

4.2 Fire

EXAMPLE 3

A wooded area is to be rewilded and as part of this the landholder ceases maintaining it and clearing it of debris. Dry brush begins to accumulate. During a particularly dry summer a large wildfire starts and spreads to neighbouring land, damaging crops and causing injury. The neighbour alleges that wild campers – who are invited to enter the land – have regularly been lighting campfires, and this is tolerated by the landholder.[13]

The rewilder could find themselves open to a claim that they failed to mitigate the risk of fire occurring or spreading to neighbouring land. The neighbour could also argue that the rewilder, by inviting wild campers and tolerating campfires on the land, has *"adopted"* a nuisance precipitated by the campers and failed to take reasonable steps to stop it.

A detailed factual assessment would be required to determine what amounts to *"reasonable steps"* in these circumstances. However, it would assist the rewilder to be able to point to having taken reasonable precautions such as erecting signs prohibiting fires or, alternatively, maintaining dedicated fire pit areas that are periodically cleared of flammable debris. The rewilder could also argue that the wildfire and/or its spread were not reasonably foreseeable, and that it would not be reasonable to expect them to clear all dry brush from the land to address the outside chance of such an occurrence during an unusually dry period.

If successful in any claim, the neighbour could obtain an injunction and recover compensation for damage to their crops, but not for the personal injury caused by the fire (they could also recover for personal injury if they can demonstrate that the rewilder's conduct was negligent).

Whilst some rewilding activities can reduce wildfire risk, where land is no longer being actively managed in the way it had been previously and fire starts which spreads to and damages neighbouring property (despite the rewilder responding in the usual way, such as calling the fire brigade and alerting her neighbour), the possibility of neighbouring landholders seeking an injunction and/or damages cannot be ruled out.

Should this transpire, the rewilder may be liable for nuisance if they failed to take reasonable steps to control the spread of the fire or prevent it from occurring in the first place.[14] This will ultimately turn on the facts at hand, focusing on how foreseeable it was that fire could start and spread to other land without precautions being taken, how readily the rewilder, given their resources, could have contained or mitigated that risk, and the reasonableness of requiring them to do so.

The rewilder could also potentially be *strictly* liable for fire damage to a neighbouring property (i.e., without any breach of duty of care/assessment of the reasonableness of their conduct on their part), following the principles in section 3 above. However, this could only arise where the landholder themselves brought the fire onto their property (i.e., by starting it). Where a fire starts accidentally, and then spreads to neighbouring land, the rewilder will likely only be liable if their conduct can be said to be unreasonable (even if the material which caught fire was particularly flammable and was accumulated on the land by the rewilder).

4.3 Subsidence and landslides

Every landholder has a right to have their land supported in its natural state by the land of their neighbours.[15] Higher level land is known as the *"dominant land"* that benefits from a right of support from the lower *"servient land"*. If support is removed from the *"dominant land"*, and subsidence results, then the owner of the *"dominant land"* may be able to bring an action against the neighbouring *"servient"* landholder.[16] Such a claim can be for harm caused to buildings on the land (as well as the land itself) if the land would have subsided without the extra weight of the buildings on it, or otherwise if the building itself can be said to have a right of support from the neighbouring property.[17] The right of support may extend to requiring positive action on the part of a neighbouring rewilder,[18] subject to the application of the reasonableness test which requires that where such a hazard (such as a risk of subsidence) is present, the landholder will only owe a *"measured duty"* to take *"reasonable steps"* to prevent or minimise the risk of damage to neighbouring land. What constitutes reasonable steps will depend on what is fair, just and reasonable, taking into account the resources and abilities available, and how reasonably foreseeable it was that the hazard would cause the damage if not dealt with.

In this particular context, the following three elements will be taken into account when determining whether liability for nuisance arises: (i) whether the landholder knew or could be presumed to have known of the risk of subsidence; (ii) whether the landholder foresaw that this would cause damage to the neighbour's land if not remedied; and (iii) the landholder's ability to address it.

In cases where the *"servient"* landholder has done nothing to create the danger which has arisen through nature, the *"measured duty"* of care owed is a more restricted one and is dependent on the facts of each case. The *"servient"* landholder's duty is limited to taking reasonable steps to avoid damage caused by apparent (rather than concealed) risks which they ought to have foreseen without geological investigation. In the leading case,[19] it was determined that "reasonable steps" amounted to the *"servient"* landholder simply warning the *"dominant"* landholder about the foreseen risk and on the facts, there was no duty to carry out expensive preventative works. A landholder will not be liable merely because they could have discovered the defect on further investigation.

The *"servient"* landholder's duty is further limited by the fact that it would *not* be considered fair, just or reasonable to find liability in circumstances where the damage was greater in extent than anything foreseeable without further geological investigation and where the danger had been equally apparent to the *"dominant"* landholder.

Similarly, an owner of land situated uphill from their neighbour can be held liable for failing to take reasonable steps to address the risk of erosion causing landslides which result in damage to or unreasonable interference with the downhill property, where they are or should be aware of that risk.[20] Again, the above-mentioned reasonableness test will apply when determining liability. Whilst in such circumstances it may be impossible, disproportionate or outside the rewilder's resources to fully cure the source of the nuisance, to minimise the potential for liability the rewilder should ensure they still take some practical action. This may simply include discussing the issue with the neighbouring landholder and seeing if any steps can readily be taken to reduce the risk of a landslide occurring.[21]

If successful in a nuisance claim of this sort, the main remedies available to the claimant are seeking an injunction, damages in lieu of an injunction, or abatement of the nuisance.[22] To the extent a rewilding project involves allowing natural processes to shape and sculpt the landscape (e.g., by allowing a river to return to its more natural course, or removing coastal defences), the rewilder should therefore consider whether this could potentially result in an increased risk of neighbouring land being adversely impacted by subsidence, undermining or landslips.

Whilst the rewilder will not be under an obligation to do everything in their power to prevent such risks from materialising, liability is more likely to arise where they have been made aware of a risk and it is readily in the rewilder's means to address it.

EXAMPLE 4

As part of a large rewilding project, a river is to be allowed to regain its natural floodplain. To that end, the rewilder refrains from maintaining banks and river defences. Over time the river begins to meander and widen. Eventually this leads to the erosion of neighbouring land overlooking the river, parts of which begin to break off and are no longer safe for grazing.

The neighbour's land overlooking the river is likely to benefit from a right of support from the rewilder's land below, and it appears that support is being removed by the widening of the river and the subsequent erosion to the land on the far bank.

In the event that the rewilder is aware of the erosion and can foresee the risk it presents to the neighbour's land and fails to take any action, it may be possible for the neighbour to bring an action against the rewilder in nuisance to compensate for the loss of enjoyment of the land and/or the cost of establishing new river defences to prevent further erosion and undermining of the land.

However, it would also need to be fair, just and reasonable to establish a duty of care in the first place. The damages which the neighbour could seek will also be limited to the extent of damage which the rewilder foresaw or should have foreseen and the neighbour would need to establish that erosion was a foreseeable consequence of the river widening and that the rewilder failed to take reasonable steps to prevent it.

N.B. Failing to maintain the beds and banks of the watercourse could separately also amount to a breach of riparian obligations, affecting up or down-stream riparian owners. As noted at endnote 8 above, such activities might also necessitate consultation with the relevant risk management authorities.

4.4 Animals

As with the other forms of "natural nuisance" discussed above, a landholder can be held liable in nuisance for damage caused to neighbouring land by animals, including, in some situations, wild animals, on their land. Liability for nuisance caused by wild animals may arise where a landholder is aware or ought to have been aware of the nuisance being caused by the wild animals, has the means to put a stop to the nuisance and fails to take reasonable steps to prevent that damage from occurring.[23]

In addition to liability in nuisance, the Animals Act 1971 sets out a statutory regime governing when individuals can be held liable for damage caused by animals (both "dangerous" and non-dangerous), including livestock. In many circumstances this regime sets a lower threshold for liability and is more likely to be relevant to the rewilder than liability in nuisance. Please see the *Rewilding in England & Wales: Liability for Damage Caused by Animals* briefing for more details on the statutory regime governing when individuals can be held liable for damage caused by animals.

It should be noted, however, that the Animals Act 1971 does not impose liability in respect of animals that are living wild (i.e. that no one possesses or is in control of), whereas a landholder may potentially be liable in nuisance for things done by wild animals on their land in the circumstances described above (i.e. they are aware of the nuisance, they have the means to stop it and they fail to take such action)[24]. There may therefore be circumstances in which a neighbouring landholder can claim damages in nuisance but not under the Animals Act 1971.

4.5 Encroachment by trees and shrubs

Encouraging the (re)growth of trees is a hugely important element of many rewilding projects. Whilst supporting natural regeneration of forests might be a common approach for many rewilders, it may also be necessary to support the natural process through reducing grazing, direct seeding and planting saplings.

With this in mind, rewilders should be aware that encroachment by trees onto neighbouring property can give rise to liability in nuisance where damage results, for example in the (perhaps unlikely) event of encroaching roots extracting moisture and causing subsidence to neighbouring land and buildings, or overhanging branches negatively impacting the neighbour's land (e.g., by stifling growth of crops, or poisoning livestock)[25]. This applies both to trees planted by the landholder and self-sown trees. In these circumstances, whether liability arises will again depend on whether the landholder failed to take reasonable steps to prevent or minimise the danger presented by the encroaching trees. Such potential liability will generally only

ever apply to trees on or near the boundary of the property.

The rewilder should therefore consider whether trees bordering neighbouring properties could cause damage to or interfere with neighbouring land, and how readily the risk of damage can be contained. However, the mere presence of trees, which over time spread onto or overhang neighbouring land, will not in itself constitute a nuisance; there must be some physical damage or other form of harm to the neighbour's enjoyment of their land.

The above principles also apply to plants other than trees, including shrubs and – notably – weeds. For example, the close presence of Japanese knotweed on neighbouring property has been held to constitute an unreasonable interference with the enjoyment of a landholder's property (even in the absence of physical damage), giving rise to liability in nuisance.[26] Weeds are also subject to their own statutory regime, which is likely to be of greater relevance to the rewilder than the ordinary principles of nuisance. This regime is covered in detail in the *Rewilding in England and Wales: Invasive and protected plants* briefing.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 31 October 2022.

ENDNOTES

1. A landholder can either own land outright or hold it (e.g. on trust for a beneficiary, or under a lease), so this is a broader concept than that of "*landowner*".
2. This note addresses private nuisance only. It does not cover "*public nuisance*", which applies to conduct that impacts the general public rather than just the occupier of neighbouring land; nor "*statutory nuisance*", pursuant to which local authorities (or, upon application by adversely impacted persons, magistrates' courts) can serve abatement notices for certain specified categories of nuisance.
3. *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312.
4. *Hunter v Canary Wharf Ltd* [1997] AC 655.
5. *Leakey v The National Trust* [1981] QB 485.
6. *Ibid*.
7. *Rylands v Fletcher* [1868] UKHL 1.
8. Those who own land through or along which watercourses run – "*riparian*" owners – are subject to special legal rights and responsibilities, which are outside the scope of this note. Interference with these rights by landholders up- or down-stream is actionable in damages or can be remedied by way of injunction. Riparian owners are also subject to a statutory obligation under the Land Drainage Act 1991 not to erect any obstruction in the watercourse, erect culverts, or alter culverts in a way that would affect the flow of the watercourse without obtaining prior consent. Any changes to a watercourse's path or its ability to manage floodwaters must first be discussed with the relevant risk management authority. Depending on the watercourse, this will either be the local flood authority or the Environment Agency.
9. For the latter remedy, a neighbour is in practice more likely to complain to the relevant flood management authority to take action under the Land Drainage Act 1991, which in all likelihood will be both quicker and less costly.
10. *Whalley v Lancashire and Yorkshire Railway Co* [1884].
11. *John Green v Lord Somerleyton* [2003].
12. N.B. this case study raises many questions that are beyond the scope of this briefing note. For example, as noted in endnote 8 above, such riparian owners owe special responsibilities, which include the obligations to avoid causing obstruction to the watercourse, to maintain the beds and banks of the watercourse by clearing waste and debris (even where not generated by them) and to maintain trees and vegetation growing on the banks. Failure to comply with these obligations could expose the landholer to liability to neighbouring riparian landholders, if their riparian rights (such as to use water from and navigate the watercourse) are impinged upon.

    We have restricted our comments to those that illustrate the law relating to nuisance.
13. Again, our comments are limited to illustrating nuisance.
14. *Spicer v Smee* [1946] 1 All ER 489. It should also be noted that in these circumstances the neighbouring landholder would also likely be able to seek damages by alleging the landholder was *negligent* in allowing the fire to begin or spread. The legal test for liability under negligence would be substantially the same, but there would be an advantage for the claimant in also being able to recover damages for personal injury or damage to possessions on their land.
15. *Hunt v Peake* [1860] 70 ER 603.

16. *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] 2 All ER 705. In this case the claimants were the owners of a hotel which was destroyed when the cliff on which it rested slipped into the sea. It was held that the defendant owners of the adjoining land had a duty to take reasonable steps to address any threat to the claimants' property from failure of the support provided by their land.
17. When such a right of support arises is outside the scope of this note, but many properties will benefit from one, whether through an express grant or by being acquired over time.
18. *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] 2 All ER.
19. *Ibid.*
20. *Leakey v National Trust* [1980] QB 485 (CA). In this case erosion caused a landslip onto the claimant's house. However, damage to buildings is not necessary for liability in nuisance to arise, provided there has been some degree of physical damage to property or unreasonable interference with the neighbour's enjoyment of their land.
21. *Ibid*.
22. Abatement of nuisance may involve the "*dominant*" landholder being ordered to carry out specific actions to bring the nuisance to an end.
23. *Wandsworth London Borough Council v Railtrack plc* [2001] EWCA Civ 1236. This case involved a finding of public nuisance rather than private nuisance, as the claimant's enjoyment of their land was not interfered with and there was no physical damage to it. However, it illustrates that failure to prevent unreasonable interference emanating from wild animals can amount to a nuisance. Further, in *Sedleigh-Denfield v O'Callaghan* [1940] AC 899 it was acknowledged that, in both public and private nuisance claims, liability can arise when a defendant knew of the danger posed and was able to prevent it yet did not prevent it. It is therefore prudent to assume that interference emanating from wild animals can amount to private, as well as public, nuisance.
24. *Ibid.* In this case the nuisance was caused by pigeons roosting under a railway bridge on the defendant's land and messing on passing pedestrians and the pavement.
25. *Davey v Harrow Corpn* [1957] 2 All ER 305.
26. *Network Rail Infrastructure v Williams & Waistell* [2018] EWCA Civ 1514.

PLANNING PERMISSION

CORE TOPICS:

- Planning permission and when it is required.
- Special considerations applicable to non-developed land.
- Material changes of use.
- Environmental Impact Assessments (EIAs), including for forestry

KEY TAKEAWAYS:

- Planning permission:
  - Planning permission will be required for any “development” or material change in the use of land (by reference to standard use classes).
  - Development or change of land use on agricultural or forestry land benefits from certain exemptions.
- Environmental impact assessments:
  - The main EIA regime is unlikely to apply to the majority of rewilding activities.
  - A forestry EIA may be required for activities including afforestation and deforestation.

TABLE OF CONTENTS

1. **Introduction**

2. **Planning permission**
   - 2.1 What are the aims of the planning system?
   - 2.2 When is planning permission required?
   - 2.3 What is operational development?
   - 2.4 What is a material change of use?
   - 2.5 Are there any special considerations applicable to non-developed land?
   - 2.6 What are permitted development rights?
   - 2.7 What are the different stages of the planning application process?

3. **Environmental Impact Assessments for development**
   - 3.1 What is the purpose of EIAs?
   - 3.2 When are EIAs required?
   - 3.3 What are Schedule 2 Developments?
   - 3.4 How do sensitive areas impact EIAs?

4. **EIAs For forestry projects**
   - 4.1 When is a forestry EIA required?
   - 4.2 What is a “relevant project”?
   - 4.3 What is involved in a forestry EIA?

1. INTRODUCTION

Rewilding projects will often be accompanied by development, whether in the form of ancillary building works or conversion of land or buildings for commercial, educational, or ecological purposes. Planning permission and environmental impact assessments ("**EIAs**"), both of which are integral to successful and sustainable development, should be at the forefront of rewilding practitioners' minds when preparing for and carrying out any such development.

Practical scenarios

This note considers how the planning permission and EIA regimes apply to the following practical scenarios.

REWILDING PROJECT A

Landowner A holds mixed land in England. Some of the land is arable on which Landowner A currently grows cereal crops, some of it is pasture on which she grazes sheep and cattle.

There is also a large area of upland heath where the sheep graze in the summer months. Part of this is a site of special scientific interest ("**SSSI**") since it is important foraging territory for raptors and a good example of dwarf-shrub heath plant communities.

Finally, there is a 4-hectare plantation of mature larch.

Landowner A intends to:

- Stop growing cereal on her arable land and allow natural succession, plant a few individual trees and allow extensive grazing with the purpose of creating a shifting mosaic of habitats. It will be a dynamic habitat, neither permanently woodland, scrub or open. Selective tree planting and grazing are tools used to realise that purpose.
  - The fences in the ex-arable land will be removed and gaps broken into hedges so that the ex-arable land can be extensively grazed.
  - About 1 hectare will be fenced off and made into a campsite with yurts in the summer months and a permanently plumbed-in toilet block;
- Continue to graze the grazing land together with the ex-arable land with ancient breed cattle and sheep. The livestock will graze extensively and become hefted.
  - The ex-grazing area will be nudged towards developing into woodland pasture. Some of the individual trees and clumps of trees will be fenced off to protect them from the stock. The cattle and sheep will be sold for meat;

Block the land drains on her upland heath with the aim of rewetting the peat. This may cause seasonal heathland ponds to appear; and fell the larch and, again, allow natural succession under grazing, to create native woodland pasture.

REWILDING PROJECT B

Landowner B is the freeholder of land in England none of which is part of a "sensitive area". Although most of the land has been converted into rewilding land, 5 hectares continue to be arable land. Landowner B grows a variety of vegetables and cereals on the arable part which are being sold in the farm shop located on the land. The farm shop also sells honey produced on the neighbouring farm.

There is also a barn and several sheds situated near the front end of the land and in walking distance from the farm shop. The barn and sheds were formerly used to lamb and shear sheep and house cattle in winter. These are now idle.

Landowner B intends to:

- expand the size of the farm shop to meet the increased demand he has experienced over the last three years;
- convert the idle barn into a café;
- pave over the track from the public road to the barn to facilitate future access to the café;
- demolish the idle sheds and use the area for parking; and
- construct a small, temporary bird hide, for winter bird watching together with a short, raised wooden walkway to access the hide.

REWILDING PROJECT C

Landowner C recently purchased the freehold of an estate in Wales and has devoted the estate to rewilding. Landowner C wants to convert the manor house located at the front end of the land into an education centre. The manor house does not form part of any "sensitive area". The education centre will include four smaller classrooms as well as a larger conference space.

2. PLANNING PERMISSION

The planning system regulates "development" and planning permission is the official approval from a local planning authority (the "**LPA**") to carry out operational development or changes of land or building use. Planning permission will not be required where rewilding activities (or activities ancillary to rewilding projects) fall outside the scope of the definition of "development" or benefit from permitted development rights. Given the intricacies of applications for planning permission and associated material considerations, advice should be sought from the LPA via the local council responsible for the land on the relevant requirements for planning permission.

This sub-section covers the aims of the planning system, when planning permission is required, the meaning of "development", special considerations applicable to non-developed land, permitted development rights and an overview of the planning permission application process. Practical scenarios are considered throughout this sub-section to demonstrate when rewilding activities (or activities ancillary to rewilding projects) may require an application for planning permission.

2.1 What are the aims of the planning system?

- The English and Welsh planning systems control development which affects land and the use of land.
- The UK Government's planning policies for England are set out in the National Planning Policy Framework[1] (the "**NPPF**"). The NPPF emphasises that the English planning system seeks to contribute to "the achievement of sustainable development" by way of pursuing economic, social and environmental objectives. The English planning system's environmental objectives include the protection of the environment, prudent use of natural resources and improvement of biodiversity, amongst others.
- The UK Government carried out a consultation on the proposals for reform of the planning system in England and launched a concurrent consultation on changes to the current planning system between 6 August 2020 and 29 October 2020.[2] The UK Government is yet to publish the outcome of the consultations.
- The LPA is required to consider the NPPF when drawing up its vision and strategy for development of the area for which it has authority, in the form of a development plan. Any application for planning permission must be decided in accordance with such a development plan. Additionally, the LPA is required to take the NPPF into account as a material consideration when deciding planning applications.
- The Planning Policy Wales[3] (the "**PPW**") sets out the planning policies of the Welsh Government. The PPW aims to "ensure that the planning system contributes to the delivery of sustainable development and improves the social, economic, environmental and cultural well-being of Wales" pursuant to the Well-being of Future Generations (Wales) Act 2015.
- The Welsh planning system is also development led and built on a National Development Plan, Strategic Development Plans at a regional and sub-regional level and Local Development Plans at a local level. As such, the PPW should be read in conjunction with Future Wales[4], the Welsh Government's National Development Framework.

2.2 When is planning permission required?

Planning permission is required for the "carrying out of any development on land".[5]

For the purposes of planning permission, "development" is given a wide meaning and includes:

- the carrying out of building, engineering, mining or other operations in, on, over or under land ("**operational development**"); or
- the making of any material change in the use of any buildings or other land ("**material change of use**").

Given that many rewilding projects will involve agricultural land and that agriculture is treated as a special category under the planning legislation, it may be helpful to summarise the general scheme of the planning legislation and the place of agriculture and related rewilding activities within that general scheme:

- Agriculture (and forestry) is excluded from the definition of "development" under the Town and Country Planning Act 1990 (the "**TCPA**"), meaning that in many instances activities that fall within the definition of agricultural or forestry do not require planning permission;
- Agriculture is widely defined in the TCPA (see below) and a change from one of the activities within that definition (say, growing arable crops) to another (say, grazing animals) will be unlikely to constitute a "material change of use" (discussed below) under the TCPA. Whether or not grazing animals as part of a rewilding project will constitute "agriculture" will be fact dependent – see the practical examples discussed below;
- Subject to various exceptions, if agricultural land is put to a new use, i.e., a use that falls outside the definition of agriculture (e.g., if a camp site is opened on the land), then that may be considered a material change of use and planning permission would be required;
- Subject to various exceptions, if a rewilding project involved an "operational development" (see below) such as building a new building, it would require planning permission; and
- Some types of activity that would otherwise fall within the definition of "development" are expressly permitted without the need for permission to be obtained. This is called "permitted development" (described below). If the rewilding activity falls within a permitted development, then planning permission will not be required.

If in doubt as to whether planning permission is required, advice should be sought from the LPA via the local council responsible for the land, as a wrong decision at the initial

stage could cause significant delays, require rectification action incurring significant cost or even require any development to be reversed completely.

2.3 What is operational development?

The meaning of "operational development" provided in legislation is discussed below. Each LPA may apply and interpret these provisions differently for a number of reasons, which may lead to the same activities requiring planning permission in one LPA area and not requiring it in a neighbouring area. Such discrepancy is perhaps more likely to occur for rewilding projects which are undertaking activities that may not be familiar to LPAs.

Operational development includes:

- Building operations, defined as the demolition of buildings or parts thereof, rebuilding, structural alterations of or additions to buildings or parts thereof, and other operations normally undertaken by a person carrying on business as a builder (which could include the simple act of erecting scaffolding).

  Beyond the obvious examples of building a new structure to house a research facility or to facilitate monitoring of rewilding or extending an existing structure, this may also include the demolition of buildings (depending on the LPA and the building to be demolished). It may also include any temporary or interim structures erected or brought onto the land such as portacabins (this depends on the size and nature of the structure as well as the length of time it will be on the land for);
- Engineering operations, which are likely to include earthworks and the construction of lakes and ponds. It appears that LPAs take different approaches on whether or not ponds and scrapes etc. constitute operational development and in many cases, the determination may be impacted by wider factors such as the local development plan, other proposed works and the scale of the proposed pond etc.
- Mining operations. This is more relevant to the extraction of minerals from land and therefore unlikely to be relevant to rewilding in and of itself; and
- Other operations. This term is not defined in legislation, but it has been suggested that the erection of wooden stakes to mark out plots of land as well as the construction of poultry units may qualify as other operations. Given the breadth of this element of operational development and its previous interpretation, it may apply to a wide range of temporary structures, even ones used in transitioning the land from its current use to its natural use. Careful consideration should be given to the process of rewilding including each individual stage of the process.

EXAMPLE 1: FENCING

The removal of the fences from the ex-arable land in Rewilding project A would be unlikely to be considered "development".

The construction of the fences around the campsite and trees in Rewilding project A may, however, constitute "development". Notwithstanding, Landowner A may benefit from permitted development rights in this regard (for further detail below).

EXAMPLE 2: LAND DRAINAGE

The blocking of the land drains in Rewilding project A may be considered minor works and, as such, will not constitute "development". Alternatively, the LPA may consider the blocking of the land drains in Rewilding project A, even if the resulting ponds are small and shallow, to be engineering operations, in which case it will fall within the scope of "development". Landowner A should consult with the relevant LPA in advance of undertaking such drainage works.

Whether or not specific rewilding actions, for example, creating intentionally 'leaky' dams and breaking up underground land drains would be considered to be minor works (and therefore not constitute development) will depend upon the specific circumstances of the project in which they are carried out, the scale of the activity and its likely impact.

Landowner A should also consider whether additional watercourse consents may be required from either the Environment Agency or the appointed local flood authority, depending on the nature of the land in question. The detail of these consents is beyond the scope of this briefing note.

EXAMPLE 3: PERMANENT TOILET BLOCK

The toilet block in Rewilding project A will likely qualify as "development" and Landowner A would be advised to apply for planning permission. Depending on the location of Rewilding project A and the location of the toilet block on the site, the LPA will take into account such considerations as the character and appearance of the locality, the impact on neighbouring land and accessways to the toilet block as part of its determination on planning permission

EXAMPLE 4: EXTENSION OF FARM SHOP

Even though Landowner B would have initially obtained planning permission for construction of the farm shop, the construction works associated with the extension of the farm shop in Rewilding project B will likely qualify as building operations, meaning that planning permission would be required.

EXAMPLE 5: OTHER DEVELOPMENT

The alterations to hedges in Rewilding project A and the planting of trees in Rewilding project A are unlikely to require planning permission but may be protected and controlled through planning conditions, legal covenants and tree preservation orders.

EXAMPLE 6: CONVERSION INTO AN EDUCATION FACILITY

Whether Landowner C has to apply for planning permission for the alterations associated with the conversion into an education facility in Rewilding project C depends on the extent of the alterations. Internal alterations typically do not require planning permission and neither do repairs of, maintenance of or minor improvements to external walls. Notwithstanding, the conversion into an education centre may require more extensive structural alterations which, in turn, would qualify as "development".

EXAMPLE 7: TEMPORARY BIRD HIDE

The bird hide and associated accessway will likely qualify as "development" and, in its determination on planning permission, the LPA may consider the character of the area, harm to the landscape and traffic generation, amongst other considerations. The LPA may also render such planning permission subject to a condition that the bird hide be removed following expiry of the period of its temporary use.

EXAMPLE 8: CONVERSION INTO A CAFÉ

The building works associated with converting the barn in Rewilding project B into a café and the associated accessway will likely qualify as building operations, meaning that planning permission would be required.

EXAMPLE 9: CAMPSITE

The use of arable land as a campsite with yurts in the summer months in Rewilding project A would entail a change of use and likely require planning permission if in excess of the 28-day period of permitted development (see below for further detail). Landowner A would be encouraged to contact the LPA for guidance on the relevant planning rules for temporary buildings.

EXAMPLE 10: FARM SHOP

The use of the farm shop in Rewilding project B may be considered ancillary to the use of the land for agricultural purposes. However, given that the farm shop sells a proportion of produce from neighbouring land, it is more likely to constitute a use separate to agricultural use (Class E: mixed commercial use or Class F2: local community, for example) and require planning permission.

2.4 What is a material change of use?

A change of use of land or buildings requires planning permission if it is material. This is usually a question of fact and degree to be decided by the LPA.

The Town and Country Planning (Use Classes) Order 1987[6] (the "**UCO**") sets out categories of building or land use (known as "**use classes**[7]) which may be used to determine whether an application for planning permission is required. Use classes that may be relevant to certain rewilding projects include uses such as retail, food and drink, business, hotels and learning and non-residential.

The UCO also provides a non-exhaustive list of certain types of land use that do not fall within a particular use class (referred to as "**sui generis use**"). Sui generis use includes drinking establishments, hot food takeaway and caravan sites, amongst others.

The following changes of land or building use qualify as "development":

- a change of use from one use class to another use class;
- a change of use from a sui generis use to another sui generis use; and
- a change of use from a sui generis use to a purpose within a use class.

A change of use from one purpose within a given use class to a different purpose within the same use class does not constitute "development".[8]

EXAMPLE 11: CAFÉ

The café in Rewilding project B will fall within Class E and this would likely require planning permission, subject to the application of permitted development rights (see below for further details).

EXAMPLE 12: EDUCATION CENTRE

The conversion of the manor house (assuming it doesn't fall within the definition of a "building occupied together with agricultural land" – see below) into an education centre in Rewilding project C would likely entail a change of use from Class C3: dwelling houses to Class D1: non-residential institution. This would be a change of use and likely require an application for planning permission.

EXAMPLE 13: CONVERSION FROM SHEDS INTO PARKING

If the parking in Rewilding project B will primarily be used for access to the café, the parking would be considered ancillary to such use and fall within the same use class as the farm shop and café (likely Class E: mixed commercial use). If the parking will be used as a commercial car park, it would constitute a sui generis use. This may constitute a change of use where, for example, the sheds are considered to have previously been put to storage uses. Landowner B should contact the LPA for further guidance.

2.5 Are there any special considerations applicable to non-developed land?

The approach of the planning system to non-developed land (which may include agricultural land and forestry) is complex but the following considerations may be relevant to rewilding practitioners in guiding their approach to rewilding-related planning issues.

Operations and land use excluded from "development"

Certain operations or land uses may be excluded from the definition of "development", meaning that planning permission is not required. These include "the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used".[9]

- For the purposes of planning permission, agriculture includes horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes.[10]
- There is limited statutory guidance on the meaning of "forestry" or "afforestation". The Forestry Commission, however, suggests that afforestation entails the conversion of a non-woodland use such as agriculture into woodland or forest by means of planting, or facilitating natural regeneration of trees to form woodland cover.[11]

Greenfield and brownfield land

The LPA may consider the rewilding land to be greenfield land, in which case it may be particularly restrictive as regards the grant of planning permission for future development on such land. Greenfield land constitutes previously undeveloped land which is not constrained by buildings or existing structures. Alternatively, if the land to be rewilding had previously been developed, it may be regarded as brownfield land. The LPA will likely want to encourage re-use of brownfield land, especially where such re-use would consist of rewilding activities.[12]

Agricultural land classification

The loss of land or quality of land from a proposed development, assessed by way of agricultural land classification ("ALC"), is of relevance in guiding planning decisions. ALC groups agricultural land into grades ranging from Grade 1 (excellent quality agricultural land) to Grade 5 (very poor quality agricultural land). This is because LPAs are minded to promote significant development on areas of poorer quality agricultural land (as opposed to higher quality agricultural land).[13]

Tree felling

Felling licences may be required for any development involving the felling of trees.

Tree felling is a legally controlled activity and a rewilder will normally need permission from the Forestry Commission[14] to fell growing trees, who will usually provide this permission by issuing a felling licence. The licence will allow the rewilder to fell identified trees and woodland legally.

Not every tree felling project requires a felling licence. Exemptions can be based on: location; the type of tree work; the volume and diameter of the trees; felling of certain fruit trees, lopping and topping ;other permissions already in place; and legal and statutory undertakings. However, it is always advisable to seek advice from the Forestry Commission before any felling activity takes place.

There are more general good practice guidelines to help plan sustainable woodland management[15] that control how tree management operations are carried out, which in turn will help prevent any damage to habitats or species and may be useful to flag certain complexities with rewilding projects that involve tree felling or areas with trees, more generally.

Other considerations relating to tree felling include:

- Tree felling in or near protected sites (such as SSSIs, Special Areas of Conservation ("**SACs**") or Special Protection Areas ("**SPAs**")) may require a separate consent from the relevant authority (usually Natural England and Natural Resources Wales) for the protected site. Often the Forestry Commission can help with the additional consent whilst processing a felling application;
- Larch felling – regulations exist to prevent the spread of pests and pathogens of trees and one of the more widely known pathogens is the one that affects larch species. A movement licence[16] will be needed in order to safely move the timber from larch felling to prevent further pathogen outbreaks;
- Management plans to accompany licences – these are plans that provide a structured way to plan and

organise the sustainable management of woodland to a common industry standard. They are most useful for larger woodland holdings and long-term woodland management. These plans, which are intended to contain sustainable proposals of woodland management are often required before approval will be given for a tree felling licence; and

- Possible restocking conditions on a licence to ensure regeneration of felled area – the government has a general policy against deforestation and so restocking conditions will normally be included in felling licences, other than for those licences approving areas to be thinned. Restocking proposals will be expected as part of a tree felling application.

A felling licence is transferable to a new landowner as long as there is no change to the felling or restocking set out in the felling licence. Any restocking conditions that apply to the land after a felling licence has been enacted remain in force after the land is sold. Those who sell land with a felling licence must advise the Forestry Commission and the purchaser accordingly.

A felling licence will usually contain permissions to fell trees for five years. However, a felling licence associated with a Forestry Commission approved woodland management plan is valid for 10 years.

EXAMPLE 14: SHIFTING MOSAIC OF HABITATS

The LPA may consider Landowner A to be putting the ex-arable land to forestry use by facilitating natural succession and the planting of trees. Such a change of use would be unlikely to require an application for planning permission as neither use falls within the scope of "development".

- Additionally, if the land now being used to create a shifting mosaic of habitats is considered to have previously been developed (although unlikely where it was previously used for agricultural or forestry purposes), it may attract priority habitat status as an open mosaic habitat on previously developed land[17]. Key to the definition of open mosaics of habitat are (i) a previous disturbance to the site and (ii) the presence of unvegetated substrate and successional communities of sites and species such as mosses, open grassland and heathland.[18]**
- The LPA would be required to consider such priority habitat status and the imperative to maintain and enhance biodiversity in its determination on planning permission for future development on such land.

EXAMPLE 15: GRAZING OF THE LAND

The grazing of the land by ancient breed cattle in Rewilding project A would qualify as agricultural use (even if the cattle were not to be used for agricultural purposes so long as the predominant purpose for which the land is being used is that of grazing[19]) as would the keeping of the cattle and sheep as livestock for the sale of their meat.

EXAMPLE 16: FELLING OF THE LARCH

Landowner A would require a felling licence to fell the larch in Rewilding project A. Special considerations apply to the felling of larch trees which mean that Landowner A may, in addition, require a movement licence.[20]

2.6 What are permitted development rights?

Certain types of development may benefit from general planning permission (referred to as "**permitted development rights**"[21]). The scope of permitted development rights is varied and complex and will need to be carefully considered on the facts of any relevant developments. However, the basic impact is that where a given development falls within the scope of a permitted development right, the applicant will be authorised to carry on the development without needing to apply to the LPA for planning permission.

The permitted development rights that specifically apply to agricultural and forestry developments vary depending on factors such as the area of land concerned and include developments such as building central grain stores, cattle sheds, on-farm reservoirs or facilities to store timber or forestry machinery. As these are unlikely to be relevant to rewilding land, they are not covered in further detail in this note. There are various other categories of permitted development rights relating to e.g., fencing and certain change of use which may be relevant to rewilding activities and some of these are highlighted using the practical scenarios below.

- Permitted development rights may be accompanied by specific conditions, non-compliance with which would place the development outside the category of permitted development rights.
- Permitted development rights may also be restricted or excluded altogether in certain circumstances, such as where the development is to take place in a

National Park ("**NP**") and can be removed temporarily or permanently at the discretion of the LPA and Secretary of State.

- For some types of permitted development, the LPA may still need to give prior approval before works can commence.

EXAMPLE 17: ACCESSWAY TO THE CAFÉ

If the accessway leading to the café leads to a highway which is not a trunk road or a classified road, this would likely constitute permitted development under schedule 2, part 2, Class B, TCP (GPD) Order 2015.

EXAMPLE 18: WOODLAND PASTURE

The LPA may consider the development of woodland pasture in Rewilding project A to qualify as agricultural use ("use of land for woodlands") or forestry use ("conversion [...] into woodland [...] by means of planting, or facilitating natural regeneration of trees to form woodland cover").

Additionally, as a priority habitat, wood pasture will be taken into account in the LPA's determination on planning permission for future development on such land.

EXAMPLE 19: FENCING

Provided the fences in Rewilding project A comply with the conditions relating to height thereof, Landowner A may benefit from permitted development rights provided for in schedule 2, part 2, Class A, TCP (GPD) Order 2015.

EXAMPLE 20: CAMPSITE

Landowner A may be able to claim a permitted development right under schedule 2, part 4, Class B, TCP (GPD) Order 2015 if the use of the land as a campsite with yurts lasted for no more than 28 days in any calendar year.

EXAMPLE 21: CAFÉ

Provided the conversion of the agricultural barn into a café does not fall within one of the exceptions in schedule 2, part 3, Class R, TCP (GPD) Order 2015, Landowner B may benefit from these permitted development rights. Notwithstanding, the permitted development would be subject to the following conditions:

- the café would qualify as a sui generis use;
- Landowner B would be required to provide certain information to the LPA if the agricultural barn's floor space did not exceed 150 square metres; and
- Landowner B would be required to apply to the LPA for a determination as to whether prior approval of the LPA would be required if the agricultural barn's floor space exceeded 150 square metres.

2.7 What are the different stages of the planning application process?

Where it has been determined that planning permission will be required, the planning application process will involve the following five stages:

- Pre-application advice: The LPA may offer pre-application advice on the requirements for and merits of the planning application. It is recommended that such advice be sought to increase the chances of a successful planning application and reduce the time spent at the decision-making stage;
- Application: Most applications may be made online via the Planning Portal[22] (for England) or Planning Applications Wales[23] (for Wales), although hard copy applications are permitted. A valid application will include a completed application form, mandatory information including plans, drawings and proof of ownership, an application fee and any other information specified by the relevant LPA;
- Validation and registration: The LPA will validate the application as soon as is reasonably practicable. Once an application has been deemed valid, the application is placed on the planning register and assigned an application reference number. The LPA will notify the applicant of the application's date of registration, contact details of the case officer and deadline for the application.

  Where the LPA has deemed an application invalid, the LPA will notify the applicant of its reasons in writing and /or may request supporting information. An application may be deemed invalid for a number of reasons, including incomplete application forms or supporting documents, a missing application fee or incomplete plans. The application will usually have the right to appeal a non-validation decision;
- Consultation and publicity: The LPA will consult various groups of consultees for a period that usually lasts 21 days (or longer where additional consultation is required). As part of such consultations, the LPA is required to seek the views of neighbours and local community groups.

  The LPA will also be required to publicise the application for planning permission. Minimum publicity requirements depend on the type of development for which planning permission is sought. They will likely include site displays on or near the land to which the application relates, publication of notices in local newspapers, service of written notice on neighbours and announcements on the LPA's website; and

- Consideration and decision-making: A case officer will consider the application, conduct site visits if necessary and prepare a report setting out his or her recommendations.

  The LPA may choose to grant conditional or unconditional planning permission or refuse planning permission.

  The applicant usually has the right to appeal against the decision or the conditions if his or her application for planning permission has been refused or has been granted subject to conditions. Where the LPA fails to determine the application within the relevant statutory timeframe (this is referred to as "**non-determination**"), the applicant also has a right to appeal to the SoS.

3. ENVIRONMENTAL IMPACT ASESSMENTS FOR DEVELOPMENT [24]

EIAs aim to understand if a particular development will have an effect on the environment and how to implement measures that will mitigate any negative effects that a development may have on the environment.

EIAs are unlikely to be required for the majority of rewilding projects. The only clear exception to this is where a project involves the creation of a permanent campsite which is either over 1 hectare in size or is in or partially in a "sensitive" area. Where a project involves a significant amount of building works (such as a visitor centre, café and associated parking), advice should be taken on whether this could constitute "urban development" for the purpose of the EIA regime and therefore require an EIA.

Given the intricacies of planning applications that require EIAs and material considerations relating thereto, where there is any uncertainty, advice should be sought from the LPA via the local council responsible for the land on the relevant requirements of an EIA and when an EIA will be required. Consulting with the LPA will provide a rewilder with certainty as to whether their rewilding project requires an EIA and the information that should be included in an EIA.

3.1 What is the purpose of EIAs?

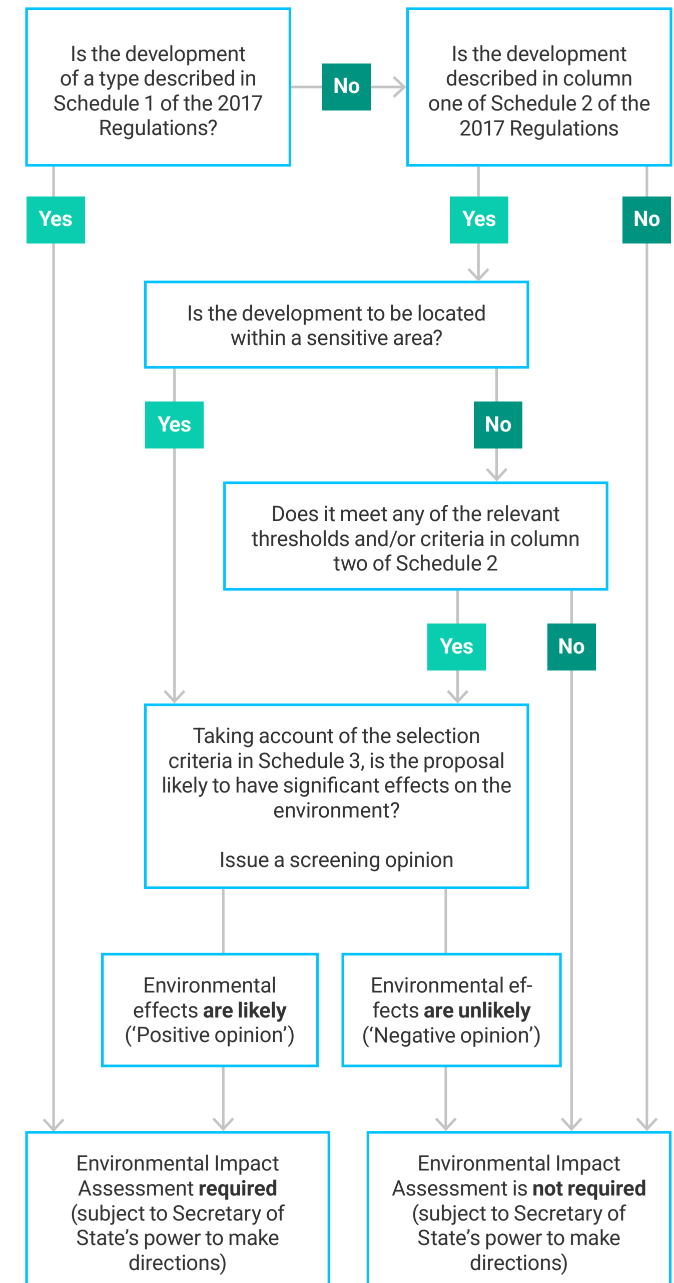
EIAs aim to:

- protect the environment to ensure the LPA is aware of the likely significant effects a development/project may have on the environment; and
- ensure that the public and other applicable consultation bodies (e.g. Natural England)[25] are given an opportunity to participate in the decision-making process.

The 2017 EIA England Regulations[26] and 2017 EIA Wales Regulations[27] (together the "**2017 EIA Regulations**") set out a procedure for identifying developments that are subject to an EIA and the assessment, consultation and decision-making processes applicable to a development that requires an EIA in England and Wales.

3.2 When are EIAs required?

This flowchart available on the Government website is helpful in understanding when an EIA is required:



In summary, the EIA process begins with consideration as to whether or not development falls within the definition of either "Schedule 1 Development" or "Schedule 2 Development", as defined in the Regulations.

This note does not address Schedule 1 Developments as they are large scale infrastructure projects which are therefore not relevant to rewilders.

It is possible (although unlikely) that some rewilding projects could be Schedule 2 Developments, in which case the next question is whether or not the development will have a significant effect on the environment.

More generally, both the LPA and the Secretary of State have discretion under Regulation 5 to determine whether or not a development is an EIA development even if it does not fully satisfy the criteria of Schedule 1 or Schedule 2 Developments.

3.3 What are Schedule 2 Developments?

Schedule 2 Developments include, for example, the use of uncultivated or semi-natural land for intensive agricultural purposes, water management projects for agriculture, urban development projects and the creation of permanent campsites, all of which must either cross a specified area of development threshold or be in or partially in any "sensitive areas" (see below). A full list of Schedule 2 Developments can be accessed using the link below in the endnote.[28]

It is unlikely that rewilders will undertake Schedule 2 Developments. A potential exception to this general rule is the development of permanent camp sites which are larger than 1 hectare in size or are in a sensitive area. Rewilders should also be aware that the Regulations have been interpreted broadly and although at first glance "urban development" does not appear applicable to rewilding projects, it has been interpreted broadly and could conceivably capture rewilding projects involving significant cumulative building works (e.g. where visitor centres, cafes and car parking, etc., are developed).

When assessing Schedule 2 Developments, there are three questions that can be asked to determine if your development requires an EIA:

- Is the proposed development within a category set out in Schedule 2?
- Does it exceed the threshold set out for that category in Schedule 2? **Or** is it located in or partially in a "sensitive area"?
- Is it likely to have a significant effect on the environment due to factors such as nature, size or location? (This will be assessed by reference to the criteria set out in Schedule 3 of the 2017 Regulations).

If the answer is yes to all three questions above, then the proposed development would require an EIA. The government has produced this useful table indicating the type or scale of Schedule 2 development that is likely to require an EIA.

If a rewilder is unsure if their project will require an EIA, they should always request the LPA to issue a screening opinion.

3.4 How do sensitive areas impact EIAs?

Sensitive areas under the 2017 EIA Regulations are:

- SSSIs and European sites;
- NPs;
- the Broads and areas of outstanding natural beauty ("**AONBs**"); and
- World Heritage Sites and scheduled monuments.[29]

Where a development is of a type listed in Schedule 2 and is in or partially in a sensitive area, the exclusion thresholds and criteria (in the second column of Schedule 2) are not applied. This means that when proposing to conduct any development listed in the first column of Schedule 2 that is in or partially in a 'sensitive area', the development must be screened by the LPA.

An LPA should consult with various consultation bodies (for example, Natural England or Natural Resources Wales) if it is uncertain as to the significance of a proposed development's likely effects on a sensitive area. Natural England or Natural Resources Wales, as the case may be, should be consulted in respect of developments within SSSIs and European sites.

When considering the sensitivity of a location, an LPA or developer should also consider whether any nationally or internationally agreed environmental standards are already being approached or exceeded.

Separately, any activities being undertaken in, or sufficiently close to impact, a SSSI or a European site may require additional consents and assessments, such as a Habitats Regulation Assessment. See the *Rewilding in England and Wales: Protected areas* briefing note for further information on potentially additional relevant assessments for sensitive areas.

EXAMPLE 22: REWILDING PROJECT A

Rewilding project A may require an EIA for the yurts, depending on their nature:

- Landowner A will be constructing a campsite with yurts for use in the summer months. The first test to consider is if this would be classified as a Schedule 2 Development.
- The installation of a campsite would be a Schedule 2 paragraph 12(e) development if it were 'permanent' and the area of development exceeds 1 hectare.
- If the campsite occupied an area of less than 1 hectare, it could still be a Schedule 2 Development if the proposed campsite exists within or partially in the SSSI on Rewilding project A which qualifies as a "sensitive area".
- The final question would be whether the construction of the campsite would have an effect

on the environment and this would be a question of fact and expert assessment.

- If the above circumstances apply, Landowner A would be advised to request the LPA to issue a screening opinion before proceeding with the full EIA process. The LPA must respond within 21 days. The LPA will then decide if Rewilding project A would require an EIA.

The following actions in Rewilding project A are unlikely to require an EIA:

- Any blocking of land drains with the aim of rewetting the peat is unlikely to be classified as a Schedule 2 Development, meaning that an EIA will not be required.[30]
- Creating woodland pasture and felling any larch would not require an EIA under the 2017 EIA Regulations. A rewilder may be required to follow a separate application process under the Forestry Regulations (see below).

EXAMPLE 23: REWILDING PROJECT B

Landowner B will be converting an old barn into a café, creating access and a car park and building a bird hide. On the realistic assumption that these buildings etc are not deemed to be urban development of more than 1 hectare, it is likely that it will not require an EIA. However, if Rewilding project B were to include multiple developments, an LPA may decide that Rewilding project B is undertaking "urban development" (which has been interpreted broadly) having a significant effect on the environment due to e.g., its scale and an increase in traffic, car emissions and noise. In this case, it may require an EIA.

Landowner B should consult with the LPA if there is any doubt but in any case, could proceed to file a planning application without EIA, in the knowledge that the LPA will request EIA if they consider it to be necessary.

EXAMPLE 24: REWILDING PROJECT C

Landowner C will be converting a manor into an education centre.

On the realistic assumption that the education centre is not deemed to be an urban development of more than 1 hectare, then it is likely that it will not require an EIA.

4. EIAS FOR FORESTRY PROJECTS

4.1 When is a forestry EIA required?

The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2228) ("**Forestry Regulations**") implement the EIA regime for forestry projects in England and Wales and set out whether a project is a "relevant project".

If a project is deemed to be a "relevant project" then it will require consent from the Forestry Commission.

Rewilders should consult the Government guidance on forestry EIAs where they are undertaking forestry activities as the application of the Forestry Regulations is complex and beyond the scope of this note.

4.2 What is a "relevant project"?

Under the Forestry Regulations, afforestation, deforestation, forest road works and forest quarry works will be a "relevant project" where:

- a project is likely, by virtue of factors such as its nature, size or location, to have significant effects on the environment. Subject to specified exceptions[30], it will be assumed that projects not exceeding relevant thresholds specified in Schedule 2 of the Forestry Regulations will not have a significant effect of the environment; and
- a project (i) does not involve "development" for the purposes of the planning permission regime; or (ii) involves "development" but is not identified in Schedule 1 or column 1 in Schedule 2 of the EIA Regulations; or (iii) involves "development" subject to specified permitted development rights.[31]

According to the Government's guidance page, the four project activities mean:

- Afforestation – this means conversion of a non-woodland land use, for example agriculture, into woodland or forest (these terms are used interchangeably) by means of planting or facilitating natural regeneration (self-sowing) of trees to form woodland cover. This can include both commercial proposals for short rotation coppice (SRC) and short rotation forestry (SRF), including energy crops and Christmas tree plantations and proposals solely for woodland or forest creation with no wider commercial purpose. Note that planting or natural regenerations of less than 0.5 hectares will not be considered afforestation under the Forestry Regulations.
- Deforestation – this means removal of woodland cover for conversion to another land use. This can include proposals for the removal of SRC and SRF, including the removal of energy crops and Christmas tree plantations;

- Forest road works – this means forest road projects that include the formation, alteration or maintenance of private ways on land used (or to be used) for forestry purposes, including roads within a forest or leading to one;
- Forest quarry works – this includes quarrying to obtain materials required for forest roadworks on land that is used or will be used for forestry purposes.

There are certain exceptions to what constitutes a 'relevant project', see the Government's guidance for details.

4.3 What is involved in a forestry EIA?

There are two relevant application stages:

- By submitting a 'Stage 1' EIA application it is possible to confirm whether the Forestry Commission believes the project is likely to have a significant effect on the environment or not. There are three types of 'Stage 1' applications: Basic notification; Full Notification and Application for Opinion. The application type is determined by the project size and land sensitivity.
- Those projects that are determined at 'Stage 1' to have a significant effect on the environment will require a 'Stage 2' consent.
- If the project does not require a grant to create the woodland, and the Forestry Commission has said at 'Stage 1' that a 'Stage 2' EIA consent is not required, then a rewilder can begin to plant the woodland at that point. A decision should arrive within 28 or 42 days depending on the Stage 1 application type.
- Carrying out a forestry project without a 'Stage 2' EIA consent where it was required will leave a person liable to the Forestry Commission taking enforcement action against them. This may include, but is not limited to, requiring the person to restore the land to its previous condition at their own expense.
- Anyone with a new project should consult the Forestry Commission's guidance table on thresholds[32] because for afforestation for example, the total area of the woodland creation proposal must be added to that of other nearby (within 500 metres) recent woodland creation projects (those completed within the past five years, including on other people's land). The thresholds change depending on the land sensitivity e.g. sensitive land (like a local nature reserve). The land sensitivities can also be found in the same guidance note as the thresholds.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 1 December 2022.

ENDNOTES

1. https://www.gov.uk/government/publications/national-planning-policy-framework--2.
2. For further reading, see the consultation on changes to planning policy and regulations (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927157/200805_Changes_to_the_current_planning_system.pdf) and the White Paper: Planning for the Future (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958421/Planning_for_the_Future_web_accessible_version.pdf).
3. https://gov.wales/planning-policy-wales.
4. https://gov.wales/future-wales-national-plan-2040.
5. TCPA, s 57(1) (https://www.legislation.gov.uk/ukpga/1990/8/section/57).
6. https://www.legislation.gov.uk/uksi/1987/764/contents/made. Note that the latest version of the UCO is not available on the Government's official legislation website. The Planning Portal (for England) (https://www.planningportal.co.uk/permission/common-projects/change-of-use/use-classes) and Welsh Government (https://gov.wales/planning-permission-use-classes-change-use) offer useful guidance on the UCO.
7. Agricultural or forestry use currently does not fall within any of the statutory use classes provided for in the UCO.
8. TCPA, s 55(2)(f) (https://www.legislation.gov.uk/ukpga/1990/8/section/55).
9. TCPA, s 55(2)(e) (https://www.legislation.gov.uk/ukpga/1990/8/section/55).
10. TCPA, s 336 (https://www.legislation.gov.uk/ukpga/1990/8/section/336).

11. See Forestry Commission's Guidance on Environmental Impact Assessments for woodland (https://www.gov.uk/guidance/environmental-impact-assessments-for-woodland).
12. Refer to UK Government's National Planning Policy Framework (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf") and The Countryside Charity's Annual State of Brownfield Report (https://www.cpre.org.uk/wp-content/uploads/2021/11/Nov-2021_CPRE_Recycling-our-land_brownfields-report.pdf) for further information.
13. See Natural England's Technical Information Note TIN049 https://publications.naturalengland.org.uk/publication/35012
14. https://www.gov.uk/government/organisations/forestry-commission.
15. European Protected Species and woodland operations checklist (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697613/eps-checklist-v4.pdf).
16. https://www.forestresearch.gov.uk/tools-and-resources/fthr/pest-and-disease-resources/ramorum-disease-phytophthora-ramorum/phytophthora-manual-9-licences-to-move-and-process-wood-from-trees-with-ramorum-disease/.
17. See Natural Environment and Rural Communities Act 2006 (the "NERC"), s 41 9 https://www.legislation.gov.uk/ukpga/2006/16/section/41); Environment (Wales) Act 2016 (the "EWA"), s 7 (https://www.legislation.gov.uk/anaw/2016/3/section/7).
18. See the UK Biodiversity Action Plan: Priority Habitat Descriptions (https://data.jncc.gov.uk/data/2728792c-c8c6-4b8c-9ccd-a908cb0f1432/UKBAP-PriorityHabitatDescriptions-Rev-2011.pdf
19. Sykes v Secretary of State for the Environment and Another (1981) 42 P. & C.R. 19.
20. For further reading, refer to the Forestry Commission's Operations Note 23: Processing felling applications involving larch species
21. Refer to TCP (GPD) Order 1995, sched 2 (https://www.legislation.gov.uk/uksi/1995/418/schedule/2) and TCP (GPD) Order 2015, sched 2 (https://www.legislation.gov.uk/uksi/2015/596/schedule/2).
22. https://www.planningportal.co.uk/.
23. https://gov.wales/planning-applications.
24. For further reading on EIAs, see the briefing article prepared by Friends of the Earth, dated September 2020 (https://cdn.friendsoftheearth.uk/sites/default/files/downloads/September_2020_Environmental_Impact_Assessment.pdf). This provides a useful guide on EIAs and provides various links to further reading materials.
25. See regulation 2(1) of the 2017 EIA England Regulations (https://www.legislation.gov.uk/uksi/2017/571/regulation/2) and the 2017 EIA Wales Regulations which provide a list of the consultation bodies (https://www.legislation.gov.uk/wsi/2017/567/regulation/2).
26. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017
27. The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017
28. https://www.legislation.gov.uk/uksi/2017/571/schedule/2
29. See regulation 2(1) of the 2017 EIA Regulations (https://www.legislation.gov.uk/uksi/2017/571/regulation/2).
30. See The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2228, Regulation 3(3)
31. The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2228), Regulation 3(1)(c).
32. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033301/A_Guide_to_Planning_New_Woodland_in_England_V1.0_Nov2021.pdf

PROTECTED AREAS

CORE TOPICS:

- Key designated areas for the protection of nature and limitations on managing these areas.
- Proposed legislative reform to designated areas of protection.

KEY TAKEAWAYS:

- Rewilding in a protected area may be restricted by the area's designated aims of protecting specific species and habitats.
- The SSSI regime limits activities within SSSI sites only and consent / permission must be granted for any activities falling within the site-specific list of "operations requiring consent".
- It is an offence for anyone to intentionally or recklessly damage the protected natural features of any SSSI.
- Any activities which are likely to have a significant negative effect on the protected features of Special Areas of Conservation (SAC) and Special Protection Areas (SPA) will be restricted and may require a Habitats Regulation Assessment.
- It is an offence to intentionally or recklessly damage the natural feature by reason of which the land has been designated as a European site.
- Rewilding within a National Park or Areas of Outstanding Natural Beauty may be subject to stricter planning and development controls.

TABLE OF CONTENTS

1. Areas protected for nature – key designations
- 1.1 Site of Special Scientific Interest (SSSI)
- 1.2 What restrictions are placed on the management of SSSIs?
- 1.3 How are SSSIs identified and selected for protection?
- 1.4 Special Area of Conservation (SAC) and Special Protection Areas (SPA)
- 1.5 Ramsar sites

2. Designations reform

3. National and Local Nature Reserves
- 3.1 National Nature Reserve (NNR)
- 3.2 Local Nature Reserve (LNR)

4. Protections applicable to specific habitat types
- 4.1 Peatlands
- 4.2 Coastal habitats
- 4.3 Hedgerows protection
- 4.4 Limestone Pavement Order (LPO)

5. National parks and Areas of Outstanding Natural Beauty
- 5.1 National Parks (NPs)
- 5.2 Area of Outstanding Natural Beauty (AONB)

1. AREAS PROTECTED FOR NATURE – KEY DESIGNATIONS

In England and Wales, certain areas of land that have particular importance for nature (e.g. because they are home to rare plant species or they are home to breeding sites for threatened animal species) are protected by laws which often restrict the management of that land and may limit the activities which can be pursued on that land by landholders.

The most common designations in England and Wales are Sites of Special Scientific Interest ("**SSSI**"), Special Areas of Conservation ("**SACs**"), Special Protection Areas ("**SPAs**") and Ramsar Sites.

The designated sites system[1] can be used to identify these protected sites in England, and the Magic Map[2] can be used to identify these protected sites in Wales.

Each of these designations and their potential impact on rewilding activities are described below.

1.1 Site of Special Scientific Interest (SSSI)

A SSSI is a site notified (designated) as being of special interest due to the flora or fauna present or the geological make-up or physiography of the area under the Wildlife and Countryside Act 1981 (the "**WCA**"). Sections 28 to 33 of the WCA set out the SSSI regime, which is a domestic designation that applies in Great Britain.

Natural England ("**NE**") and Natural Resources Wales ("**NRW**") may designate particular sites as being of special scientific interest when it believes the land's wildlife, geology or landform is of special interest. Their objective is for all SSSIs to reach 'favourable condition'.

SSSIs exist on "*land*", which may include estuarial waters, land lying above mean low water mark, and further adjacent waters in certain circumstances (*section 28(1A)-(1B)* of the WCA), meaning that although SSSIs are principally a terrestrial designation, the sites can extend into marine areas.

It is important for rewilders to be aware that NE and NRW have the power to prosecute anyone who intentionally or recklessly damages a SSSI, destroys any of the designated features or disturbs wildlife for which a site was notified. Designation as a SSSI may therefore limit the rewilding activities that can be carried out on site and any change in land management is likely to require the consent of NE or NRW. Therefore, if rewilding land is a SSSI, this designation is likely to limit the freedom that you have in relation to your rewilding project and constraints may have been imposed on how the land can be managed and developed.

The designated sites system[3] and the protected areas search[4] can be used to search for a SSSI to get a list of the operations requiring NE's and NRW's consent, respectively.

1.2 What restrictions are placed on the management of SSSIs?

SSSIs must be managed effectively and appropriately to conserve the special features of the site. The sites are assessed and categorised as being in favourable, unfavourable (with specifications on whether the area is recovering, declining or has no change available from NE only) or destroyed/part destroyed condition. In order to assess the condition of the site, NE / NRW will visit your SSSI at least every six years. This may be more or less r egular depending on the site in question. They will notify in advance, but do have a power of entry if they believe a site is being damaged.

Each SSSI has a specific list of activities (usually extensive), known as 'operations' for which consent from NE / NRW will be required. The list of operations will be specific to each site and could include, for example:

(a) grazing and changes in the grazing regime (including type of stock or intensity or seasonal pattern of grazing and cessation of grazing);

(b) stock feeding and changes in stock feeding practice, including changes in the number of animals stocked;

(c) the release into the site of any wild, feral, captive bred or domestic animal, plant or seed;

(d) the destruction, displacement, removal or cutting of any plant or plant remains, including tree, shrub, herb, hedge, dead or decaying wood or turf;

(e) the introduction of, or changes to tree or woodland management; and

(f) modification of the structure of watercourses.

Undertaking any "operation" identified for the relevant SSSI will require consent from NE or NRW and rewilders should therefore engage with NE / NRW at an early stage when they are considering changes to the management of their land. Failure to obtain such consent may constitute an offence.

In order to understand whether a site is a SSSI and any restricted activities applicable to that site, visit the Natural England site or the Natural Resources Wales site, as applicable.

Note that NE / NRW must be notified within 28 days of changes to the ownership and occupation of SSSI land, including notification of sales, leases or easements.

EXAMPLE: IMPACT OF SSSI DESIGNATION ON REWILDING LAND

Landowner A is rewilding a 50 hectares site, part of which is covered by a SSSI designation because it is a good example of dwarf-shrub heath plant communities.

Landowner A notices that, by natural succession and regeneration, native, pioneer tree species such as birch, rowan and willow are colonising the upland heath area of her land and she would like to support this process and allow it to continue.

She would also like to introduce cattle and horses to graze the land and encourage the creation of a mosaic of habitats.

Part of the land in Rewilding Project A is covered by a SSSI. Landowner A therefore needs to ensure that her management of the land is in accordance with the management statement and that through her action she does not either intentionally or recklessly damage the dwarf-shrub heath plant communities for which the site is designated. Causing such damage could amount to an offence.

She should discuss the natural succession and regeneration of native trees on the upland heath with NE and work together to understand if there are ways to support these processes within the SSSI designated land.

If the use of natural grazing herbivores is not envisaged in the management statement, it may be an operation requiring consent, in which case NE will need to be consulted and their consent granted before the animals are introduced to the land.

1.3 How are SSSIs identified and selected for protection?

If NE / NRW believe that an area of land should be protected as a SSSI, they will send a letter of notification to the landowner. This letter will set out the reasons for designation, their views on management, a map of the SSSI, a list of operations that will require their consent, legal obligations and how to give your opinions or object to the designation.

NE / NRW must also notify the Local Planning Authority (the "**LPA**"), the Secretary of State for Environment, Food and Rural Affairs (the "**SoS for Environment**") as well as other relevant public bodies. Following these notifications, there will be a consultation period of not less than three months during which any comments or objections to the designation can be submitted.

All SSSIs are registered on the Land Charges register. If you are buying land or to find out if your land is within a SSSI, a conveyancing search should be carried out to see if the land is notified as a SSSI.

1.4 Special Area of Conservation (SAC) and Special Protection Areas (SPA)

SACs and SPAs in England and Wales form the UK network of *Natura 2000* sites designated in the UK under EU law prior to the end of the Brexit transition period along with any SACs and SPAs that were designated after the transition period ended. SACs and SPAs continue to be known collectively as "*European sites*" after the transition period.

SACs protect certain natural habitats and fauna and flora originally identified under the EU's *Habitats Directive (92/43/EEC)* (the "**Habitats Directive**") as being of particular ecological importance.

SPAs are a network of areas designated under the EU's *Birds Directive (2009/147/EC)* ("**Birds Directive**") to protect:

(a) vulnerable wild bird species listed in Annex 1 to the Birds Directive which naturally occur in the UK; and

(b) regularly occurring migratory species of birds not listed in Annex 1 which naturally occur in the UK.

SACs and SPAs are designated and protected in England and Wales and adjacent territorial waters (up to 12 nautical miles offshore), under the *Conservation of Habitats and Species Regulations 2017 (SI 2017/1012)* ("**Habitats Regulations**") and can be identified by viewing an online map called the Magic Map[5] that allows someone to view all the SAC and SPA designated sites across the EU. It also provides information on the reasoning behind a particular site gaining its status. Alternatively, just the UK sites can be viewed here (for SACs) or here for SPAs.

The appropriate nature conservation body can make management agreements in relation to an SPA or SAC with the landowner[6]. Alternatively, the appropriate authority can make a special nature conservation order ("**SNCO**") specifying operations (on or off the SPA or SAC) likely to destroy or damage protected features[7]. For example, an SNCO specifies operations that appear likely to destroy or damage the flora, fauna, or geological or physiographical features by reason of which the land is a European site.

The SNCO is a local land charge which means it will be recorded in a register of local land charges by the relevant authority and the register will be open to public inspection. The authority can then serve a stop notice (although compensation may be payable) and make a restoration order in relation to any activities which breach the SNCO[8]. In addition, the appropriate nature conservation body can make byelaws to protect the site[9].

More generally, there are significant restrictions on development affecting an SAC or SPA and these may impact rewilders looking to develop land to facilitate ecotourism and public engagement facilities. The appropriate authority is required to undertake an appropriate assessment of any plan or project that is likely (either alone or in combination with other plans or projects) to have a significant effect on an SAC or SPA and which is not directly connected with or necessary to the management of that site. This means that even if rewilded land is not itself an SAC or an SPA, a plan or project may still be subject to assessments if it is likely to have a significant effect on a nearby SAC or SPA.

A "plan or project" has a broad meaning and will effectively include any activity which could impact the conservation objectives of the protected site. This could include e.g., erecting any buildings, felling trees or causing changes to relevant habitats including by introducing new species of animals or plants.

The appropriate assessment is known as a Habitats Regulation Assessment ("**HRA**") in England and Wales, which is to assess:

(a) if the proposed plan or project will have a negative effect on the site's conservation objectives; and

(b) whether there is an alternative solution.

The general rule is that consent for the plan or project will only be given if the assessment determines that it will not adversely affect the integrity of the protected site.

There are some exceptions to this rule. In particular, if a plan or project has a negative assessment and there is no alternative solution, consent may be given for the plan or project to be undertaken if it is for "*imperative reasons of*

overriding public interest", including those of a social or economic nature. In reality this is a very hard test to satisfy and will generally be reserved for public infrastructure projects rather than anything a private landowner may wish to do on their land. If consent is granted in such circumstances, compensatory measures must be made.

EXAMPLE: IMPACT OF SPA DESIGNATION ON REWILDING ACTIVITIES

Landowner B is rewilding a 300-hectare area near the Seven Sisters Country Park which includes a SPA which is designated to protect a unique wetland habitat.

Landowner B learns that a neighbouring landowner is planning to significantly increase the amount of drainage on their land and Landowner B thinks that this could negatively impact the protected wetland habitat.

Although the proposed increased drainage by the neighbouring landowner is not taking place in the SPA itself, it is still caught by the protections offered by the Habitats Regulations and will need to be subject to a Habitats Regulation Assessment if it likely to have a significant effect on the integrity of an SPA.

This means that an appropriate assessment will need to be conducted to understand the likely impact of the increased drainage on the SPA. If a significant negative effect cannot be ruled out, NE will not grant consent if there is an alternative solution. If an alternative solution is not available, NE will only grant consent in the exceptional circumstance of there being an overriding and imperative public interest which is a very stringent test to satisfy.

1.5 Ramsar sites

A Ramsar site is a wetland of international importance designated for protection under the Convention on Wetlands of International Importance (Ramsar Convention) of which the UK is a signatory. While a Ramsar site is principally a terrestrial designation, it can extend into intertidal areas.

Specific legal protection for the Ramsar site habitat and species is provided by designation as SSSIs or SPAs.

2. DESIGNATIONS REFORM

In March 2022, the Department for Environment, Food and Rural Affairs ("**Defra**") published a Nature Recovery Green Paper on protected sites and species in England for consultation. The Green Paper is intended to support the government's target to restore nature and halt the decline in species abundance by 2030, as required by the Environment Act 2021 (the "**Environment Act**"). The Green Paper includes significant reform proposals, in particular for:

1. protected sites, by consolidating various designations (such as SSSIs, SACs and Marine Conservation Zones) into single terrestrial and marine designations, possibly with different categories of protection;
2. species protection legislation, by consolidation of protection, licensing and enforcement legislation into simpler and consistent legislation; and
3. HRAs potentially with a single reformed process to complement the proposals for simplified designations.

As at February 2023, the Retained EU Law (Revocation and Reform) Bill is currently passing through parliament and has the potential to bring significant change to all aspects of our laws that originate from the EU, including the Habitats Regulations which regulated SPAs and SACs.

3. NATIONAL AND LOCAL NATURE RESERVES

In addition to the protected area designations described above, areas of land which are publicly owned may also be identified as National Nature Reserves ("**NNRs**") or Local Nature Reserves ("**LNRs**").

3.1 National Nature Reserve (NNR)

A NNR is a visitor-focused designation under section 19(1) of the National Parks and Access to the Countryside Act 1949 (the "**NPACA**") and section 35(1) of the WCA. It protects and often contains an exceptional SSSI. The main difference is that NNRs are positively managed by a public authority or environmental organisation, even when privately owned, while SSSIs are managed by the land-owner, in accordance with the provisions set out by the relevant authority. Most NNRs are open to the public.

The way in which a rewilding project may be affected if it concerns land with NNR status will depend on the agreements that are reached with the public body or environmental organisation that is responsible for managing the NNR. As such, further advice should be sought when this applies.

There are currently 225 NNRs in England covering a total area of over 98,600 hectares.[10]

3.2 Local Nature Reserve (LNR)

A LNR can be designated by a local authority under sections 19(1) and 21 of NPACA provided that the site is controlled by the local authority through ownership, lease or agreement with the owner. It will be locally important for wildlife, geology, education or enjoyment (without disturbing wildlife). Occasionally, a LNR may also be designated as a SSSI. Usually, the site will remain a protected LNR for a minimum of 21 years.

The LNR designation:

(a) gives limited protection from development by indicating its conservation value;

(b) encourages proper management of its conservation features; and

(c) enables bye-laws to be made to protect the site.

The policies provided by local planning policies will aim to resist developments adversely affecting LNRs and as such, rewilding activities which adversely affect these areas may be limited for a substantial period of time. A manager of a LNR will be responsible for caring for and protecting the LNR's natural features, rather than the area being publicly managed. It is not a formal requirement to open the LNR to the public, but government guidance provides that at least part of it should be publicly accessible.

There are over 1,500 LNRs in England covering 35,000 hectares.

4. PROTECTIONS APPLICABLE TO SPECIFIC HABITAT TYPES

4.1 Peatlands

Due to the interaction of peatland habitats with a variety of land uses and their use in tackling a number of environmental issues (such as water quality and climate change), peatlands may be protected under a number of different protected area designation types and fall under a number of government policies.

The government launched the England Peat Action Plan in May 2021 with the aim of reversing the decline in peatlands. The plan confirms that only 13% of England's peatlands are in a near natural state. In order to improve the state of peatlands, NE and Defra launched a grant scheme in 2021 (The Nature for Climate Peatland Grant Scheme) to enable restoration of degraded peatlands.

Peatlands may also be protected under designation as a SPA, SAC or a SSSI. See relevant section of the note for applicable restrictions/requirements depending on designation.

Any burning of heather, rough grass and other vegetation is regulated by the Heather and Grass etc. (Burning) Regulations 2007. In general, heather, rough grass and other vegetation may be burned provided certain rules are followed and provided that it is carried out during permitted burning season (1 October to 15 April for uplands, otherwise 1 November to 31 March), with particular precautions taken. See Government guidance.

However, more restrictive rules apply to certain protected peatland sites or where the activity is outside of the burning season and/or has a particular impact due to the size or topography of the site.

In particular, in relation to protected peatlands, additional prohibitions are contained within the *Heather and Grass etc. Burning (England) Regulations 2021* which aim to prevent further damage by burning to protect blanket bog habitat. The government is required under the Habitats Regulation to protect this habitat type.

Given the Action Plan and the crossover with other protected area designation, rewilders undertaking any activities on peatlands other than restoration should consider whether there may be any applicable restrictions to such activity.

4.2 Coastal habitats

The UK coast supports a range of well-known habitat types. Coastal saltmarsh and coastal shingle habitats occur within reach of the tides and are subject to periodic saltwater inundation and wave action. Further inland, where the sea seldom reaches, coastal sand dune, machair and coastal cliff habitats occur. Moving inland, habitats become increasingly terrestrial, with various types of coastal grassland, heathland and scrub types predominating. In fact, there are 17 coastal habitat types listed under Annex I of the Habitats Directive and five coastal priority habitats listed under the UK Biodiversity Action Plan.

UK coastal habitats are a priority for nature conservation. This is partly due to the variety of specialised species associated with them, but also because of their naturalness, fragility, scarcity and intrinsic appeal.

A number of international Conventions, European Directives and pieces of national legislation apply to UK coastal habitats[11]. These have been instrumental in the design of biodiversity strategies, priority habitat lists, and site-based designations.

Finally, to close this section, it is worth mentioning that on 5 November 2021, the Environmental Agency published three restoration handbooks[12] setting out best practice for creating new estuarine and coastal habitats. These handbooks cover saltmarsh, seagrass and restoration of estuarine and coastal habitats with dredged sediment. They include advice on planning and implementing such schemes as well as case studies and lessons from previous examples.

4.3 Hedgerows protection

Hedgerows meeting certain size and location criteria are protected under the Hedgerows Regulations 1997 (SI 1997/1160) ("**Hedgerows Regulations**") from being removed or worked on without control. This excludes hedgerows within or bounding the curtilage of a dwelling-house.

A countryside hedgerow is protected if it is located on or next to:

(a) land used for agriculture or forestry;

(b) land used for keeping horses, ponies or donkeys;

(c) common land or a village green;

(d) a SSSI, SAC or SPA;

(e) a NNR or LNR;

(f) a public right of way; or

(g) Crown land;

and if it is:

(a) a boundary line of trees and shrubs that at one time was a continuous line;

(b) more than 20m long with gaps of 20m or less in its length;

(c) less than 20m long, but meets another hedge at each end; or

(d) less than 5m at its base.

Regulation 3(1) of the Hedgerows Regulations state that "*important hedgerows*" have additional protection. The criteria for determining whether a hedgerow is "*important*" are listed in Part II of Schedule 1. The hedgerow must have existed for 30 years and meet additional detailed criteria relating to archaeology and history, wildlife and landscape value.

A person who intentionally or recklessly removes, or causes or permits another person to remove a hedgerow in contravention of regulation 5(1) *or* (9) of the Hedgerows Regulations is guilty of an offence and liable on conviction to an unlimited fine. This liability also applies if the hedgerow is uprooted or otherwise destroyed.[13]

4.4 Limestone Pavement Order (LPO)

A limestone pavement is an area of limestone which lies wholly or partly exposed on the surface of the ground and has been fissured by natural erosion.

NE or NRW must notify any LPA of any limestone pavement in that authority's area.[14] Where the SoS for the Environment or the LPA considers the character or appearance of any such notified land would be likely to be adversely affected by removal or disturbance of the limestone, the SoS or LPA may make a limestone pavement order ("**LPO**") designating the land and prohibiting removal or disturbance of the limestone.

Schedule 11 to the WCA sets out the procedure for making LPOs. There are powers to amend or revoke an LPO. It is an offence for any person without reasonable excuse to remove or disturb limestone on or in any land designated by an LPO. An offender is liable on conviction to an unlimited fine (*section 34(4)*). Planning permission amounts to reasonable excuse if it authorises the removal or disturbance of the limestone (*section 34(5)*).

5. NATIONAL PARKS AND AREAS OF OUTSTANDING NATURAL BEAUTY

National Parks ("**NPs**") and Areas of Outstanding Natural Beauty ("**AONB**") are landscape scale designations which will typically cover large areas of land which will be owned by many different people or organisations. The protection of nature is an aspect of the management of NPs and AONBs alongside cultural and access priorities but the real impact of these designations is to restrict planning and development. Many rewilding sites will exist within NPs and AONBs and may be impacted by particular restrictions applicable to those areas.

5.1 National parks (NPs)

NPs in England and Wales are designated under Part II of the NPACA[15], under which they have the specific legal purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of an area.

There are 15 NPs in the UK, with the ones in England and Wales being the following:

(a) England: Broads, Dartmoor, Exmoor, Lake District, New Forest, Northumberland, North York Moors, Peak District, Yorkshire Dales, and South Downs; and

(b) Wales: Brecon Beacons, Pembrokeshire Coast, and Snowdonia.

Each NP is administered by its own authority, but that authority does not own the land within the park. They are independent bodies funded by central government who have statutory duties to:

(a) conserve and enhance the natural beauty, wildlife and cultural heritage; and

(b) promote opportunities for the understanding and enjoyment of the special qualities of the NP by the public.

If there is a conflict between these two duties, the duty of conservation takes precedence (this is known as the Sandford principle).

While pursuing these duties, NP authorities must attempt to encourage the economic and social well-being of local communities within the NP, and cooperate with local authorities and public bodies whose functions include the promotion of economic or social development within the area of the NP.

There are 10 NP authorities in England and three NP authorities in Wales. The Norfolk Broads have a status similar to a NP, but the Broads authority was established under its own Act of Parliament, the Norfolk and Suffolk Broads Act 1988. The NP authorities and Broads authority have particular obligations with regard to access to the land, management and maintenance of footpaths and conservation.

From a practical perspective, land sitting within a NP boundary will be subject to a high level of protection against inappropriate development through the planning system. Each NP authority may also offer financial support under particular schemes which aim to help achieve the NP's statutory purpose. It may be that some of these will be applicable to rewilding projects.

5.2 Area of Outstanding Natural Beauty (AONB)

An AONB is a designation to protect landscapes. AONBs are designated under the NPACA. AONBs are fine landscapes, of great variety in character and extent, and the designation provides special protection for their outstanding natural beauty.

NE and NRW are responsible for designating AONBs and advising government on policies for their protection. Once designated, each AONB must have a management plan within three years of an AONB's designation and a review must take place within five years of the start of the plan. The local authority will be responsible for producing and reviewing the plan and its purpose of conserving and enhancing the natural beauty of the AONB. Furthermore, a local authority will be responsible for giving permission for any developments in or affecting an AONB, which will include rewilding activities.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

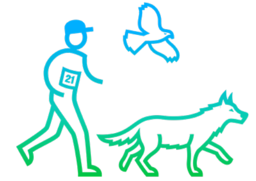
This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of January 2023.

ENDNOTES

1. https://designatedsites.naturalengland.org.uk/SiteSearch.aspx
2. https://magic.defra.gov.uk/magicmap.aspx
3. https://designatedsites.naturalengland.org.uk/SiteSearch.aspx.
4. https://naturalresources.wales/guidance-and-advice/environmental-topics/wildlife-and-biodiversity/protected-areas-of-land-and-seas/find-protected-areas-of-land-and-sea/?lang=en
5. https://magic.defra.gov.uk/MagicMap.aspx.
6. Regulation 20, Habitats Regulations.
7. Regulation 27, Habitats Regulations.
8. Regulations 28 to 30, Habitats Regulations.
9. Regulation 32, Habitats Regulation.
10. https://www.gov.uk/government/collections/national-nature-reserves-in-england
11. E.g. the Convention on Biological Diversity; the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention); the Conservation of Habitats and Species Regulations 2017; the Conservation of Offshore Marine Habitats and Species Regulation 2017; the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019; the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017; and the WACA (plus amendments & supplements).
12. https://www.gov.uk/government/news/restoration-handbooks-published-to-give-best-practice-advice-on-creating-new-estuarine-and-coastal-habitats.
13. See definition of 'remove' under section 97(8) of the Environment Act 1995.
14. Section 34 of the Wildlife and Countryside Act 1981.
15. https://www.legislation.gov.uk/ukpga/Geo6/12-13-14/97.

PUBLIC ACCESS



CORE TOPICS:

- Different forms of public access to rewilding land.
- Rewilder responsibilities and obligations.

KEY TAKEAWAYS:

- Rewilding land may have public rights of way running through it which puts obligations on the landholder.
- Permissive access allows landholders to allow the public to enjoy rewilding land whilst giving the landholder more flexibility.
- Open access land and commons also allow the public to access land.
- The law of trespass allows landholders to exclude the public from private land.

TABLE OF CONTENTS

Introduction

1. Public rights to access land
- 1.1 Public rights of way
- 1.2 Permissive access
- 1.3 Open access land
- 1.4 Common land

2. What is trespass?

3. Other landholder responsibilities

INTRODUCTION

Many rewilding projects have areas that are open to public access. A right of public access may already exist on rewilding land, or the rewilder may wish to grant such access. If you are considering granting new rights of access to rewilding land, it is important to understand how this may create permanent rights over the land itself, which could affect how the land can be used and what its resale value might be in the future. This note will consider the rights of the public to access rewilding land as well as the rights and responsibilities of landholders.[1]

1. PUBLIC RIGHTS TO ACCESS LAND

1.1 Public rights of way

Generally a landholder can control who accesses their land and exclude those who enter without their permission.[2] However, rural land (which is most likely to form the site of a rewilding project) is often subject to public rights of way which can limit a landholder's ability to exclude people.

What is a public right of way?

- The general public has a right of access to use public rights of way that cross private land. Public rights of way include:
  - footpaths;
  - bridleways;
  - restricted byways (i.e. a highway over which the public has a right of way on foot, horseback/ leading a horse, or for vehicles other than mechanically propelled vehicles);[3] and
  - byways (i.e. highway) open to all traffic.

How are public rights of way created, changed and removed?

Public rights of way limit a landholder's ability to control who can access their land and impose responsibilities on the landholder.[4] It is therefore important for rewilders to know where they are, if they do run across the rewilding land. The local authority should keep a "*definitive map*" showing all footpaths, bridleways and byways, which can be consulted for these purposes.

Public rights of way may also be created by:

- agreement between a local authority and anyone who has the power to dedicate such a way over the land (e.g., the rewilder); or
- where a way over (private) land is used or accessed by the public as of right and without interruption for a full period of 20 years and nobody has asked them to stop.[5]

If a rewilder wishes to create new formal public rights of way, the first step would be to discuss the proposal with the local authority. The responsibilities outlined below will apply to any newly created public right of way. Another option, offering the rewilder more flexibility to change pathways and add conditions as the needs of the site change could be to create a permissive pathway instead of a formal public right of way (see below).

Public rights of way may only be removed (the legal term for which is "extinguished") or diverted by agreement between a local authority and anyone who has the power to dedicate such a way over the land in question (e.g., the rewilder). If land was previously used as a public right of way, the general public have a right of public access today, under the maxim "*once a highway, always a highway*". Therefore, when a public right of way is created, it continues to exist indefinitely, whether it is used or not, unless it is extinguished.[6] Under the Countryside and Rights of Way Act 2000 ("**CROW**"),[7] rights of way that are not recorded on the definitive map as at the "*cut-off date*" of 1 January 2026 may be extinguished.[8]

If a way over (private) land is used or enjoyed by the public as of right and without interruption for 20 years, this usage can also create a public right of way. If this is not your intention then you may wish to seek legal advice promptly to avoid it being deemed a public right of way.

What are the landholder's responsibilities regarding public rights of way?

Landholders have specific obligations with respect to public rights of way on their land, some of which may conflict with rewilding plans. These are to:

- Keep public rights of way clear of obstructions
  - Generally, the bar for what is considered an obstruction is low. It includes any obstacle that crosses the right of way, such as fencing (even if temporary), hedgerows and vegetation encroaching on the right of way. For example, even an unlocked but closed gate could be "*a psychological barrier to the public*" if it means the path is not clearly identifiable as part of the public highway.[9] The landholder must leave a minimum of 1.5 metres clear for a field edge footpath, or three metres for a field edge bridleway.[10]
  - Wilfully obstructing a public right of way is a criminal offence under the Highways Act 1980 (the "**Highways Act**").[11] The relevant highway authority has the right to demand that the landholder removes any obstruction they cause or permit to be there. If the landholder fails to act, the relevant highway authority can remove the obstruction and recover the cost from the landholder. Erecting misleading signage to discourage public use of rights of way (e.g., "*bull in field*" when there is not a bull in the field) is also an offence under the National Parks and Access to the Countryside Act 1949 ("**NPAC Act**"), likely to be regarded as obstruction, and is punishable by a fine of up to £2,500.[12] Signs should not be displayed, or should be securely covered, when the animals to which they refer are not present in the field or area.
  - Water sources, slurry pits and overhanging/fallen trees also need to be taken into consideration as they may be viewed as an obstruction to public access.

- Maintain structures for access
  - The landholder must maintain existing stiles, gates and similar structures on public rights of way so that they are safe and reasonably easy to use. The relevant highway authority must contribute at least 25% of maintenance expenses. It may also be agreed that such structures will be maintained at public expense,[13] although increasingly the highway authority will only approve new structures on rights of way if the landholder takes on the full cost of maintenance .
  - New structures must be as unrestrictive as possible, taking into account the animals being segregated. Landholders also need to consider how accessible their site is to those with disabilities.[14] For this reason, there is a shift away from using stiles and other less accessible structures.
  - The landholder must liaise with the relevant highway authority about replacing or maintaining structures on public rights of way. The highway authority can require the landholder to remove unauthorised structures at the landholder's expense.[15]
- Not to permit certain livestock on land crossed by a public right of way
  - Landholders may be prosecuted if they fail to safeguard the public from potentially dangerous animals on land crossed by a public right of way. Examples and further information on this topic are provided in the note entitled *Rewilding in England & Wales: Liability for Damage Caused by Animals*.[16]
  - In particular, bulls over 10 months old of recognised dairy breeds (e.g., Ayrshire, Friesian, Holstein, Dairy Shorthorn, Guernsey, Jersey and Kerry) may not be kept in a field containing a public right of way or which the public are otherwise allowed to access under any circumstances. Where bulls of other cattle breeds are kept in fields with public access (e.g., for conservation grazing) and are more than 10 months old, they must be kept with cows.[17]
  - Beef bulls are banned from fields or enclosures with footpaths unless accompanied by cows or heifers. This does not include open fells or unenclosed moorland.[18]
  - Horses may be kept loose in a field containing a public right of way, as long as they are not known to be dangerous.[19] More generally, any animal known or suspected to be aggressive should not be kept in a field that has public access.
  - Notwithstanding the above, rewilders may wish to consider asking dog walkers to put their dogs on leads where large animals are known to be near areas of public access, as all large animals are potentially dangerous.
  - Members of the public may not understand that cattle with calves at foot can present a risk due to protective maternal instincts, especially when a dog is present.[20] The Health and Safety Executive ("**HSE**") regularly investigates incidents involving cattle and members of the public in England and Wales, with the two most common factors in these incidents being cows with calves and walkers with dogs. Wherever possible, landholders should therefore keep cattle on land that does not have public access, especially when cattle are calving or have calves at foot, particularly during periods of greater public use, such as school holidays.[21]
  - When considering whether to keep livestock in certain areas and what precautions to take, landholders should consider that members of the public are unlikely to be aware of the behavioural characteristics of the livestock. They should also consider the amount and type of public access in different areas of the rewilded land (e.g., large groups of walkers with dogs every day, groups of children, or infrequent lone walkers). A more extensive list of precautions to consider when grazing cattle in fields with public access can be found in HSE's guidance.

1.2 Permissive access

What is permissive access?

A landholder may grant permissive access to the general public over their land. This may include access by invitation for a particular purpose or event or a more general ability to access the site.

Where a landholder enables permissive access to (or over) their land, they can impose conditions on that access (e.g., not allowing dogs to enter the land, access during certain hours, for particular purposes only etc.).

As this type of access is subject to express permission and is not a prescriptive right (i.e. a right acquired by long-standing use of the land), rights of way will not be established after 20 years (as outlined above) where a rewilder is specifically permitting/inviting people onto the land only to visit the rewilding project.

What are the landholder's responsibilities regarding permissive access?

Permissive access is a right of way that is distinct from public rights of way. Unlike for public rights of way, there are no statutory responsibilities on the landholder to maintain permissive access granted over a site to the public. Access is controlled by the landholder. This makes it a more flexible way of enabling public access.

However, it is important to note that the rewilder must still take steps to ensure that visitors are safe when exercising permissive access rights. More information about obligations owed to the public is set out in the briefing entitled *Rewilding in England & Wales: Liability to Individuals on Land*.

How is permissive access created, changed or removed?

Permissive access is the granting of permission to access (private) land by the landholder and is created by that granting of permission.

Where a landholder grants permission to access land for a particular purpose or event, the access right is created as part of that invitation, extends to cover activities connected to that purpose and expires when the invitation expires. For example, if a person joins an event, their access is subject to conditions relating to that event and expires when the event concludes.

Where a landholder grants a more general right of permissive access, such as creating a pathway through the land, it is important that any conditions intended to apply to such right are communicated to the public. Often the most appropriate way to do this is through signage.

Signage must be clear and readily visible, kept up-to-date, and be appropriate for visitors (e.g., with language translations where relevant). In addition, to avoid such a path giving rise to a public right of way, signage should state that it is a *permissive* path that may be closed at the landholder's discretion, and it may be sensible for the pathways to be closed for at least one day per year so that permanent public access over the route cannot be evidenced. Any conditions specified in the signage should be monitored to ensure they are actually adhered to (i.e. to avoid any inference that restricted activity is in fact permitted).

EXAMPLE 1: PUBLIC RIGHT OF WAY VS PERMISSIVE ACCESS

A rewilder wants to enable the public to pass through and enjoy their rewilding project which currently does not contain any public rights of way. However, the rewilder wants to ensure that the route of the path can be changed or closed in the future as the site matures.

Unless there is a specific reason that the rewilder wants to create a permanent, public right of way, the rewilder may prefer to create a permissive access route as this preserves the rewilder's ability to change the route or close off access as the needs of the project change. The rewilder should erect signage on the new pathway stating that it is a permissive pathway and adding any conditions the rewilder wishes to impose (e.g., no dogs, access only during certain hours, right to modify route or to close it etc).
If conditions apply, these will also need to be enforced.

1.3 Open access land

What is open access land?

1.25 million hectares of land in England and Wales is designated for "open access" under CROW. Broadly speaking, the public has a right of access under CROW to land mapped as open access land, such as mountain, moor, heath and down, or registered common land. This enables the general public to enjoy walking, site seeing, birdwatching, climbing and running and certain other activities that have been permitted in the past on such land.[22]

Unlike a public right of way which is restricted to a particular, specified path, these activities can take place across the open access land.[23]

What are the landholder's responsibilities on open access land?

Generally the landholder must not restrict access for permitted activities (see the list above and further details in the accompanying endnote 33).

How are rights relating to open access land created, changed or removed?

By contacting the Open Access Contact Centre,[24] private land can be dedicated as open access land to create public access rights if the landholder owns the freehold or holds a lease which has more than 90 years left to run.[25]

There are advantages to landholders in dedicating land as open access, because it decreases the landholder's liability to third parties compared to other types of public access. This is discussed in the *Rewilding in England & Wales: Liability to Individuals on Land* briefing.

However, dedicating land for open access is *permanent* (or lasts for the duration of the long lease in leaseholder situations), so it will remain open access land even if it changes ownership.

Some open access land, although mapped, may be considered "*excepted land*" which means that landholders may restrict access. This is generally due to safety or infrastructure considerations, for example where wind turbines or telephone masts, railways, golf courses or quarries are on the land.

The landholder can remove or relax restrictions on the types of activities members of the public can perform on the land (e.g., to allow wild camping or horse riding). However, they cannot restrict the types of activity further (e.g., prevent hiking or climbing). The list of permitted and restricted activities under CROW applies by default, unless specific variations or exclusions to this have been expressly stated by the landholder.

It may be possible in some circumstances to restrict access to open access land (i.e. land to which CROW applies) to avoid danger to the public, although public rights of way can still be used.[26]

1.4 Common land

What is common land?

Common land is usually privately owned land which certain others (known as "*commoners*") are entitled to use, by exercising their "*rights of common*" to take or use its natural resources. The scope of any such rights should be included in the title deeds of the rewilder or, if the land is registered common land, on the common land register (see below).

Such rights may include the right to:

- collect firewood, turf or peat to burn as fuel;
- put livestock out to graze or feed on the common;
- take fish from waterways, ponds or lakes, or take wild animals; and
- take soil or minerals from the common.

Where the landholding is registered common land,[27] it is also dedicated as (open) "*access land*" under CROW. This gives a more general right of public access on foot. It is an offence to drive over common land without lawful authority.[28] Common land is outlined on the commons register. There is also a database of common land in England.

What are the landholder's responsibilities regarding common land?

The landholder must not restrict the exercise of rights of common over the landholding by commoners.

How are rights of common created, changed or removed?

The Commons Act 2006 provides that new "*rights of common*" may only be created by statute or by express grant over common land.[29]

Often rights of common were granted historically and, if the landholding is subject to them, the landholder should be aware of who the commoners are and the nature of their rights.

Landholders have some limited recourse if "*commoners*" exceed their "*rights of common*", for example, by grazing more livestock than they have rights to graze, or selling timber or wood taken from the common.

On any registered common land, Natural England ("**NE**") and Natural Resources Wales ("**NRW**") can stop anyone, including "*commoners*", from exceeding their "*right of common*" by serving a notice. NE and NRW can apply for a court order to have the notice legally enforced if there is a failure to comply. NE must inform the interested parties (e.g., the landholder, commons council and other rights holders) of this.

EXAMPLE 2: CAN A REWILDER RESTRICT OR ALTER EXISTING PUBLIC ACCESS?

There is an existing path through a newly acquired landholding that local members of the public use to walk their dogs. The rewilder wants to introduce red deer to the site but is concerned about the risk this might pose to members of the public during the deer's breeding season. Could public access be altered or prevented permanently or during the breeding season?

The rewilder must first consider the type of access rights members of the public have. In this scenario, the public appears to be using a particular path so it is likely there is either a public right of way or a permissive access pathway.

If the path is a public right of way, then any closure, diversion or conditions to it usage (e.g., no dogs) must be agreed with the local authority. This is generally a lengthy process that includes a public consultation and the rewilder should be aware that there is no guarantee that changes will be agreed. There are steep penalties for unauthorised closures and alterations. Alternative solutions to reduce risk to the public during the breeding season (such as fencing) are likely to be more practical.

If the route is a permissive access pathway, then the rewilder has the flexibility to change or restrict access at will, although the rewilder may want to consider signage to give notice of the changes.

2. WHAT IS TRESPASS?

What is trespass?

"Trespass" is a civil (rather than a criminal) wrong which is committed where:

- a member of the public enters private land without a valid legal basis for doing so (e.g., where there is no public right of way and the site is not open access land); or
- a visitor goes beyond the extent of the permission granted by the landholder (e.g., because they engage in activities not authorised by the landholder), or
- the landholder withdraws that permission.

Trespass is not committed where people enter private land without the explicit consent of the landholder if they have implied permission. For example, where land is entered in order to carry out an inspection or conduct repairs with lawful authority.

EXAMPLE 3: WHAT IS TRESPASS?

The rewilder discovers a group of wild campers on their rewilding land. They have been overnighting for several days and have told the rewilder that they are planning to stay on the land for another three nights.

- Unless the rewilder (as landholder of the rewilding land) has granted express permission for wild camping, or the land is open access land on which the right to camp already exists, the campers are likely to be considered trespassers.
- If the rewilder does not wish to permit wild camping on their land they should in the first instance simply advise the group that camping is not permitted and ask them politely to leave. You should keep in mind that if you do decide

to allow the group to stay for the remaining three nights, this could make it more difficult to remove the group later if they decide to stay even longer. If there is any damage to the site, this should be recorded and possibly notified to the police for the records.

- Unless there is an escalation of some kind (e.g., threats of violence or a refusal to leave), it is unlikely the police will assist in the group's removal as trespass is a civil (rather than criminal) offence, though the attitude of the police to trespass varies from place to place.

The rewilder discovers that some locals have been taking peat from the land.

- The landholder should consider whether there are rights of common that enable certain people to remove these resources from the land. These rights should be included in the title deeds of the land or, if the land is registered common land, on the common land register (see above). If these rights do exist, they are likely to cover residents of specific properties in the local area and specific resources only.
- If there are no rights of common, then they are likely to be considered trespassers and the analysis above would apply.
- Where rights exist and they are being exceeded (e.g., the rights cover collection of firewood not peat, the people are from different properties or they are taking too much), then they may be considered trespassers. However, rights of common are complex so specific legal advice may be required.

What are the consequences of trespassing?

Generally speaking, trespass is a civil wrong against the landholder, but trespass can also constitute a criminal offence where it is: (i) committed intentionally; (ii) involves a residential building; and (iii) the trespasser is living or intends to live in the property.[30] Civil trespassers may, however, commit other crimes when trespassing, for example, if they use force or threaten an occupier with violence in order to gain entry to the land.

What can a landholder do?

Landholders should ensure that paths over their land are clearly marked so that members of the public do not enter land that is not subject to a right of public access.

If the landholder encounters people on their land who do not have a right or permission to be there, they should:

- politely ask them to leave as soon as they become aware of them;
- be aware that agreeing to let them stay for a certain amount of time may affect their right to remove them later; and
- take note of any damage that they believe they have caused.

A trespasser is permitted to leave the land they are trespassing on by the most direct route to a public right of way rather than having to retrace their steps.

If the trespassers refuse to leave, the landholder may be able to obtain assistance from the police without having to apply to the courts for an order requiring the trespassers to leave. More information on landholder rights and remedies against trespassers is outlined below.

When may the police be able to assist?

Under the Criminal Justice and Public Order Act 1994 (the "**CJPO Act**"), the police have limited discretionary powers to remove trespassers from land. In particular, the police may direct trespassers to leave and remove any vehicles or other property they have on the land if they believe that[31]:

- two or more people are trespassing with the intention of residing on the land; and
- reasonable steps have been taken by the landholder to ask the trespassers to leave, and the trespassers have:
  - caused damage to the land or to property on it;
  - displayed threatening, abusive or insulting behaviour towards the landholder or their family, employees or agents; or
  - six or more vehicles on the land between them.

If the police have already directed the trespassers to leave and they fail to do so, or they return to the land within three months, the trespassers would be committing an offence punishable by up to three months' imprisonment and/or a fine of (currently) £2,500.[32]

What other remedies may be available to the landholder?

If the police are unable (or unwilling) to remove the trespassers from the land, it is possible to take action through the courts. This is a lengthy and often costly process, so is generally appropriate only where there are repeated or persistent instances of trespass or where there is risk of significant damage.

To remove the trespassers, the landholder will need to make a possession claim against the trespassers in the County Court. The procedure for doing so is out of scope of this briefing, but can be found in Rule 55 of the Civil Procedure Rules. Specific legal advice should be sought to ensure the correct procedure is followed.

If successful, the court will grant the landholder an order for possession, which must be served on the trespassers. If the trespassers do not voluntarily vacate following service of the possession order, the landholder will need to obtain a warrant for possession, pursuant to which the County Court Bailiff or High Court Sheriff will take steps to force the trespassers to leave.

3. OTHER LANDHOLDER RESPONSIBILITIES

Fences and hedges

A freeholder or leaseholder may find that their deed or lease requires them to maintain some or all of the fencing or hedging separating their land from that of their neighbours. In the case of freehold land, this obligation can bind future purchasers, as well as the original purchaser of the land at the time the obligation was created.[33] In the absence of such an obligation, it will be the landholder's responsibility to maintain any fencing or hedging that sits on their land, but they will not be under a duty to do so. Rewilders should therefore check their lease or title documentation to determine whether they are subject to any obligations to maintain fencing or hedging around their land, especially if they are considering removing existing fencing.

Additionally, for landholders who keep livestock on the land, it is vital that they erect and maintain fencing along the boundaries of their land to prevent the livestock from escaping and causing damage or injury, for which the landholder could be held liable.

If the landholder decides (following a risk assessment) to keep livestock in a field with public access, they should ensure that fences, gates or other means of enclosure are the correct height, strength and degree of security to accommodate safe public access. The HSE guidance provides more information on this.

It is also possible for a duty to fence land to arise as a matter of local custom.[34] However, it is rare for such a customary duty to be recognised by the courts, and they are unlikely to be encountered in practice.

Generally speaking, landholders should regularly check that fences, gates and stiles are safe and fit for purpose, especially on land that is subject to public access.

Implications of keeping livestock and other animals

Keeping livestock or other animals on land comes with various responsibilities and potential liabilities for landholders, which can vary from liability for damage that they might cause to, in extreme cases, criminal liability if they cause injury or death where the landholder is in breach of other responsibilities regarding health and safety. These topics are dealt with more fully in the briefings entitled *Rewilding in England & Wales: Liability to Neighbouring Landholders*, *Rewilding in England & Wales: Liability for Damage Caused by Animals* and *Rewilding in England & Wales: Liability to Individuals on Land* respectively.

Duty to ensure land is safe

Where third parties – whether invited or not – are present on the land, the landholder owes a duty to take reasonable care to ensure the land is reasonably safe to those accessing it. This is covered in detail in the *Rewilding in England & Wales: Liability to Individuals on Land* briefing.

It is good practice for landholders with rights of public access through their land to conduct risk assessments when planning or implementing changes to their land. HSE has the ability to investigate and where necessary prosecute landholders for harm caused to members of the public who have a legal right to be on landholders' land.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

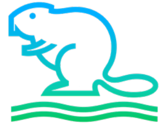
This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 9 October 2022.

ENDNOTES

1. A "*landholder*" can own the land outright, or hold it e.g., on trust or under a lease, so this is a broader concept than "*rewilder*". "*Landholder*" and "*rewilder*" are therefore used synonymously throughout this briefing.
2. As to which, please see the subsequent paragraphs on landholder rights and remedies against trespassers.
3. Section 48(4), CROW.
4. Please see the subsequent paragraphs on landholder responsibilities in relation to public rights of way.
5. Section 31, Highways Act.
6. *Harvey v Truro RDC* [1903] 2 Ch 638.
7. Section 53, CROW.
8. Section 56, CROW.
9. *Herrick & Anor v Kidner & Anor* [2010] EWHC 269.
10. There are some temporary exceptions to this where the public right of way crosses a field and the landholder is cultivating crops on the land, though these are unlikely to be of relevance to rewilders.
11. Section 137, Highways Act.
12. Section 57, NPAC Act.
13. Section 146, Highways Act.
14. Section 175A, Highways Act.
15. Section 143, Highways Act.
16. See "Cattle and public access in England and Wales: Advice for farmers, rewilders and other livestock keepers", Health and Safety Executive (2019): https://www.hse.gov.uk/pubns/ais17ew.pdf
17. Section 59, Wildlife and Countryside Act 1981.
18. See endnote 15 above.
19. Guidance published in 2014 from Natural England.
20. See e.g., https://press.hse.gov.uk/2022/02/08/farmer-sentenced-after-walker-killed-by-cattle/
21. Guidance published in 2019 from the HSE.
22. Permitted activities include walking, sightseeing, birdwatching, climbing and running. According to guidance from Natural England, visitors using their open access rights must keep dogs on a short lead of no more than two metres between 1 March and 31 July each year (except on the coastal margin), at all times near livestock, and under effective control at all times on the coastal margin. Unless express permission is given to the contrary, or the right to do something already exists, visitors to open access land cannot do the following things: ride a horse or bicycle (including mountain bikes); drive a vehicle (e.g., off road quad bikes); bring an animal, other than a dog; light, cause or risk a fire; camp; leave litter; post any notices; use a metal detector; play organised games; hang-glide or paraglide; run commercial activities on the land; remove, damage, or destroy any plant, shrub, tree or root with intent; damage hedges, fences, walls, crops or anything else on the land; leave gates open, that are not propped or fastened open; disturb livestock, wildlife or habitats with intent; or commit any criminal offence.
23. Natural England maintains a map of open access land. In addition, open access land is marked on Ordnance Survey maps by a yellow wash (or magenta wash, for coastal land).
24. Email: openaccess@naturalengland.org.uk; telephone: 0300 060 2091.
25. Section 16, CROW.
26. Guidance published in 2019 from the HSE.
27. Section 1, CROW.
28. Section 193, Land and Property Act 1925; Section 34(1), Road Traffic Act 1988.
29. Part 1 and Section 15, Commons Act 2006.
30. This is assumed to be unlikely to be relevant in a rewilding context, and therefore criminal trespass will not be covered any further in this briefing.
31. Section 61, CJPO Act.
32. Section 61(4), CJPO Act.
33. *Lawrence v Jenkins* [1873] L.R. 8 Q.B. 274.
34. *Egerton v Harding* [1974] EWCA Civ J0621-5 – in which a customary duty to maintain a hedge against common grazing land was recognised.

REINTRODUCTIONS



CORE TOPICS:

- Licences and statutory requirements relating to the reintroduction of animals.
- Animal welfare obligations before and after reintroduction.

KEY TAKEAWAYS:

- Reintroductions into the wild of species which are not “ordinarily resident in” or “regular visitors” to Great Britain will require a release licence.
- Under the Dangerous Wild Animals Act there are further restrictions on the reintroduction of certain native animals including elk, bison, wild boar, lynx and wolves.
- Certain species of animals are protected species meaning that licences will be required to capture them from any existing wild populations.
- The impact of any reintroduction on any protected areas will need to be considered.
- Reintroduction projects will need to comply with animal welfare laws.

TABLE OF CONTENTS

1. Overview

1.1 Relevant guidance for reintroduction projects

2. What licences are required to release animals into the wild?

2.1. Summary

2.2. When will a licence be required under the Wildlife and Countryside Act 1981?

2.3. What is the Dangerous Wild Animals Act and how does it impact reintroductions?

2.4. Are there any other relevant licences or permissions required for the release of animals?

2.5. How do these laws apply in practice?

3. Licences to capture, keep and transport animals for reintroduction projects

3.1. Overview

3.2. Do I need any licences to capture animals from the wild as part of my reintroduction project?

3.3. What animal welfare obligations do I need to comply with?

1. OVERVIEW

This briefing note addresses some of the key legal obligations and requirements that may apply to any rewilding projects seeking to reintroduce animals to their landscapes in England and Wales.

The legislative framework for wildlife reintroductions varies between England, Wales and Scotland. This note focuses on England and Wales only. While, in general terms, there are similarities between the primary legislative frameworks applicable to reintroductions in England and Wales, these frameworks are administered by different agencies in England (primarily Natural England) and Wales (primarily Natural Resources Wales) and care should be taken to identify any particular regional differences that may apply to a particular wildlife reintroduction project. Engagement with other UK Government agencies, particularly the Department for Environment, Food & Rural Affairs ("**Defra**") and the Animal and Plant Health Agency, may also be necessary for some aspects of wildlife reintroduction projects, for example if engaging in importation of wildlife from outside Britain, or in relation to animal welfare requirements.

1.1 Relevant guidance for reintroduction projects

Other helpful sources of guidance for those considering a wildlife reintroduction project include:

- The **IUCN Guidelines for Reintroductions and Other Conservation Translocations** ("**IUCN Guidelines**").[1] The IUCN Guidelines provide guidance on the justification, design and implementation of wildlife reintroductions and translocations, to maximise the prospects of success of these projects (and minimise any negative impacts). The IUCN Guidelines outline some of the practical steps involved in planning a wildlife reintroduction, including: establishing the project's objectives, assessing the feasibility of the project, conducting a risk assessment to identify potential impacts of a project, managing project implementation, and conducting project monitoring.
- Defra has published the '**Reintroductions and other conservation translocations: code and guidance for England**' (the "**Reintroductions Code**"),[2] which provides specific guidance (based on the IUCN Guidelines) for reintroduction projects in England. The Reintroductions Code provides further detail on how the IUCN Guidelines interact with the regulatory regime in England. The Code also provides guidance to help in the interpretation of legislation relevant for wildlife reintroductions, however the guidance is non-statutory and does not constitute a legally binding interpretation of the legislation to which it refers.
- Natural England publishes a **Wildlife Reintroduction Scoping Form**[3] which provides a checklist of key considerations that should be taken into account when contemplating a potential reintroduction. It is a requirement to submit this checklist to Natural England when a licence is required as part of a reintroduction project. However, even if a licence is not required, the checklist provides helpful guidance on key considerations to take into account.
- **Other briefing notes in this series**, which provide an overview of other legal considerations which may be relevant for a wildlife reintroduction (including landowner rights and responsibilities, liability considerations, and land-use restrictions).

These Guidelines and Codes are not legally binding. In particular, where these documents interpret or apply legislation or regulations, this guidance is not a legally binding interpretation of the legislation to which it refers, but instead a reflection of the relevant body's interpretation of the law at a point in time. In this note, we indicate where these forms of guidance may assist in the interpretation of relevant legal requirements, but this does not override the requirements of underlying legislation.

2. WHAT LICENCES ARE REQUIRED TO RELEASE ANIMALS INTO THE WILD?

2.1 Summary

This flowchart identifies the key questions and considerations to determine whether any licences will be required to release an animal into the wild in England and Wales:

Question	Answer	Requirement
Is the species ordinarily resident in, or a regular visitor to, Great Britain in a wild state?	NO	Licence required under the Wildlife & Countryside Act 1981 (W&C Act 1981) for release "into the wild"
Is the species listed in Schedule 9 of the W&C Act 1981?	YES	Licence required under the W&C Act 1981
Is the species listed as an invasive alien animal under the Invasive Alien Species Regulations? (unlikely for rewilding projects)	YES	Licence required under the Invasive Alien Species (Enforcement and Permitting) Order 2019, and specific restrictions apply
Is the species listed in the Dangerous Wild Animals Act 1976?	YES	Licence required under the Dangerous Wild Animals Act 1976, and specific restrictions apply
Is the species a fish?	YES	Permission required for reintroduction to any inland water
Is the site of the wildlife reintroduction subject to specific protections (e.g. special scientific interest (SSSIs), special areas of conservation (SACs), special protection areas (SPAs), wetlands of international importance (Ramsar sites)	YES	Licences may be required under several pieces of legislation, including the W&C Act 1981 and the Habitats Regulations

2.2 When will a licence be required under section 16 W&C Act 1981?

Under Section 14(1)(a) of the Wildlife and Countryside Act 1981 (W&C Act) it is an offence to release (or allow to escape) **into the wild** any animal which is not "***ordinarily resident in and is not a regular visitor to Great Britain in a wild state***" or is listed in Part I, IA or IB of Schedule 9. Any breach of these provisions is punishable by fine and/ or imprisonment.[4]

Where a rewilder wishes to release an animal which fits into either part of this test, a licence is required under section 16 of the W&C Act.

What does "ordinarily resident" and "regular visitor to Great Britain" mean?[5]

- A species is considered by Defra to be '**ordinarily resident**' in Great Britain if the population has been present in the wild for a significant number of generations and is considered viable in the long term.[6] If an animal has become extinct, even if recently, Defra considers it not to be 'ordinarily resident.' For example, the short haired bumblebee which was declared extinct in 2000, and the Eurasian elk which became extinct in the 13th century, are considered by Defra to no longer be 'ordinarily resident' in Great Britain.[7] Furthermore, if a population only exists in the first generation at another wildlife reintroduction project, it is less likely to be considered by Defra to be 'ordinarily resident' in Great Britain.
- A species is likely to be considered by Defra to be a 'regular visitor' to Great Britain if it appears with reasonable frequency or predictability, such as seasonal migratory species. Note that vagrants or strays (i.e., specimens found well outside their normal range) are not 'regular visitors.'[8] For example, in 2008, it was reported that an American Common Nighthawk was blown 3,000 miles off course and ended up in the Isles of Scilly, but this bird is not a 'regular visitor'.

"ORDINARILY RESIDENT" AND "REGULAR VISITOR" IN PRACTICE

The white stork: In 2019, 24 captive bred white storks were released into the wild in the UK. In 2020, three nests were built in the wild and four chicks successfully fledged. It is unlikely that this small, first-generation population would amount to a species that was 'ordinarily resident' in Great Britain. However, the organisation undertaking the project has stated that a licence was not required for a recent white stork reintroduction, as the species was determined by Defra and Natural England to be a 'regular visitor' to Great Britain. If a reintroduction project is proposed for white storks, this interpretation should be re-confirmed with Defra. For more information, please see the practical examples relating to a white stork reintroduction below.

Black grouse: Black grouse are very uncommon but could still be considered to be 'ordinarily resident' in Great Britain in a wild state, in which case a licence would not be required (however this should be checked with the relevant regulatory authority prior to a proposed reintroduction).

What does a release "into the wild" mean?

- The meaning of what it is to release an animal 'into the wild' is not defined in legislation but is generally understood to mean the deliberate introduction of an animal from a condition of captivity into an area considered to be 'the wild'. Although no legal definition exists, the Reintroductions Code defines 'the wild' as "*the diverse range of natural and semi-natural habitats species can live in. It includes the wild native flora and fauna of rural and urban areas, which can be described as the general open environment.*"[9]
- Whether a given release will be considered to constitute a release 'into the wild' is a heavily fact dependent question, which cannot always be answered precisely. For example, in some circumstances, the release of an animal into an enclosure within the general countryside may still be considered by Defra to constitute a release 'into the wild'. In such cases, whether a release into the enclosure would be considered by Defra to be a release 'into the wild' will depend upon whether the enclosed land comprises natural habitats and associated native flora and fauna living in a wild state that may be impacted.
- According to Defra: "*It would create rather perverse outcomes if significant areas of natural habitats containing wild native flora or fauna could be put at risk of being adversely affected by introduced species with regulation precluded merely because of the existence of perimeter fencing or some other boundary feature ultimately confining the introduced species.*"[10]
- In contrast, animals in secure enclosures in environments that are isolated from the general countryside, and from which escape into the general countryside is highly unlikely (e.g. artificial animal enclosures in zoos), are unlikely to be considered to be 'into the wild'.
- Further information regarding whether a release is likely to be considered by Defra to be a reintroduction 'into the wild' is set out in the Reintroductions Code and earlier guidance is contained in Annex A of the 2007 Defra guidance note *Guidance on section 14 of the Wildlife and Countryside Act, 1981*.[11]

What is Schedule 9 and what does it mean for reintroductions?

Schedule 9 identifies three categories of animals:

- Part I: Non-native animals which are established in the wild;
- Part IA: Native Animals; and
- Part IB: Animals no longer normally present.

A number of species important for rewilding are included in these schedules, e.g. beaver, wild boar, white tailed-eagles and red kites. A number of non-native but widely present species of deer are also included in these schedules.

The specific animals included can change over time so it is best to consult the latest list (available here) when you are considering a reintroduction.

If a species you wish to reintroduce is included in Schedule 9, you will need to apply for a licence under section 16 W&C Act 1981. Eligibility for a licence can be affected by a wide range of factors that are specific to each wildlife reintroduction project, so it is recommended that expert advice be obtained if it is identified that a licence is or may be required for a reintroduction.

Note that the Invasive Alien Species Regulations separately set out animals (and plants) that it is unlawful to release or allow to escape without a licence. Animals subject to restrictions and therefore requiring a licence for release are those listed in: (a) Schedule 2 of the Invasive Species Regulations (Enforcement and Permitting) Order 2019; and (b) Retained European Commission Implementing Regulation 2016/1141.[12]

How do I get a W&C Act 1981 licence?

England and Wales each have different agencies that are responsible for granting licences under the W&C Act 1981, each of which follow different processes for licence applications. Where a licence is obtained, it will contain a range of conditions, including reporting requirements and limits on the scope of the licence. The failure to comply with a licence condition is a breach of the licence and may result in the licence being revoked, as well as the potential for other sanctions under the W&C Act 1981.

In England:

- The relevant licensing authority for licences under the W&C Act 1981 in England is Natural England. In order to apply for a licence you must send a licence application form with a conservation translocation project scoping form to wildlife@naturalengland.org.uk. Copies of the relevant forms for applications to Natural England are available on the Natural England website at the following links: licence application; project scoping form.
- The contents of the licence application form should adhere to the principles embodied in the Reintroductions Code. It is stated in the form that the level of detail to be included in the application should be proportionate to the potential impacts of the translocation. This means for low-risk applications, the applicant will need less information to demonstrate that there are no significant risks or legislative constraints. Where risks or legislative constraints are identified by the applicant, the applicant will need to include sufficient detail for Natural England to understand the impacts of the proposal.
- As part of any application, ecological surveys and consultations with the public and/or community will typically need to be carried out. These surveys and consultations will depend on the location and species proposed for reintroduction, and will require consultation with Natural England or Natural Resources Wales (as applicable).

In Wales:

- The relevant licensing authority for reintroductions in Wales is Natural Resources Wales. In Wales, the licence application forms are specific to the species proposed for reintroduction. Copies of the relevant forms for applications to the Natural Resources Body of Wales are available on their website.
- The point of contact in the Natural Resources Body of Wales is the Species Permitting Team, which can be contacted at specieslicence@naturalresourceswales.gov.uk

2.3 What is the Dangerous Wild Animals Act and how does it impact reintroductions?

When will a licence be required?

The Dangerous Wild Animals Act 1976 ("**DWAA**") provides that "*no person shall keep any dangerous wild animal except under the authority of a licence granted … by a local authority.*"[13] There are some limited exemptions to this requirement in section 5 of the DWAA, including where animals are kept in a zoo under the Zoo Licensing Act 1981.

Schedule 1 of DWAA sets out the list of 'dangerous wild animals,' which include 'exotic' mammals such as lions, bears and hippos, but also includes a number of important native animals such as bison, elk, wild boar, lynx and wolves.[14] The DWAA means that any reintroduction project seeking to release an animal listed in Schedule 1 into an enclosed area will need to comply with the terms of the DWAA. The Lifescape Project is undertaking work in relation to the DWAA and would be happy to discuss its application with any rewilding projects considering the wild release of any of the species listed in Schedule 1.

A DWAA licence can be obtained from the relevant local authority. For a licence to be granted, a number of conditions must be satisfied, including the following:

(a) the animal must be kept in secure accommodation from which it cannot escape and such accommodation must have been inspected by a veterinary surgeon or practitioner;

(b) the animal must be provided with suitable food, drink and exercise;

(c) all reasonable precautions must have been taken to prevent and control the spread of infectious diseases; and

(d) appropriate steps must be taken for the protection of the animal in an event of an emergency.

Once granted, a DWAA licence will be subject to strict and ongoing compliance conditions, including a requirement that the applicant hold a current and satisfactory insurance policy insuring him and other persons entitled to keep the animal against damage which may be caused by the animal.

How do I get a DWAA licence?

Licences to keep dangerous wild animals are granted by the relevant local authority. An application to a local authority must specify the proposed species of animal and number

of animals to be kept, as well as the premises where any animal will normally be held.[15] The local authority will need to be satisfied that all relevant criteria (including those listed above) are satisfied before granting a licence.

A veterinary surgeon or veterinary practitioner authorised by the local authority will need to inspect the premises and produce a report before granting a licence. Failure to have a licence where this is required is a criminal offence punishable by fine.[16]

2.4 Are there any other relevant licences or permissions required for the release of animals?

In addition to the licences described above, the following restrictions should also be taken into account where relevant:

- **Reintroduction of fish species** (including molluscs such as mussels): any such release will be subject to specific regulations and will always require a licence for a wildlife reintroduction project. With limited exceptions, it is an offence to introduce or possess with the intention to introduce any fish, crustaceans or molluscs[17] into inland waters without the permission of the Environment Agency or Natural Resources Wales.[18]
- **Protected areas:** there may be additional statutory or regulatory requirements (including further licences and restrictions) if the proposed wildlife reintroduction is on a site that is subject to specific protections (e.g., SSSIs, SACs, SPAs or Ramsar sites). Those additional requirements may also arise where the reintroduction project may affect such protected sites. Information about whether these designations are applicable to a proposed release site are available on Defra's MAGiC Maps website, and Natural Resources Wales or Natural England may be able to provide further guidance on the consents required in relation to protected sites. Further information on protected sites is also outlined in a separate briefing note (see *Rewilding in England & Wales: Protected Areas* and the *Rewilding in England & Wales: Planning Permission* briefings in this series).
- **Public rights of way:** if a reintroduction project may impact on public rights of way (for example, if the proposed site for a reintroduction is on land that is subject to a right of way), or may impact on other species (including protected species), such impacts should be considered at an early stage of the reintroduction project. Further information on access-related issues is outlined in a separate briefing note (see *Rewilding in England & Wales: Public Access*).
- **Zoo licences:** if wild animals (being animals of a species that is not normally domesticated in Great Britain) are released into enclosures (including very large enclosures), and kept for exhibition to the public, a zoo licence may be required from the relevant local authority under the Zoo Licensing Act 1981.[19] Projects licensed under the Zoo Licensing Act 1981 are subject to detailed compliance requirements – both initially and on an ongoing basis – and specific advice should be obtained if such a project is being considered.

2.5 How do these laws apply in practice?

The following practical examples illustrate indicative licensing considerations for three species: pine marten, white stork and European bison. The conclusions are only indicative and should be confirmed with Natural England or Natural Resources Wales prior to engaging in a reintroduction project.

In addition to the licensing considerations below, a reintroduction project would also need to take into account further considerations such as land use requirements (including protected areas) and impacts on landowners and other stakeholders (including liability for environmental impacts of the project). Some of these considerations are addressed by other briefing notes in this series.

As part of a reintroduction project, ecological surveys and consultations with the public and/or community will also typically need to be carried out. These surveys and consultations will depend on the location and species proposed for reintroduction and will require consultation with Natural England or Natural Resources Wales (as applicable).

EXAMPLE: PINE MARTEN REINTRODUCTION

The pine marten was a common carnivore in ancient Britain. Its numbers declined dramatically in the 19th and 20th centuries due to habitat loss and increase in hunting activity. While the pine marten population is recovering in Scotland, its numbers remain very low in England and Wales. Without reintroduction, pine martens are unlikely to re-colonise southern and central England naturally.

The pine marten:

- exists in Scotland and fragmented sites in England and Wales. They are therefore likely to be 'ordinarily resident' in Great Britain. A licence is therefore unlikely to be required under section 14 W&C Act but this interpretation should be checked with Natural England / Natural Resources Wales;
- is not listed in Schedule 9 of the W&C Act 1981 or listed in the Invasive Alien Species Regulations. A licence is therefore not required under this legislation;
- is not on the list of dangerous wild animals in DWAA, so a licence from the local authority is not required;
- is not subject to species-specific legislation in England and Wales; and
- is a protected species under Schedule 5 W&C Act 1981 meaning that a licence will be required to capture specimens from the wild for release as part of any reintroduction project.

Conclusion: Subject to any site-specific licensing requirements, a licence is unlikely to be required to re-introduce pine marten as part of an animal reintroduction project in England or Wales, assuming they are considered to be "ordinarily resident" in Great Britain. However, if the project intends to capture pine marten from elsewhere in Great Britain for release as part of this project, a licence will be required as pine marten are listed in Schedule 5 W&C Act 1981 (see below).

In addition, as pine marten reintroductions can be controversial as a result of their potential impact on local ecosystems, it is recommended to engage with and seek advice from Natural England and Natural Resources Wales at an early stage of any such project. These bodies recommend that ecological and social feasibility studies should be undertaken in order to comply with the Reintroductions Code.

EXAMPLE: THE WHITE STORK

In 2016, a feasibility study was conducted in relation to a proposed white stork reintroduction in England. In line with the IUCN Guidelines and the supplementary Guidelines for the Translocation of Waterbirds for Conservation Purposes, the feasibility study assessed whether it was feasible and justified to re-establish a free living, breeding population of European white storks (Ciconia ciconia) into England. This included a full assessment of the biological suitability of the area, and the ecological and socio-economic costs and benefits of a reintroduction. The feasibility report is available in an online pdf. According to the feasibility report, "Despite the regular occurrence of vagrants from Europe, and the presence of extensive areas of suitable habitat, the breeding ecology of the species with its strong natal philopatry, indicates that natural re-colonisation is unlikely."

The white stork:

- was confirmed by Natural England and Defra to be a regular visitor to Britain. Accordingly, a licence was not required under the W&C Act 1981 to re-establish a breeding population of white stork in England (however this should be confirmed for any future project);
- is not a listed species in Schedule 9 of the W&C Act 1981 or listed in the Invasive Alien Species Regulations. A licence is therefore not required under this legislation;
- is not on the list of dangerous wild animals in DWAA, so a licence from the local authority is not required;
- is not subject to species-specific legislation in England and Wales; and
- is not a protected species.

For the 2016 project, the majority of storks donated to the project were rehabilitated wild storks sourced from Warsaw Zoo in Poland. A small number of captive-bred storks were also imported from the Alsace region of France. The specific importation and animal welfare requirements (including licences) would need to be carefully considered, and these will differ depending on the species, country of origin, and mode of transportation.

Conclusion: Subject to any site-specific requirements, a licence is unlikely to be required to re-introduce white stork as part of an animal reintroduction project in England or Wales (but licences may be required for other aspects of the re-introduction process, e.g. the capture or importation). Any reintroduction project should also comply with the IUCN Guidelines and the Reintroductions Code, undertaking ecological surveys and social consultations as required.

EXAMPLE: EUROPEAN BISON

A wildlife project intends to introduce European bison into an enclosed landscape

European Bison are included in Schedule 1 of the DWAA, meaning that they will need to be kept in a secure enclosure under a DWAA licence granted by the local authority (unless they are kept in a licensed zoo).

Depending on the nature and extent of the enclosure, it is possible that Defra will consider a release into an enclosure to be a release "into the wild", thereby triggering section 14 W&C Act 1981 because European bison are neither "ordinarily resident in Great Britain" nor "a regular visitor" in a wild state. In this case, a release licence under section 16 W&C Act 1981 will be required.

It is currently unclear how these requirements under the DWA and W&C Act 1981 interact and guidance should be sought from Natural England.

Although beyond the scope of this note, projects that have reintroduced bison to date in England have experienced a large number of other regulatory hurdles around how to import and classify the animals. Please get in touch if you are considering a bison project, so that learning can be shared.

3. LICENCES TO CAPTURE, KEEP AND TRANSPORT ANIMALS FOR REINTRODUCTION PROJECTS

3.1 Overview

Even if a licence is not required for the reintroduction of a species, the process of obtaining, relocating, and managing reintroduced animals may give rise to additional licensing or compliance requirements. In particular:

(a) **Obtaining animals from the wild**: the taking of wild birds, and certain species of other wild animals, from a wild location in Great Britain requires a licence and/or may be subject to specific restrictions relating to the method of capture (e.g., restrictions on the types of traps or capture devices used).

(b) **Keeping, possessing and transporting animals**: in order to reintroduce animals to a new location, it is likely to be necessary to keep and transport those animals in the lead-up to their introduction into a new habitat. This phase of the reintroduction process gives rise to specific animal welfare requirements and related obligations, which will vary depending on the species involved and nature of the reintroduction project.

(c) **Importing of animals from outside Great Britain**: the importation of any live animals into Great Britain (including from Northern Ireland) requires specific documentation (and in many cases other requirements must be satisfied, such as veterinary checks). These requirements are beyond the scope of this briefing note, as they vary significantly depending on the species and country of export. If it is intended that live animals be imported from outside Great Britain for a reintroduction project, it is recommended that expert advice is obtained.

3.2 Do I need any licences to capture animals from the wild as part of my reintroduction project?

Several pieces of legislation impose restrictions on the taking, possessing and transporting of protected animal species. In order to obtain and transport these animals for the purpose of a reintroduction project, it is generally necessary to obtain a licence from Natural England or Natural Resources Wales.

In summary:

Checklist of licences that may be required to capture, take or possess animal species in England and Wales (excluding marine or freshwater reintroductions)		
Is the species a wild bird?	YES	Licence required under the W&C Act 1981, unless the species is listed in Schedule 2 of the W&C Act 1981 and outside the close season
Is the species listed in Schedule 2 of the Habitats Regulations or Schedule 5 of the W&C Act 1981?	YES	Licence required under the Habitats Regulations to take or capture
Is the species listed in Schedule 6 or 6ZA of the W&C Act 1981, or Schedules 2 or 4 of the Habitats Regulations?	YES	Licence required under the W&C Act 1981 or Habitats Regulations to capture an animal using certain methods (e.g. cage traps)
Is the species listed in the Dangerous Wild Animals Act 1976? (See Section 2 above)	YES	Licence required to possess the animal under the Dangerous Wild Animals Act 1976
Is the species listed in Annex IV(a) of the Habitats Directive	YES	Licence is required to possess or transport the animal under the Habitats Regulations
Is the site of the taking subject to specific protections (e.g. special scientific interest (SSSIs), special areas of conservation (SACs), special protection areas (SPAs), wetlands of international importance (Ramsar sites)) (See Section 2 above)	YES	Licences may be required under several pieces of legislation, including the W&C Act 1981 and the Habitats Regulations

Wildlife and Countryside Act 1981

In addition to licences being required to *reintroduce* certain species under the W&C Act 1981, the Act also requires a licence to be obtained in order to *take, possess, or capture* protected species of wild animals. In particular:

(a) Section 1 provides that a licence is required to take any wild bird or egg of a wild bird (except those specified in Schedule 2 outside the relevant closed season);[20]

(b) Section 9 makes it an offence to intentionally kill, injure or take any wild animal specified in Schedule 5 (subject to certain exceptions including any such action pursuant to a licence issued under Regulation 55 of the Conservation of Habitats and Species Regulations 2017 (the "**Habitats Regulations**"); and

(c) Section 11 prohibits the use of certain traps (e.g., cage traps) or other devices for capturing certain animals specified in Schedules 6 and 6ZA (except for limited purposes).

There is some overlap in the species listed in the W&C Act 1981 and the Habitats Regulations (detailed below). Accordingly, it may in some instances be necessary to apply for and obtain licences to obtain and possess protected wild animals under both pieces of legislation (as well as obtaining any licence required to reintroduce those species).

The Habitats Regulations[21]

The Habitats Regulations protect wild animals and plants of a European protected species or of Community Interest. The list of European protected species that have a natural range which includes any area in Great Britain are set out in Schedule 2 of the Habitats Regulations and include species such as dormouse, natterjack toad, beavers and otters.[22]

Under Regulation 43 of the Habitats Regulations, a person who does any of the following to a European Protected Species is guilty of an offence:

- deliberately captures, injures or kills any wild animal of a European protected species,
- deliberately disturbs wild animals of any such species,
- deliberately takes or destroys the eggs of such an animal, or
- damages or destroys a breeding site or resting place of such an animal.

It is a separate offence to possess, control, transport, sell or exchange a European protected species or any other animal listed in Annex IV(a) of the Habitats Directive (see link, p 44)[23].

Such prohibitions are overcome by obtaining a licence under Regulation 55 of the Habitats Regulations. Licences may be granted for a number of reasons including for "*conserving wild animals or wild plants or introducing them to particular areas*". With some limited exceptions, the licences will be issued by Natural England or Natural Resources Wales who must be satisfied that the grant of the licence would be consistent with the requirements of Article 16(1)(e) of the Habitats Directive (namely "*under strictly supervised conditions, on a selective basis and to a limited extent*" and "*in limited numbers*").[24] Furthermore, Natural England / Natural Resources Wales must not grant a licence under this Regulation unless it is satisfied: (a) that there is no satisfactory alternative; and (b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.[25]

Care must be taken to ensure the contents of any licence application is accurate, as the failure to do so can be a criminal offence.[26]

It is also a criminal offence to fail to comply with a licence condition, unless the relevant individual can show: (a) they took all reasonable precautions and exercised all due diligence to avoid commission of the offence, or (b) the commission of the offence was otherwise due to matters beyond their control.[27] Accordingly, a detailed plan encompassing a risk assessment, a series of controls, owners of those controls, and testing or closure dates for the controls should be drawn up to ensure the terms of the licence are complied with.

Separately, it is an offence to use certain prohibited means of capturing or killing European protected species and those listed in Schedule 4 of the Habitats Regulations (which includes e.g. pine marten and various species of seal)[28]. If these provisions apply to the target species for a relocation, care will need to be taken to ensure these requirements are complied with.

Specific species-related legislation

In addition to the general protections under the W&C Act 1981 and the Habitats Regulations, there is specific legislation that aims to protect badgers and deer:

- The **Protection of Badgers Act 1992** makes it a criminal offence to "take a badger" or interfere with a badger's sett,[29] unless a relevant exception applies. If badgers are required for a wildlife reintroduction project or need to be removed for a wildlife reintroduction project, then a licence will be required, either authorising the taking and sale of a badger, or the removal of a badger.
- The **Deer Act 1981** sets out restrictions on taking and killing certain species of deer, including Chinese water deer, fallow deer, red deer, red/sika deer hybrids, roe deer and sika deer. If these species are to be taken or killed as part of a wildlife reintroduction project, then this must not be done in the closed seasons set out in Schedule 1 of the Act.

3.3 What animal welfare obligations do I need to comply with?

It is important that all aspects of the reintroduction process, including the capture, transport, holding and release of a species, are designed so as not to cause stress, harm or death to the translocated species. The Animal Welfare Act 2006 ("**AWA**") and other relevant welfare legislation such as, in the case of mammals, the Wild Mammals (Protection) Act 1996 ("**WMPA**") impose specific requirements and duties on those that interact with animals to ensure appropriate levels of animal welfare protection. In particular, anyone acting under a licence issued by Natural England or Natural Resources Wales is expected to comply with all relevant animal welfare legislation, including the AWA. If the species to be translocated is captured in another country, you will also need to comply with any relevant animal welfare legislation of that country (including EU law) and should also consider relevant best practice principles such as the IUCN Guidelines.

Scope of the AWA and WMPA

The AWA imposes obligations on individuals in relation to "protected animals," which include both domesticated animals, and wild animals under human control. In particular:

- **Animals of a kind "commonly domesticated"** in the British Islands are "protected animals" under the AWA, whether or not they are "under the control of man" on a permanent or temporary basis. Kinds of animals which are considered commonly domesticated in the British Islands are those "*whose collective behaviour, life cycle, or physiology has been altered as a result of their breeding and living conditions being under human control, in the British Islands, for multiple generations.*"[30]
- **Wild animals** (animals of a kind not "commonly domesticated" in the British Islands) are also "protected animals" under the AWA where they are either (i) under human control, be it on a temporary or permanent basis; or (ii) are no longer under human control (for example, animals that have escaped captivity) but are not yet living "in a wild state". Therefore, wild animals kept for the purposes of reintroduction projects may

be protected under the AWA, for example, whilst they are held in an enclosure (potentially including large areas of fenced land), pen or cage trap, during transportation, whilst caught in a net (including a mist net) or snare, or whilst held in the hand.[31]

The WMPA extends animal welfare obligations to certain wild mammals that are not otherwise subject to protections under the AWA. The WMPA defines a "wild mammal" as any mammal which is not a "protected animal" within the meaning of the AWA, meaning that the WMPA applies to wild mammals which are not otherwise subject to the protections contained under the AWA.

The WMPA provides that it is an offence to mutilate, kick, beat, nail or otherwise impale, stab, burn, stone, crush, drown, drag or asphyxiate any wild mammal with intent to inflict unnecessary suffering. The WMPA includes certain exceptions for humane acts, and those authorised by other laws.[32]

Responsibility under the AWA

Responsibility for an animal under the AWA generally arises where a person: (i) owns the animal; or (ii) can be said to have assumed responsibility, whether on a temporary or permanent basis, for its day-to-day care or for its care for a specific purpose.[33]

Accordingly, in the context of reintroduction, the persons undertaking the reintroduction will have obligations under AWA to the extent the animal being reintroduced remains under their control or care (including the period during which the animal is within captivity or being transported to the reintroduction site). Others may also have obligations under the AWA, such as the person in charge of transporting the translocated animal.[34]

Where a person is responsible for an animal, they are required under Section 9 of the AWA to take reasonable steps to ensure that the needs of an animal for which they are responsible (as defined in the AWA) are met to the extent required by good practice. For the purposes of the AWA, an animal's needs shall be taken to include:

(a) a suitable environment;

(b) a suitable diet;

(c) to be able to exhibit normal behaviour patterns;

(d) to be housed with or apart from or with other animals; and

(e) protection from pain, suffering, injury and disease.[35]

Other provisions of the AWA which may apply to a wildlife reintroduction include the following:

Unnecessary suffering (Section 4)

A person commits an offence if:

(a) their act, or failure to act, causes a protected animal to suffer, either physically or mentally;

(b) he knew or could be reasonably expected to know that an animal would suffer as a result of that act or failure to act; and

(c) the suffering is unnecessary.

The AWA also provides that a person responsible for an animal who permits another person to cause unnecessary suffering will also commit an offence if they fail to take reasonable steps to prevent the suffering from taking place, for example, by failing to supervise that other person.[36] An offence of 'permitting' unnecessary suffering caused by another can only be committed by a person in relation to an animal for which they are 'responsible' (as defined in the AWA).[37]

The AWA sets out considerations to which the courts would have regard in determining whether the suffering is unnecessary. Considerations focus on "*the necessity, proportionality, humanity and competence of the conduct*".[38] These include whether:

(a) the suffering could reasonably have been avoided or reduced;

(b) the conduct which caused the suffering was in compliance with any relevant laws, a licence or code of practice – where suffering inevitably occurs in the course of complying with any regulations, licence or code of practice, an offence would not normally be committed;

(c) the conduct which caused the suffering was for a legitimate purpose, such as to benefit the animal, or to protect a person, property or another animal;

(d) the suffering was proportionate to the purpose of the conduct concerned; and

(e) whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.

If the translocation is under a licence issued by Natural England, it is important to ensure that the requirements of the licence are met, including the use of the appropriate equipment permitted by the licence (e.g., trap, net etc.) and to ensure that it is used competently.

Mutilation (Section 5 of AWA)

This offence will be particularly relevant to techniques used in wildlife conservation and research where, for example, animals will need to be tagged or identified.

A person commits an offence if they carry out, or cause to be carried out, a procedure that involves "*interference with the sensitive tissues or bone structure of the animal, otherwise than for the purpose of its medical treatment*" (referred to in the AWA as a "prohibited procedure").[39] Techniques that do not penetrate living tissue are not considered mutilations (e.g., ringing, use of collars, attachment of radio tags by harness or glue and wing clipping by cutting the primary feathers of a bird's wing).

The AWA makes provision for the Secretary of State and the National Assembly for Wales to specify procedures which will be exempted from this general prohibition of mutilation. An example of such exempt procedures is the Mutilations (Permitted Procedures) (England) Regulations 2007 (as amended) (the "**Mutilations Regulations**"), which permits

certain commonly used wildlife identification techniques to be used, despite technically being "mutilations", provided that they are carried out in such a way as to minimise pain or suffering, in hygienic conditions and in accordance with good practice.[40] These exceptions include ear clipping/notching, branding, micro-chipping, tattooing and the insertion of tracking devices.[41]

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of 7 October 2022.

ENDNOTES

1. International Union for the Conservation of Nature (IUCN), Guidelines for reintroductions and other conservation translocations, 2013 (link).
2. Department for Environment, Food & Rural Affairs, 'Reintroductions and other conservation translocations: code and guidance for England' (May 2021).
3. Natural England, Conservation translocation project scoping form: https://www.gov.uk/government/publications/reintroductions-and-conservation-translocations-in-england-code-guidance-and-forms
4. Wildlife and Countryside Act 1981, s.21.
5. See Department for Environment, Food & Rural Affairs, 'Reintroductions and other conservation translocations: code and guidance for England' (May 2021), Chapter 5.
6. Department for Environment, Food & Rural Affairs, 'Reintroductions and other conservation translocations: code and guidance for England' (May 2021), p. 77.
7. Department for Environment, Food & Rural Affairs, 'Reintroductions and other conservation translocations: code and guidance for England' (May 2021), p. 26.
8. Department for Environment, Food & Rural Affairs, 'Reintroductions and other conservation translocations: code and guidance for England' (May 2021), p. 25.
9. Department for Environment, Food & Rural Affairs, 'Reintroductions and other conservation translocations: code and guidance for England' (May 2021) pp. 24-25.
10. Department for Environment, Food & Rural Affairs, Guidance on section 14 of the Wildlife and Countryside Act 1981 (link), p. 11. Defra states that the information "represents the views of Defra and the Welsh Assembly Government on the meaning of key elements that make up the offences in section 14; it does not, therefore, represent a definitive interpretation of the law…".
11. Department for Environment, Food & Rural Affairs, Guidance on section 14 of the Wildlife and Countryside Act 1981 (link), pp 9-12.
12. See also further guidance at https://www.gov.uk/guidance/invasive-non-native-alien-animal-species-rules-in-england-and-wales.
13. Dangerous Wild Animals Act 1976, s.1.
14. In some instances, the DWAA lists certain types of animals, but then creates an exception – for example, 'old world pigs … exception: domestic pig other than farmed wild boar' or 'horses … exception: donkey, domestic horse' or 'all cats … exception: the wild cat [amongst others]'. As such, a careful review of the England and Wales schedule (which can be found here) is required in order to determine if an animal is classed as a dangerous wild animal.
15. Dangerous Wild Animals Act 1976, s.1(2).
16. Dangerous Wild Animals Act 1976, s.6(1).
17. The Salmon and Freshwater Fisheries Act 1975, s.41. The definition of fish includes crustaceans and molluscs.
18. The Salmon and Freshwater Fisheries Act 1975, s.30; The Keeping and Introduction of Fish (England and River Esk Catchment Area) Regulations 2015, s.4.
19. Zoo Licensing Act 1981, s 1.
20. The definition of 'wild bird' under the Wildlife and Countryside Act 1981 generally does not include game birds (namely pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan)

except for certain provisions of the W&C Act 1981 relating to licencing and the prohibition on the use of certain traps.

21. The Conservation of Habitats and Species Regulations 2017, S.I. 2008/301. (link)

22. Regulation 47 of the Habitats Regulations creates a similar offence in relation to the plant species specified in Schedule 5, see link. Regulation 47 makes it an offence to be in possession of, or to control, transport, or to offer to or sell or exchange any live or dead plant or part of a plant taken from the wild or listed in Annex II(n) or Annex IV(b) of the Habitats Directive (European Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) without a licence.

23. The Conservation of Habitats and Species Regulations 2017, Regulation 43(3).

24. Article 55(7) Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, see: https://www.legislation.gov.uk/eudr/1992/43/contents

25. The Conservation of Habitats and Species Regulations 2017, Regulation 55(9).

26. The Conservation of Habitats and Species Regulations 2017, Regulation 59.

27. The Conservation of Habitats and Species Regulations 2017, Regulation 60.

28. The Conservation of Habitats and Species Regulations 2017, Regulation 45.

29. Protection of Badgers Act 1992, s.1.

30. Animal Welfare Act 2006, Explanatory Notes, s.2(14) . This will include livestock, domestic pets, stray dogs and feral cats, but will also include feral animals that may be considered wild on the basis that they came from domestic stock, such as feral pigeon, mink, geese, goats and wild boar.

31. Natural England, Wildlife Management Advice Note, The Animal Welfare Act 2006: what it means for wildlife, April 2019, see: https://www.gov.uk/government/publications/wildlife-management-advice-notice-the-animal-welfare-act-2006-wml-gu02.

32. Wild Mammals (Protection) Act 1996, s.2.

33. Animal Welfare Act 2006, s.3.

34. Natural England, Wildlife Management Advice Note, The Animal Welfare Act 2006: what it means for wildlife, April 2019.

35. Animal Welfare Act 2006, s.9(2).

36. Animal Welfare Act 2006, s.4(2)(c).

37. Animal Welfare Act 2006, s.4(2)(a).

38. Animal Welfare Act 2006, Explanatory Notes, s.4(21).

39. Animal Welfare Act 2006, s.5(3).

40. Mutilations (Permitted Procedures) (England) Regulations 2007, s.3.

41. Mutilations (Permitted Procedures) (England) Regulations 2007, Schedule 1. This is a list of permitted procedures.

SUBSIDIES UNDER CAP

CORE TOPICS:

- Basic Payment Scheme and phase-out
- English Countryside Stewardship Scheme
- Rural Development Programmes in Wales

(See also *Rewilding in England & Wales: Subsidies after CAP*)

KEY TAKEAWAYS:

England

- The Basic Payment Scheme is now discontinued and eligible claimants from 2023 will automatically receive decreasing annual delinked payments between 2024 and 2027.
- These Direct Payments will be phased out in England by 2027 and replaced by the Environmental Land Management ("**ELMs**") schemes, which provide greater opportunities for rewilding activities (see the *Rewilding in England & Wales: Subsidies after CAP* briefing note).
- Subsidies may still be available under England's Countryside Stewardship Scheme, which is being enhanced as part of ELMs, with the changes offering more scope for rewilding activities (see the *Rewilding in England & Wales: Subsidies after CAP* briefing note).

Wales

- Glastir was the primary agri-environment scheme for farmers and land managers in Wales until 2023. It has now been discontinued and is due to be replaced by the Sustainable Farming Scheme in 2025 (see the *Rewilding in England & Wales: Subsidies after CAP* briefing note).
- The Habitat Wales scheme bridges the 2024 transition period and applications for the scheme have now closed.

TABLE OF CONTENTS

1. **Introduction**
2. **Basic Payment Scheme (BPS)**
   - 2.1 Overview and basic requirements
   - 2.2 England: End of BPS
   - 2.3 England: Delinked payments and reductions
   - 2.4 Wales: Definition of "farmer", eligible land, and other requirements
   - 2.5 Wales: Transition to the Sustainable Farming Scheme (SFS)
   - 2.6 Wales: Cross compliance conditions
3. **Rural Development Programmes in England – Countryside Stewardship Agreements**
4. **Rural Development Programmes in Wales**
   - 4.1 Glastir
   - 4.2 Habitat Wales

1. INTRODUCTION

This briefing note provides a high-level overview of the framework for farming subsidies under the legacy EU Common Agricultural Policy ("**CAP**"), in each case considered in the context of rewilding activities. As a general principle, it's worth noting that the future subsidy schemes seem likely to better align with rewilding activities than is currently the case under CAP.

Although some elements of the CAP-based subsidies currently remain in place, each of the four UK national governments is now free to set its own agricultural policy to replace CAP, and changes are underway in both England and Wales (see the *Rewilding in England & Wales: Subsidies after CAP* briefing note).

2. BASIC PAYMENT SCHEME (BPS)

2.1 Overview and basic requirements

The Basic Payment Scheme ("**BPS**")[1] forms the basis of CAP subsidies. It's administered by the Rural Payments Agency ("**RPA**") in England and Rural Payments Wales ("**RPW**") in Wales. In the 2023 scheme year, BPS payments consisted of: (i) the basic entitlement; (ii) a top-up for young farmers; and (iii) in Wales, a redistributive payment.[2 3]

The top up payment for young farmers is available to those who are at least 18[4] and no more than 40 years old in the year of their first BPS claim. The payment can be claimed for up to five years starting from the year they submit their first successful young farmer payment application.

In Wales, the redistributive payment is made to all claimants entitled to the basic BPS payment and is paid on a rate per hectare (up to a maximum of 54 hectares).[5]

There are three requirements to be eligible for the BPS: the applicant must (i) be a "farmer"; (ii) have BPS entitlements for each hectare of "eligible land" in respect of which they make their claim; and (iii) claim against at least five eligible hectares of land (subject to exemptions).

While the BPS has been phased out in England, BPS applications can still be made in Wales. Given the continuing relevance of the BPS for farmers in Wales, rewilding activities will have to be considered carefully, as they may impact on BPS eligibility.

2.2 England: End of BPS

In England, the government began phasing out Direct Payments made under BPS in 2021, and the 2023 scheme year was the final year of BPS in England.[6] This is to facilitate the transition to the new ELM schemes by 2027 (see the *Rewilding in England & Wales: Subsidies after CAP* briefing note).

Although some claimants may continue to receive payments under BPS, no new applications are possible, therefore this briefing note does not address the topic further.[7] Between 2024 and 2027, a transitional 'delinked payments' scheme will operate (see section 2.3).

2.3 England: Delinked payments and reductions

To facilitate the transition from BPS to the ELM schemes, the RPA will make delinked payments each year from 2024 to 2027.[8] It's not necessary to submit an application in order to receive delinked payments.

Unlike BPS payments, there's no requirement to hold land or eligible entitlements. Instead, delinked payments will be made automatically to any successful BPS claimant in 2023, provided that they have a "reference amount". This "reference amount" will normally be the average BPS payment in the 2020 to 2022 scheme years or can also be transferred between businesses under specified circumstances. There are other eligibility requirements which can be found in the government guidance which also provides further information about how the reference amount is calculated.[9]

The delinked payment amount is based on the reference amount. However, since 2021 a progressive reduction has been applied to BPS each year, and this reduction will continue with delinked payments until the phase-out is complete in 2027. This means that the value of the delinked payment each year will become a smaller and smaller proportion of the reference amount. Figure 1 illustrates the reductions for payments in 2024.

Note that cross compliance (see below for an explanation of the concept of cross-compliance in relation to Wales) is not required for delinked payments in England,[10] but most of the standards remain applicable to farm activities as they exist in other applicable laws.[11]

The government's present intention is that, by 2028, there will be no Direct Payments made to farmers at all, unless it decides to extend the transition period.

Payment band of reference amount	Reduction percentage applied to payment
	2024 (delinked payments)
Up to £30,000	50%
£30,000 - £50,000	55%
£50,000 - £150,000	65%
More than £150,000	70%

Figure 1: Reduction of delinked payments in 2024 compared to reference amount.[12]

2.4 Wales: Definition of "farmer", eligible land, and other requirements

As noted above, applications for BPS can still be made in Wales, subject to meeting the following criteria:

Farmer

In Wales, a "farmer" is a person/group of people, or a business that does at least one of the following on their holding, being classed as "agricultural activity":[13]

- produces, rears or grows agricultural products – including harvesting, milking, breeding animals and keeping animals for farming purposes;
- keeps an agricultural area in a state suitable for grazing or cultivation by keeping it clear of any scrub that can't be grazed and controlling non-native invasive weeds; or
- carries out the "minimum activity" on land which is naturally kept in a state suitable for cultivation and grazing. Broadly, minimum activity requires grazing to a minimum average annual stocking density of 0.01 to 0.05 livestock units per hectare, or control of non-native invasive weeds and scrub.

Additional requirements may apply under certain circumstances.

Note that this is a narrower definition of "farmer" than for tax purposes.

It may be the case that, where rewilding is passive (e.g., where a farmer undertakes a major rewilding project and removes their herd of sheep to make way for significant tree planting), the farmer would no longer be considered to be a "farmer" for BPS purposes. Projects that focus more closely on co-benefits and the regeneration of landscapes to support a thriving and diverse environment in combination with food production, may find that eligibility for BPS payments can continue, albeit perhaps on smaller parcels of "eligible" land.

Eligible land

Broadly speaking, land is generally only "eligible" under the BPS if it is arable, permanent grassland or used for permanent crops.[14] It must also be predominately used for "agricultural activities", as defined above.

Areas that are used for non-agricultural activities may still be eligible, provided that the land has been predominantly used for agricultural activities throughout the relevant scheme year.[15] The RWA has also listed the types and extent of activity that can be carried out without endangering the land's status as eligible hectares (e.g., allowing walking, fishing and game shooting on the land where the land can still be used for agricultural purposes).[16]

Finally, certain non-agricultural land features will reduce the eligible agricultural area and must be declared when applying for BPS. These include manmade constructions such as buildings, hard-standings, ungrazeable tracks, water features and natural features such as, rocks, scree, (bare areas) scrub, bracken and groups of trees.[17]

In the context of rewilding, whether the land becomes ineligible is likely to depend on whether the rewilding results in the land falling outside the three categories of eligible land and/or no longer being used for "agricultural activities" – this will depend on the fact and degree of any rewilding activities.

Other requirements

Farmers claiming BPS payments must also have the land at their "disposal". Broadly, this means that an owner or tenant (under a Farming Business Tenancy) farming the land themselves could qualify, but contractors, another kind of tenant, or a person grazing the land under licence would not. In Wales, land would also remain under the owner's disposal when they have allowed a licensee on to their land under a licence arrangement specifically for grazing, cropping or taking hay/silage over a specific and limited period of time within the year, but they retain management control.

2.5 Wales: Transition to the Sustainable Farming Scheme (SFS)

In Wales, BPS is also set to be phased-out and replaced by the Sustainable Farming Scheme (the "**SFS**") over the coming years *(see Rewilding in England & Wales: Subsidies after CAP)*.

The government's latest SFS consultation proposed that, starting from 2025, claimants will be able to choose between the SFS or BPS until the end of the transition period in 2029. Once they have chosen to participate in the SFS, they will not be able to revert back to the BPS during this period. In addition, BPS payments will be tapered by 20% each year from 2025, eventually reaching 0% in 2029 when the transition to SFS is complete.[18] At the time of writing, this proposal is still under review and may change in the future.

2.6 Wales: Cross compliance conditions

Cross compliance is a set of rules which farmers and land managers must follow on their holding to receive their rural payments in full. Failure to comply may result in a reduction to their scheme payments.

There are two components to cross compliance: statutory management requirements ("**SMRs**"), which are European legal requirements of agriculture management covering the environment, food safety, public, animal and plant health and animal welfare; and standards for good agricultural environmental conditions of land ("**GAECs**") which aim to protect soil against erosion, maintain soil structure and organic matter, and preserve wildlife habitats and landscape features through a minimum level of maintenance. Wales has its own detailed rules in respect of these standards.[19]

Cross compliance applies to all the land on a claimant's holding (including common land and land in a rural development agreement) not just to the land declared in the BPS claim, as well as to all of the claimant's agricultural activities.[20]

The claimant is responsible for ensuring that the cross compliance conditions are met throughout the entire calendar year - even, in certain circumstances, where the land is not part of their holding for the whole year.

This means a claimant may be penalised for another person's failure to comply if, for example, ownership or responsibility is transferred mid-year. The claimant is also responsible for the compliance of anyone acting for them, or under their control, on their holding, or anyone with access to the holding under the terms of an agreement, such as contractors, employees and family members.[21]

Scheme payments will normally be reduced for negligent non-compliance, depending on the extent, severity, reoccurrence and permanence of the non-compliance.[22] In Wales, physical cross compliance inspections are generally carried out unannounced, but inspectors may choose to give up to 48 hours' notice.[23]

PRACTICAL EXAMPLE

A livestock farmer wishes to rewild land on which she has grazed animals for over five years and for which she currently receives BPS payments. She doesn't live on the land nor does she tend the livestock herself. She pays a stock handler to tend the livestock. She intends to reduce the number of cattle, pigs and ponies on the land and remove internal fences, to encourage a mosaic of habitats, including thickets of young trees. The stock handler will continue to breed and sell the remaining cattle and pigs for meat. There is a public footpath running through the land that is currently protected by a fence which the farmer intends to remove.

The first question to consider, when assessing whether the farmer will continue to be eligible for BPS payments, is whether the land itself remains eligible for BPS. Permanent grassland (land used to grow grasses or other herbaceous forage for five or more consecutive years) is eligible and according to government guidance can include areas of light scrub so long as it is suitable for grazing and forage continues to predominate. However, government guidance states that permanent grassland does not include areas of dense scrub which prevents grazing.

If the desire to increase biodiversity leads to the creation of dense scrub that cannot be grazed, there is a risk that the area eligible for BPS payments will be reduced or that the land will become ineligible.

The second question is whether the farmer continues to conduct "agricultural activity", within the definition:

- There's a risk that the farmer will be unable to claim that she continues to maintain the land in a state suitable for grazing or cultivation. The trees aren't necessarily a bar to claiming the land as grazing land if 50% of the area under the canopy is herbaceous forage or grasses and used by animals for grazing. Even so, if the reduction in grazing animals and the increasing biodiversity leads to the growth of dense scrub that cannot be grazed then it's unlikely to qualify as land in a state suitable for grazing.
- The farmer may still, however, be able to claim that she's carrying out an agricultural activity if animals continue to be bred and kept on the land for farming purposes. That is likely to be the case, because the stock handler continues to sell the cattle and pigs for meat.

The third question is whether the farmer continues to have the land at her disposal. As the stock handler is a contractor carrying out operations at the direction of the farmer, it's likely that she'll be found to have the land at her disposal.

Finally, the farmer needs to show that she's complying with the cross conditions. Amongst other considerations, the farmer will need to be mindful of GAECS relating to public rights of way. In order to meet the rules, the farmer must not disturb the surface of public rights of way. If the farmer has disturbed the surface of a cross field path or bridleway, the farmer must make it good.

3. RURAL DEVELOPMENT PROGRAMMES IN ENGLAND – COUNTRYSIDE STEWARDSHIP AGREEMENTS

The RPA also administers England's Countryside Stewardship ("**CS**") Scheme, funding environmental improvements by farmers, woodland owners and foresters. The focus of this scheme is biodiversity, and it is a voluntary scheme which replaced the Environmental Stewardship Scheme, English Woodland Grant Scheme and capital grants under the Catchment Sensitive Farming programme.[24]

The scheme is being updated and enhanced as part of ELMs, so please consult our *Rewilding in England and Wales: Subsidies after CAP* briefing note to understand the current position.

4. RURAL DEVELOPMENT PROGRAMMES IN WALES

4.1 Glastir

Until 2023, Glastir was the primary agri-environment scheme for farmers and land managers in Wales.[25] It was a voluntary scheme which generally offered five-year agreements that aimed to manage soils and improve water quality, reduce flood risk, and conserve and enhance wildlife, amongst other things.

Glastir included several types of contracts, including:
(i) Glastir Advanced, which supported improvements in the environmental status of habitats, species, soils and water;
(ii) Glastir Commons, which applied to those holding rights over common land and grazing the land concurrently or having established a grazing association; and (iii) Glastir Organic, which supported those meeting organic production criteria or wishing to convert to organic production.

The last Glastir scheme ran from 2014 to 2020, and most Glastir Advanced, Commons and Organic contracts were extended to December 2023.[26] Glastir will be replaced by the SFS which is set to start in 2025[27] (see the *Rewilding in England & Wales: Subsidies after CAP* briefing note). The Habitat Wales scheme (see below) has been introduced to cover the 2024 transition period.

Although some claimants may continue to receive payments under Glastir, no new applications are possible, therefore this briefing note does not address the topic further.

4.2 Habitat Wales

To facilitate the transition from Glastir to SFS, a new Habitat Wales scheme was introduced and will run from 1 January 2024 until the introduction of SFS in 2025.[28]

The application window for Habitat Wales closed on 10 November 2023,[29] therefore this briefing note only provides a brief summary of the scheme.

Habitat Wales applies to land under a habitat option within Glastir Advanced, Commons and Organic contracts in 2023, as well as habitat land that was not under management in 2023 (excluding designated sites) and land managed as habitat.[30]

To be eligible, a claimant must: (i) be a primary producer of agricultural products (e.g. arable, beef, dairy, goats etc); (ii) have at least three hectares of eligible agricultural land registered with RPW; or (iii) be able to demonstrate over 550 standard labour hours. The claimant must also have management control of the land throughout 2024: broadly, this requires them to be an Owner Occupier, a tenant with exclusive occupation with a Farm Business Tenancy and / or a Full Agricultural Holdings Act 1986 tenancy, or 'Sole Grazier' common land registered as a field parcel with RPW.[31]

The scheme had a competitive application process and it targeted areas which could achieve the greatest environmental benefits.[32]

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of April 2024.

ENDNOTES

1. Direct Payments to Farmers (Legislative Continuity) Act 2020 incorporates the EU Direct Payments legislation. This includes the two main Regulations governing Direct Payments: the Regulation establishing rules for Direct Payments to farmers under support schemes within the framework of the Common Agricultural Policy ((EU) 1307/2013) and the Regulation on the financing, management and monitoring of the Common Agricultural Policy ((EU) 1306/2013).
2. BPS rules for 2023 in England (the "England BPS 2023 rules") are available at: https://www.gov.uk/government/publications/basic-payment-scheme-2023/bps-rules-for-2023. Links to the various components of Welsh Government guidance for BPS in Wales are available at: https://gov.wales/basic-payment-scheme.
3. The 2023 Single Application Rules for BPS in Wales (the "Wales BPS 2023 rules") are available at: https://www.gov.wales/sites/default/files/publications/2023-03/single-application-form-saf-2023-rules-booklet.pdf
Further guidance is also available at: https://gov.wales/basic-payment-scheme
4. The lower age limit is 16 in Wales for applications from farmers acting through legal persons such as limited companies.
5. Section B50 of the Wales BPS 2023 rules.
6. Government guidance on the status of BPS: https://www.gov.uk/guidance/basic-payment-scheme
7. BPS eligibility requirements in England are broadly similar to those in Wales (see sections 2.4 to 2.6), with some slight variations.
8. Government guidance on the delinked payments scheme: https://www.gov.uk/guidance/delinked-payments-replacing-the-basic-payment-scheme#receiving-delinked-payments

9. See government guidance for more information: https://www.gov.uk/guidance/delinked-payments-replacing-the-basic-payment-scheme#transferred
10. See 2023 government guidance on cross compliance and delinked payments: https://webarchive.nationalarchives.gov.uk/ukgwa/20231103060408/https://www.gov.uk/government/publications/cross-compliance-2023/cross-compliance-2023#delinked-payments-replacing-bps
11. A summary of the requirements for farmers and land managers can be found at: https://www.gov.uk/guidance/rules-for-farmers-and-land-managers
12. See Defra's progressive reductions calculator for more information: https://calculate-direct-payment-reductions.defra.gov.uk/
13. See Section B4 of the Wales BPS 2023 rules for the full details: https://www.gov.wales/basic-payment-scheme
14. Section B12.2 of the Wales BPS 2023 rules.
15. Section B12.2 of the Wales BPS 2023 rules.
16. Section B23 of the Wales BPS 2023 rules.
17. Section B21.2 of the Wales BPS 2023 rules.
18. Chapter 6 of the Sustainable Farming Scheme consultation document, dated 14 December 2023: https://www.gov.wales/sites/default/files/consultations/2023-12/sustainable-farming-scheme-consultation-document_0.pdf
    The consultation closed on 7 March 2024: https://www.gov.wales/sustainable-farming-scheme-consultation
19. Wales guidance on cross compliance 2024: https://www.gov.wales/cross-compliance-2024
20. Section F2.1 of the Wales BPS 2023 rules.
21. See Section F2 of the Wales BPS 2023 rules for more details.
22. See Section H12 of the Wales BPS 2023 rules for more details.
23. Section I.2.5 of the Wales BPS 2023 rules.
24. Links to government guidance for the various Countryside Stewardship schemes and options are available at: https://www.gov.uk/government/collections/countryside-stewardship-get-paid-for-environmental-land-management
25. Links to various Welsh government guidance for Glastir and other closed schemes are available at: https://www.gov.wales/closed-2014-2020-rural-development-plan-schemes
26. Glastir Advanced renewals: https://www.gov.wales/glastir-advanced-renewals-additional-information-html
27. See written statement by Minister for Rural Affairs and North Wales and Trefnydd, dated 21 July 2023: https://www.gov.wales/written-statement-glastir-and-transition-sustainable-farming-scheme
28. *Ibid*.
29. Habitat Wales Scheme Rules Booklet: https://www.gov.wales/habitat-wales-scheme-rules-booklet-html#131151
30. Habitat Wales Scheme Outline: https://www.gov.wales/habitat-wales-scheme-outline-html
31. Further details are available in the Habitat Wales Scheme Rules Booklet: https://www.gov.wales/habitat-wales-scheme-rules-booklet-html
32. See Habitat Wales Scheme Outline: https://www.gov.wales/habitat-wales-scheme-outline-html

SUBSIDIES AFTER CAP

CORE TOPICS:

- Environmental Land Management schemes ("**ELMs**") in England, including:
  - Landscape Recovery Scheme
  - Countryside Stewardship Scheme
  - Sustainable Farming Incentive Scheme
- Sustainable Farming Scheme ("**SFS**") in Wales

KEY TAKEAWAYS:

England

- ELMs have been introduced under the Agriculture Act 2020 in England. Compared to payments under CAP (*see the Rewilding in England & Wales: Subsidies under CAP* briefing note), ELMs moves towards results-based payments for action that benefits the environment.
- The Landscape Recovery Scheme supports long-term, large scale land use change projects such as restoring wilder landscapes and large-scale tree planting.
- The enhanced Countryside Stewardship Scheme supports targeted actions relating to specific locations, features and habitats that can be achieved alongside food production.

Wales

- The SFS has been introduced to replace both the Basic Payment Scheme and Glastir as the main source of government-funded agricultural support payments.
- The final consultation proposed a three-layered structure, including a set of Universal Actions to be undertaken by participants, some of which may support rewilding activities.
- The Scheme will start in 2025 with a transitional period until 2029, during which the different layers will be introduced in phases.

TABLE OF CONTENTS

1. Introduction

2. Policy and legislation relevant to post-Brexit subsidies in England

2.1 The UK Government's 25 Year Environment Plan

2.2 Agriculture Act 2020

2.3 Environment Act 2021

3. The Environmental Land Management schemes (ELMs) in England

3.1 The Landscape Recovery Scheme

3.2 Enhanced Countryside Stewardship (CS)

3.3 The Sustainable Farming Incentive Scheme (SFI)

4. The Sustainable Farming Scheme (SFS) in Wales

4.1 Legislative background

4.2 Proposed scheme structure and implementation timeline (subject to consultation)

4.3 Eligibility, scheme rules, and Universal Actions

4.4 Transitional arrangements

1. INTRODUCTION

This briefing note summarises ELMs in England and SFS in Wales, focusing on how they may apply to rewilding activities. See the *Rewilding in England & Wales: Subsidies under CAP* briefing note for information on rewilding and the subsidies under the Common Agricultural Policy ("**CAP**") framework, which remains relevant despite Brexit.

2. POLICY AND LEGISLATION RELEVANT TO POST-BREXIT SUBSIDIES IN ENGLAND

2.1 The UK Government's 25 Year Environment Plan

On 11 January 2018, the government published a policy document entitled 'A Green Future: Our 25 year plan to improve the natural environment'.[1] Its application is primarily limited to England, except where the UK Government is responsible for policies that affect sectors across the UK and internationally (e.g. climate change). The plan sets out to achieve, amongst other things, a growing and resilient network of land, water and sea that is richer in plants and wildlife. On land and in freshwaters it aims to do this by:

- restoring 75% of the one million hectares of terrestrial and freshwater protected sites to favourable condition;
- creating or restoring 500,000 hectares of wildlife-rich habitat outside the protected site network, focusing on priority habitats;
- taking action to recover threatened, iconic or economically important species of animals, plants and fungi, and where possible to prevent human induced extinction or loss of known threatened species; and
- increasing woodland in England in line with an aspiration of 12% cover by 2060: this would involve planting 180,000 hectares by the end of 2042.

The first review of the 25-year plan was published in January 2023.[2] The review assessed progress made in relation to each of the 10 goals set out in the original plan and made further commitments toward reaching the government's environmental targets.

2.2 Agriculture Act 2020

In England, the Agriculture Act 2020 (the "**AA 2020**") replaces the CAP and establishes a legal framework for a new agricultural system following the UK's exit from the EU (as above, note that some elements of the CAP currently remain in place).[3] Broadly speaking, the AA 2020 allows the Secretary of State to establish a new agricultural system based upon the principle of "public money for public goods", such as improvements to the environment.[4]

The AA 2020 primarily applies to England and provides for the current system of Direct Payments to be phased out. Section 1 AA 2020 states that the Secretary of State may give financial assistance for, or in connection with, a number of purposes including: managing land or water in a way that protects or improves the environment; managing land, water or livestock in a way that mitigates or adapts to climate change; conserving native livestock, native equines or genetic resources relating to any such animal; and protecting or improving the health of plants. The new financial assistance schemes made under these provisions are the ELMs. There are also powers for the Secretary of State to modify and extend other existing EU support schemes, such as Rural Development Programmes.

2.3 Environment Act 2021

The Environment Act 2021 (the "**EA 2021**") sets out a framework for legally binding targets to deliver environmental improvements, primarily in England.[5] Part 6 of the EA 2021 makes provision, among other things, for:

- biodiversity net gain to be a condition of planning permission in England;
- a general duty on public authorities to have regard to conserving and enhancing biodiversity;
- there to be local nature recovery strategies for areas in England; and
- species conservation strategies and protected sites strategies.

The EA 2021 requires the Secretary of State to set at least one long-term target in each of the following areas: air quality; water; biodiversity; and resource efficiency and waste reduction. It also requires targets to be set for fine particulate matter and species abundance.

In December 2022, Defra published the following targets:[6]

- halt the decline in species populations by 2030, and then increase populations by at least 10% to exceed current levels by 2042;
- restore precious water bodies to their natural state by cracking down on harmful pollution from sewers and abandoned mines and improving water usage in households;
- deliver the government's net zero ambitions and boost nature recovery by increasing tree and woodland cover to 16.5% of total land area in England by 2050;
- halve the waste per person that is sent to residual treatment by 2042;
- cut exposure to the most harmful air pollutant to human health – PM2.5; and
- restore 70% of designated features in the UK's Marine Protected Areas to a favourable condition by 2042, with the rest in a recovering condition.

Separately, in March 2022, Defra published a Nature Recovery Green Paper on protected sites and species in England.[7] This proposed significant reforms to the implementation of wildlife site designations, habitats regulations and species protection but has not, to date, been implemented.

The EA 2021 requires the Secretary of State to prepare an Environmental Improvement Plan (EIP) to significantly improve the natural environment in England. The government's 25-year plan to improve the environment was treated as the first EIP, and a subsequent EIP 2023 has been published.[8]

The EA 2021 also required the Secretary of State to publish a policy statement on environmental principles, which explains how the environmental principles should be interpreted and applied by government when making policy.[9] In addition, the EA 2021 established a new independent environmental body, the Office for Environmental Protection, to hold public authorities to account and to provide government with advice on environmental law.

3. THE ENVIRONMENTAL LAND MANAGEMENT SCHEMES (ELMS) IN ENGLAND

In June 2023, Defra published a policy paper setting out the key aims of ELMs, including paying farms to improve the environment and animal health and welfare, and reduce carbon emissions.[10] Within this, "farmers" includes farmers, tenants, landowners, land managers, growers and foresters.

The paper also included updates on the Landscape Recovery, Countryside Stewardship and the Sustainable Farming Incentive Schemes.

3.1 The Landscape Recovery Scheme

The Landscape Recovery Scheme ("**LRS**") is particularly relevant for rewilders and focuses on "radical and large-scale" approaches to creating environmental change over the next 20 years. It's open to all private landowners/managers or groups, and public bodies but only in collaboration with private land managers.

Applications for the first round of pilot projects launched in February 2022 and closed in May 2022, and applications for the second round launched on 18 May 2023 and closed in September 2023. The government is committed to launching a further round in 2024 and expects to continue to launch at least annual rounds in future years as the scheme is scaled up.

There LRS has four main distinguishing features:

- **large-scale projects:** the scheme is designed to deliver outcomes that require collaborative action across a big area, such as restoring ecological or hydrological function across a landscape;
- **long-term public funding (e.g., for 20 years or longer):** the scheme will support outcomes that take a long time to deliver, such as peatland restoration, woodland management, or habitat restoration;
- **bespoke agreements:** the scheme can fund activities that contribute to priority outcomes but are specific to the locality and thus difficult to facilitate through other schemes; and
- **blended funding:** the above features and the provision of development funding should enable projects to attract private investment.

Projects will be able to blend the public money on offer with payments from private investors. Initially projects will be awarded "development" funding from the government to support detailed planning of the project over a roughly two-year period. The intention is that successful projects will, at the end of this period, proceed to implementation with agreed government funding supplemented by private sector financing.

The first application round

In the first-round funding was awarded to 22 pilot projects, the majority of which involved groups of farmers and land managers working together. The application process focused on two themes: (i) recovering and restoring threatened native species (birds and insects); and (ii) restoring streams and rivers.

The chosen projects aim to collectively restore over 400 miles of river and protect/provide habitats for at least 263 species.[11]

The criteria for the selected 2022 projects focused on feasibility, costs and potential impact, including environmental benefits, carbon and climate resilience, and social impact. Applicants were required to evidence management control of the land, or consent from those with management control, and had to show that any tenants in the project area had been engaged and were supportive.

The second application round

For the second round in 2023, the government improved the process based on its evaluation of the first round, including simplifying the guidance, running a simple competition for all projects, consolidating the criteria, removing the upper size limit on the scale of projects which can apply, and introducing a cap on the project development grants.[12]

This second round focused on funding projects that: (i) contribute to net zero, such as peatland, woodland and carbon sequestering practices; (ii) support protected sites, such as sites of special scientific interest, special area of conservation, and Ramsar wetlands; and (iii) support wildlife-rich habitats, such as acid or calcareous grassland, and coastal saltmarsh or sand dunes. All projects were also required to provide extra benefits, such as: (i) improved water quality; (ii) helping threatened species to recover; (iii) improved soil health; (iv) increasing resilience to natural hazards, for example, flooding, drought, erosion, fire; or (v) social benefits, such as physical access, participation and engagement with nature.[13]

There was no specific list of activities that qualify for the LRS, as each project would comprise a bespoke agreement negotiated for the specific project. Eligible land was widely defined, only requiring that the project be:[14]

- on land in England; and
- a broadly connected area of at least 500 hectares.

The projects could:

- involve whole holdings or parts of them;
- extend across national borders as long as there are at least 500 hectares in England, although only the land in England will be eligible for funding; and
- include land that is in other government schemes.

In this second round, funding was awarded to 34 projects – 12 more than the previous round. The chosen projects aim to restore over 35,000 hectares of peatland, create over 7,000 hectares of woodland (including temperate rainforest), and benefit over 160 protected sites (including Sites of Special Scientific Interest).[15]

The third application round

At the time of writing, applications for the 2024 series have yet to open.

PRACTICAL EXAMPLES

Examples of large-scale rewilding activities which might attract funding include:

- Landowner A: undertakes a project to plant large scale woodland alongside a project to re-wet peatland, adapt grazing to create habitats for priority species and restore eroded rights of way and create new ones. Benefits of this project include biodiversity, carbon capture and storage, water quality improvement, and improving access.
- Landowner B: re-meanders certain rivers and streams and reconnects the floodplain, alongside a project to extend woodlands and restore semi-natural habitats. This is combined with a citizen science programme with a local university. Benefits of this project include improvements in hydrology and water quality, biodiversity, carbon capture and storage, climate resilience and educational access.

  Benefits of this project include improvements in hydrology and water quality, biodiversity, carbon capture and storage, climate resilience and educational access.
- Landowner C: connects fragmented intertidal habitats and re-wets arable land and grass to create habitats, and undertakes a campaign to raise public and business awareness of the importance of these activities, including the benefits the project brings to biodiversity, carbon capture and storage, improvements to water quality, climate resilience and again educational access.

3.2 Enhanced Countryside Stewardship (CS)

Whilst the government initially planned to create a new Local Nature Recovery scheme, it has instead decided to further develop the existing Countryside Stewardship ("**CS**") framework, with the latest guidance issued in January 2024.[16]

CS provides financial incentives for farmers, foresters and land managers to look after and improve the environment by: increasing biodiversity; improving habitat; expanding woodland areas; improving water quality, air quality and natural flood management. CS is made up of eight grants (when they are all open).

Overview

Applicants should generally have management control of the land for the duration of the agreement to be eligible; where they do not, applications will require the written agreement of all parties with management control. Applicants do not need to qualify as "farmers", as they do for BPS payments (see the *Rewilding in England & Wales: Subsidies under CAP* briefing note), but the eligibility requirements for CS agreements vary by agreement and some do require the land, for example, to be arable.

Agreements usually involve receipt of an annual grant so long as the terms and/or conditions of the agreement, the scheme and the relevant CS manual are complied with.

The key elements of the CS framework are:

- Woodland-related grants: these include (i) Protection and Infrastructure grants[17] to support woodland and beaver management; (ii) Woodland Management Plan (WMP) grants[18] to create a UK Forestry Standard compliant 10-year woodland management plan; and (iii) Woodland Tree Health (WTH) grants[19] to help restock or improve woodland after tree health problems.
- Higher Tier grants[20]: these are area-specific and are only available for the most environmentally important sites, commons and woodlands requiring complex management (such as the creation of habitats and habitat restoration). Applicants are generally able to claim against the full national list of management options and agreements can be longer than five years in term, with up to 10 or 20 year agreements available in some cases. Grants in respect of common land or shared grazing can only be made for 10 years.
- Mid Tier grants and Wildlife Offers[21]: these grants are available as either five-year agreements or for specific, one-off capital works. Mid Tier supports a wide range of management options, whereas Wildlife Offers focus on providing habitats for farm wildlife and is non-competitive.
- Standalone Capital Grants[22] and Higher Tier Capital Grants[23]: these are standalone capital grants which provide 3-year agreements to achieve specific environmental benefits and can also be used to support and complement the other funding offers. The Higher Tier Capital Grants provide additional environmental benefits without the need for a Higher Tier grant.
- Implementation Plan (PA1) and Feasibility Study (PA2) grants[24]: these provide funding for more complex agreements and projects, and applicants must first discuss with Natural England before applying.

Updates under ELMs

Initial improvements were announced by the Rural Payments Agency in January 2023.[25] These included:

- increasing the duration of agreements that started on or after 5 January 2023, so that agreement holders will have three years to complete the capital works in their agreement;
- moving some Higher Tier items into Mid Tier to promote wider engagement with biodiversity friendly options; and
- increasing the maximum amount allowable for a single application by £20,000 (to £80,000), with a limit of £20,000 for certain groups such as boundaries, trees and orchards and water quality.

In their latest Agricultural Transition Plan update,[26] Defra announced further changes, including:

- increasing payment rates by 10% on average (compared to 2023);
- offering premium payment rates for 21 high priority actions, such as raising water levels in peat soils, creating nesting plots for lapwing, and connecting river and floodplain habitats;
- adding 50 new actions to ELMs;
- offering a streamlined, single application process for both CS Mid Tier and the Sustainable Farming Incentive Scheme (see section 3.3), whereby farmers can select a combination of actions from both schemes that work for them; and
- aiming to take forward twice the number of CS Higher Tier agreements by the end of 2025 to 2026.

Implications for rewilding

Rewilders may also be interested to note that CS also provides Higher Tier and Mid Tier grants that support applicants in converting their farm or land to organic status and maintaining it as such.

There is also a Facilitation Fund[27] which supports individuals who act as facilitators to bring together groups of applicants across multiple land holdings, in order to aid them in delivering CS priorities on a larger landscape scale (at least 500 hectares of land is required in usual circumstances) with an agreement lasting for three years. Facilitation funding is available, for example, to farmers, foresters and land managers working together across multiple holdings (requiring at least four entirely or mostly adjoining holdings managed by different people) to improve the natural environment.

Additionally, Wildlife Offers may be particularly relevant to those wishing to improve wildlife on a farm (e.g., providing winter food for seed-eating birds or providing sources of nectar and pollen for insect pollinators). Each option has its own payment rate and different options are on offer depending on whether the applicant's land is arable, lowland grazing, upland or mixed farming land. Agreements are for fixed terms of five years.

PRACTICAL EXAMPLE

An owner of arable land in England intends to put part of a field to seed with flower rich grass and build earth ridges. His aim is to provide a habitat and foraging sites for invertebrates, including wild pollinators such as bees, butterflies and hoverflies as well as some farmland birds. He intends to stop applying fertilisers and pesticides to the area and hopes to encourage insects which feed on crop pests.

He may be eligible to apply for a Mid Tier grant for flower rich margins and plots and a mid-tier grant for beetle banks. However, to meet the requirements of the grant for flower rich margins and plots the seed mix must contain a minimum of four grass species and 10 wildflower species. The grass component must not exceed 90% of the total seed mix by weight and no individual flower species must exceed 25% of the total wildflower species component by weight.

To benefit from a grant for beetle banks, the bank must be between 3m to 5m wide and at least 0.4m high with dense grass cover. In addition, the application process is competitive so the application will be scored and ranked in line with the available budget. Applications will be prioritised based on environmental benefits.

3.3 The Sustainable Farming Incentive Scheme (SFI)

The aim of the SFI scheme is to assist farmers in managing their land in a way which improves food production, and which is more environmentally sustainable. Applications for the Sustainable Farming Incentive ("**SFI**") scheme opened in June 2022 via the online Rural Payments Service.

Applicants for an SFI agreement had to be eligible for the now-closed Basic Payment Scheme (BPS) in 2022 or 2023.[28] See the *Rewilding in England & Wales: Subsidies under CAP* briefing note and government guidance.[29]

Given the new scope and support available for rewilding in the Landscape Recovery and Countryside Stewardship Schemes discussed above, we do not anticipate that many rewilders will seek subsidy support via the SFI scheme and therefore this note does not address the topic further.

4. THE SUSTAINABLE FARMING SCHEME (SFS) IN WALES

4.1 Legislative background

As agricultural policy is a devolved matter, Part 7 of the AA 2020 provides powers for Welsh ministers to determine agricultural policy for Wales and the majority of the provisions discussed above do not apply to Wales.

The Agriculture (Wales) Act 2023 (the "**AWA 2023**") received Royal Assent in August 2023.[30] The AWA 2023 establishes the principle of Sustainable Land Management as the new framework for agricultural policy in Wales and sets out four objectives (the "**SLM Objectives**").[31] These objectives are intended to guide future policy making with regards to climate change policy, the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.[32]

Following the AWA 2023, the Welsh Government has proposed replacing the BPS and Glastir schemes (see *Rewilding in England & Wales: Subsidies under CAP* briefing note) with a single Sustainable Farming Scheme ("**SFS**"). Among other things, the SFS aims to support the agricultural industry in Wales and reward farmers for actions that align with the SLM Objectives.

After completing a co-design project and issuing their response in July 2023,[33] the Welsh Government launched a final SFS consultation that closed on 7 March 2024, and the scheme is set to start in 2025.[34] **The remainder of this briefing note is based on the final consultation document and thus may be subject to change.**[35]

4.2 Proposed scheme structure and implementation timeline (subject to consultation)

The four proposed SLM Objectives, which underpin the SFS, are to:[36]

- produce food and other goods in a sustainable manner;
- mitigate and adapt to climate change;
- maintain and enhance the resilience of ecosystems and the benefits they provide; and
- conserve and enhance the countryside and cultural resources and promote public access to and engagement with them, and to sustain the Welsh language and promote and facilitate its use.

The consultation proposes that the SFS will sit above existing minimum legal requirements and aim to encourage and support farmers to go further. A three-layer structure is proposed:[37]

- Universal Actions, which are mandatory for all SFS participants (see section 4.3);
- Optional Actions,[38] which offer participants the choice to undertake the actions most important and appropriate to their particular circumstances; and
- Collaborative Actions, which offer participants the chance to work with others and deliver projects on a larger scale.

Each Action will be associated with a payment value and linked to a set of SLM 'outcomes', such as reduced greenhouse gas emissions, protected natural landscapes and high animal health and welfare. The Universal Actions will launch in 2025, with the Optional and Collaborative Actions to be introduced in phases between 2025 and 2029 (the "**Transition Period**").[39]

Contracts awarded under the SFS are proposed to last for one calendar year, from 1 January to 31 December.[40]

4.3 Eligibility, scheme rules, and Universal Actions

Eligibility

The following eligibility criteria have been proposed for the Universal and Optional Layers. Applicants:[41]

- must be a farmer undertaking agricultural or ancillary activities on agricultural land situated in Wales;
- must have at least three hectares of eligible agricultural land in Wales or be able to demonstrate more than 550 standard labour hours; and
- must have exclusive occupation and management control of the land for at least 10 months of the calendar year.

"Agricultural or ancillary activities" are as defined in the AWA 2023, and broadly cover the production, rearing, or growing of agricultural products, including harvesting, milking, breeding animals and keeping animals for farming purposes, as well as taking action on agricultural land to create and manage habitats, nature conservation, mitigate climate change or maintain and enhance the resilience of ecosystems.[42]

"Management control" would cover Owner Occupiers, tenants with a Farm Business Tenancy, a full Agricultural Holdings Act 1986 tenancy, or an unwritten tenancy with the same level of control. Where there are multiple farmers with a share farming agreement, only one farmer can claim SFS.[43]

Scheme rules

Applicants must also comply with a set of scheme rules, and failure to do so may affect all or part of their SFS payments. The proposed rules include to:[44]

- ensure that the Universal Actions applicable to the farm are maintained for the full calendar year;
- have a minimum of 10% tree cover by the end of 2029;
- manage a minimum of 10% of the farm as habitat for the benefit of biodiversity alongside food production; and
- adhere to the Universal Code for Habitats to prevent further loss or damage to semi-natural habitats.

These requirements will be enforced by a Level 1 Habitat Baseline Review upon the farm's entry to the SFS, as well as ongoing on-the-spot-checks via physical inspection and remote observation. A more in-depth Level 2 review will also support the Optional Layer.[45]

Universal Actions and Baseline Payment

A set of 17 Universal Actions has been proposed,[46] some of which may support rewilding activities. For example:

- maintaining all existing semi-natural habitats (e.g. enclosed wetland, enclosed semi-natural dry grassland, dense bracken etc);
- creating temporary habitats on improved land (e.g. fallow crop margins, wildlife cover crops) in order to meet the 10% habitat scheme rule requirement (see above); and
- creating new woodland and agroforestry.

Farmers which carry out the Universal Actions relevant to their farms will receive a Universal Baseline Payment, calculated based on the area of the farm. Certain Universal Actions (i.e. woodland maintenance, woodland creation, and habitat maintenance) are proposed to have a different payment rate per hectare than the other Universal Actions.[47]

4.4 Transitional arrangements

It is proposed that during the Transition Period of 2025 to 2029, farmers can choose between the SFS or BPS. However, once they have chosen to participate in the SFS, they will not be able to revert back to the BPS. In addition, BPS payments will be tapered by 20% each year from 2025, eventually reaching 0% in 2029 when the transition to SFS is complete.[48]

During the Transition Period, farmers who received BPS payments in 2024 and decide to join the SFS will receive an additional Stability Payment to cover any shortfall between the Universal Baseline Payment and the 'notional' BPS payment they would have received that year.[49]

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of April 2024.

ENDNOTES

1. A Green Future: Our 25-year plan to improve the natural environment: https://assets.publishing.service.gov.uk/media/65fd6fd0a6c0f70011ef9263/CD1.H_HM_Government_A_Green_Future_Our_25_Year_Plan_to_Improve_the_Environment.pdf
2. Environmental Improvement Plan 2023: First revision of the 25 Year Environment Plan: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1168372/environmental-improvement-plan-2023.pdf
3. Agriculture Act 2020: https://www.legislation.gov.uk/ukpga/2020/21/contents
4. See press release from Defra, dated 11 November 2020: https://www.gov.uk/government/news/landmark-agriculture-bill-becomes-law
5. Environment Act 2021: https://www.legislation.gov.uk/ukpga/2021/30/contents
6. See: https://www.gov.uk/government/news/new-legally-binding-environment-targets-set-out
7. Nature Recovery Green Paper: Protected Sites and Species: https://www.gov.uk/government/consultations/nature-recovery-green-paper
8. Environmental Improvement Plan 2023: https://www.gov.uk/government/publications/environmental-improvement-plan
9. Policy statement, updated 31 January 2023: https://www.gov.uk/government/publications/environmental-principles-policy-statement/draft-environmental-principles-policy-statement.
10. Environmental Land Management update: how government will pay for land-based environment and climate goods and services, updated 21 June 2023 (the "Environmental Land Management update"): https://www.gov.uk/government/publications/environmental-land-management-update-how-government-will-pay-for-land-based-

environment-and-climate-goods-and-services/environmental-land-management-elm-update-how-government-will-pay-for-land-based-environment-and-climate-goods-and-services

11. Environmental Land Management update
12. See: https://www.gov.uk/government/publications/landscape-recovery-more-information-on-how-the-scheme-will-work/landscape-recovery-round-2#what-we-learned-from-round-one
13. Applicant guidance for Landscape Recovery: round 2: https://www.gov.uk/government/publications/apply-for-landscape-recovery-funding/applicant-guidance-for-landscape-recovery-round-two
14. *Ibid*.
15. Full announcement and list of projects: https://defrafarming.blog.gov.uk/2023/11/29/round-two-projects/
16. Current guidance on the Countryside Stewardship scheme, published on 5 January 2023 and last updated on 4 January 2024: https://www.gov.uk/guidance/countryside-stewardship-get-funding-to-protect-and-improve-the-land-you-manage
17. Protection and Infrastructure grants guidance: https://www.gov.uk/government/publications/protection-and-infrastructure-grants-2024
18. Woodland Management Plan (WMP) grants guidance: https://www.gov.uk/government/publications/woodland-management-plan-grants-2024
19. Woodland Tree Health (WTH) grants guidance: https://www.gov.uk/government/publications/woodland-tree-health-grants-2024
20. Higher Tier grants guidance: https://www.gov.uk/government/publications/higher-tier-grants-2023-countryside-stewardship
21. Mid Tier grants and Wildlife Offers guidance: https://www.gov.uk/government/publications/mid-tier-grants-and-wildlife-offers-2023-countryside-stewardship
22. Capital Grants guidance: https://www.gov.uk/government/publications/capital-grants-2024/applicants-guide-capital-grants-2024--2
23. Higher Tier Capital Grants guidance: https://www.gov.uk/government/publications/higher-tier-capital-grants-2024
24. Implementation Plan (PA1) and Feasibility Study (PA2) grants guidance: https://www.gov.uk/government/publications/implementation-plan-pa1-and-feasibility-study-pa2-application-form
25. Rural Payments Agency blog ‘Capital Grants 2023’, dated 5 January 2023: https://ruralpayments.blog.gov.uk/2023/01/05/capital-grants-2023/

    Environmental Land Management update

26. Agricultural Transition Plan update January 2024, updated 19 March 2024: https://www.gov.uk/government/publications/agricultural-transition-plan-2021-to-2024/agricultural-transition-plan-update-january-2024
27. Facilitation Fund guidance: https://www.gov.uk/government/publications/facilitation-fund-2024-countryside-stewardship
28. SFI scheme website: https://farming.campaign.gov.uk/?utm_campaign=SFI&utm_medium=web&utm_source=Farmblog&utm_content=farmingblog_all%20
29. Sustainable Farming Incentive guidance: https://www.gov.uk/government/collections/sustainable-farming-incentive-guidance
30. Agriculture (Wales) Act 2023: https://www.legislation.gov.uk/asc/2023/4/contents/enacted
31. Section 1, AWA 2023
32. *Ibid*.
33. Sustainable Farming Scheme Outline Proposals: co-design response: https://www.gov.wales/sustainable-farming-scheme-outline-proposals-co-design-response-html
34. All government updates and materials relating to the SFS can be found here: https://www.gov.wales/sustainable-farming-scheme-guide
35. Sustainable Farming Scheme consultation document (the “SFS Dec 2023 Consultation Document”), dated 14 December 2023: https://www.gov.wales/sites/default/files/consultations/2023-12/sustainable-farming-scheme-consultation-document_0.pdf
36. Section 1, AWA 2023
37. SFS Dec 2023 Consultation Document, p.13.
38. A proposed list of Optional Actions can be found in Annex 2 of the SFS Dec 2023 Consultation Document.
39. SFS Dec 2023 Consultation Document, pp.13 and 69 to 70.
40. SFS Dec 2023 Consultation Document, pp.54 and 60.
41. SFS Dec 2023 Consultation Document, p.58.
42. *Ibid*.
43. *Ibid*.
44. SFS Dec 2023 Consultation Document, p.60.
45. SFS Dec 2023 Consultation Document, pp.59 and 61.
46. SFS Dec 2023 Consultation Document, p.15.
47. SFS Dec 2023 Consultation Document, p.64.
48. SFS Dec 2023 Consultation Document, p.72.
49. SFS Dec 2023 Consultation Document, p.67.

TAX

CORE TOPICS:

- Impact of rewilding on various tax regimes

KEY TAKEAWAYS:

- Rewilding may have a positive or negative effect on how property and income are taxed.
- Certain inheritance tax reliefs depend on land being considered farmland.
- Other inheritance tax reliefs depend on land being used for profit.
- Special rules apply to woodland which differ from farm – and other types of land.

TABLE OF CONTENTS

Summary

1. Inheritance tax: Agricultural Property Relief
2. Inheritance tax: Business Property Relief
3. Income and corporation tax
4. Conservation covenants and other legal mechanisms to protect wild land
5. Taxation of grants and subsidies
6. Taxation of woodland

SUMMARY

This note provides a high-level overview of some of the tax considerations that may be relevant for rewilding activities on land in England and Wales[1] and is more relevant to land previously used for farming.

Is rewilding "farming" and does it matter?

For tax purposes, it can be beneficial for land to be considered "farmland" given the favourable inheritance tax treatment (where Agricultural Property Relief or Business Property Relief applies) and certain capital gains tax reliefs that are available (in the form of Business Asset Disposal Relief and rollover relief). Typically, case law and legislation have focused on "farming" as including some form of tillage of soil and use of land by livestock held for its produce or for food (e.g., cows, sheep, goats, and pigs). While "farming" has historically included more diverse activities such as bread-making, homespun cloth and home-brewed ale, whether rewilding will qualify for various farming tax reliefs will depend on the fact and degree of the activity. It is therefore advisable to seek tailored legal and accounting advice before embarking on a rewilding project.

Will I lose inheritance tax relief if I rewild my land?

Agricultural Property Relief ("**APR**") is only available in respect of the agricultural value of agricultural property which has been used for agricultural purposes throughout the required period (and where certain ownership conditions are met). Where an entitlement to Agricultural Property Relief exists, a rewilding project will have to be considered carefully as it could result in the loss of such relief (e.g., where land previously used to grow crops is left to allow natural tree growth and so is no longer considered to be used for agricultural purposes, this may result in it no longer being eligible for Agricultural Property Relief). On the other hand, where no previous entitlement to Agricultural Property Relief exists, rewilding could attract such relief (e.g., where land previously only used to generate income by selling rights to shoot game is rewilded by introducing low intensity grazing by cattle and pigs that are also sold for meat production).

Business Property Relief ("**BPR**") may be available where Agricultural Property Relief (APR) does not apply. For example, where rewilding involves a trading business carried on for the purposes of gain such as conducting eco-tourism, corporate and education retreats alongside rewilding.

What if I only rewild some of my land, will that still impact inheritance tax?

Often tax reliefs operate on parts of land and per farm buildings so that a combination of reliefs can be used. It may be that rewilding is undertaken on a small portion of land in respect of which Agricultural Property Relief is lost because traditional farming is replaced by eco-tourism, but Business Property Relief is available in connection with the eco-tourism business. Or it could be that Agricultural Property Relief is given up to a certain value of an asset, with Business Property Relief available on the rest. It is important to note that Business Property Relief is not available where the business consists of "*making or holding investments*". So pure holiday lettings will not benefit from this relief. However, where the business consists of a mix of trading and investment activities, full relief from inheritance tax may be available provided that overall, the business is predominantly a trading business.

Is rewilding a "trade" for tax purposes?

This will again be a question of fact, considering whether there are any 'badges' of trade present, i.e., whether the activity of rewilding displays the characteristics that case law has considered over time to be indicative of a trading business. For example: Is there an activity undertaken with a view to generating profit? What is the number of transactions and how has the sale been carried out? Income taxed as farm trading income, rather than as investment income (e.g., from holiday cottage rentals) can be advantageous because it benefits from various capital gains tax reliefs and averaging relief, and will support a claim for Business Property Relief for inheritance tax purposes.

How is woodland taxed?

As a general principle, the commercial use of woodland is outside the scope of income tax and corporation tax, provided the woodlands are managed on a 'commercial basis' and with a view to the realisation of profits. This will need to be supported by evidence, e.g., maintaining a woodland management plan and keeping accounts and records showing historic details of any profits and losses made. The exemption from income and corporation tax does not cover income/profits received from the sale of Christmas trees or short rotation coppice such as willow and poplar, or receipts from felled timber (where the land is predominantly occupied for farming). Similarly, rental income from letting woodlands (e.g., for picnics or camp sites) is taxable.

Like other forms of land, woodland is subject to inheritance tax. However, various reliefs from inheritance tax may be available, including Woodlands Relief, Business Property Relief and Heritage Relief (see Sections 1 (*Inheritance Tax: Agricultural Property Relief*), 2 (*Inheritance Tax: Business Property Relief*), and 6 (*Taxation of Woodland*) respectively below).

Does rewilding impact the tax treatment of my woodland?

The aim of rewilding is to push woodlands in a more natural, wilder direction without being focused on any particular end points (for example, which percentage of canopy cover should be native broadleaves). Rather, nature is left to unfold in its own way. Where the woodland is occupied for the production and sale of timber, this would likely mean stopping the 'commercial' activity that attracted the exemptions from income, corporation, and capital gains tax. To the extent the woodland is used for other purposes (e.g., for commercial shooting or fishing where there is a river or lake or it is rented out), income or corporation tax may be chargeable on the profits.

However, certain inheritance tax reliefs are likely to be available where woodland is rewilded. For example, small areas of woodland such as shelter belts which are "ancillary" to the farming business can qualify for Agricultural Property Relief, and Heritage Relief may be available for woodlands considered to be of outstanding scenic, historic or scientific interest (see Section 6 (*Taxation of Woodland*) below).

What should I consider?

Those considering rewilding will need to analyse their current tax position (from both an income/capital perspective and for estate planning purposes) and seek to understand the potential impact of rewilding on that status. The various relationships between the tax reliefs available is complex, and accounting will be key for evidential purposes. Detailed advice should be taken prior to undertaking rewilding to ensure the tax implications are understood.

These issues are considered in more detail below, including some practical examples in the inset boxes in Sections 1 (Inheritance Tax: Agricultural Property Relief), 2 (Inheritance Tax: Business Property Relief) and 3 (Income and Corporation Tax) below.

1. INHERITANCE TAX: AGRICULTURAL PROPERTY RELIEF

Inheritance tax ("**IHT**") is a charge levied on the estate (the property, money and possessions) of an individual on their death. IHT can also apply to any gift or sale (at less than market value) of property that belonged to the deceased, which the deceased gave or sold within seven years of their death. The present tax rate is at 40% of the value of the deceased's estate, typically above a nil rate band of £325,000 (depending on certain circumstances).

Agricultural Property Relief is a key form of IHT relief in the context of farming. For the purposes of calculating IHT, APR reduces the "*agricultural value*" of transfers of "*agricultural property*" which has been occupied or owned by the transferor (i.e. the deceased person) for the required period for "*purposes of agriculture*"[2]. So long as the agricultural value of the relevant property is not exceeded by its open market value (see paragraph 1.7 below), APR will generally allow agricultural property to be passed on free of IHT if 100% relief is given (in certain circumstances, broadly where the property is subject to a tenancy that commenced before 1 September 1995, only 50% relief will be given). Some company shares are eligible for APR if their value (i) gave the deceased control of the company at the time of death; and (ii) comes from agricultural property that forms part of the company's assets.[3]

Even when it comes to traditional farming, the availability of APR is not straightforward and HMRC will readily challenge claims to rely on it. Working out if it would apply in the context of rewilding farmland is even more complex, given certain rewilding activities (such as reintroducing plants without any associated "tillage" of the soil) are unlikely to qualify as "agriculture" for tax purposes, whereas others (such as removing internal fencing and introducing low-intensity grazing animals) likely would.

So, what is "agricultural property"?

Under the Inheritance Tax Act 1984 (the "**IHTA 1984**"), "*agricultural property*" is broadly defined as "*agricultural land or pasture*" which includes[4]:

- woodland and any building used in connection with the intensive rearing of livestock or fish[5] provided that the woodland or building is occupied with (but ancillary to) the "*agricultural*" land or pasture; and
- cottages, farmhouses or any other farm buildings (and the land occupied with them) of a "*character appropriate*" to agricultural land or pasture.

First you have to establish that the property being transferred (or inherited) contains agricultural land or pasture that is occupied for agricultural purposes. Only once that is done can you then consider whether any farmhouses, farm cottages or buildings qualify for APR[6]. While "agriculture" is not defined in the IHTA 1984 (though s.115(4) provides that the breeding and rearing of horses on a stud farm and the grazing of horses in connection with those activities is taken to be agriculture and any buildings used in connection with those activities to be farm buildings), guidance on what does and does not constitute "*agricultural*" land and pasture can be taken from other legislation (see the Agricultural Holdings Act 1986), relevant case law and HMRC's manual. It is generally accepted that "agriculture" for these purposes includes: horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes[7].

To benefit from APR, agricultural property either needs to have been occupied for agricultural purposes by the transferor (i.e., the deceased) for the two years preceding the date of the transfer (i.e., the gift or inheritance)[8]; or owned by the transferor but occupied by any person for continuous agricultural purposes throughout the preceding seven years[9]. In certain circumstances, the seven-year ownership rule may be relaxed (where there has been a replacement of agricultural property, an acquisition on death, or where there have been successive transfers).

So, what is "agricultural value"?

Relief is only given based on the "*agricultural value*" of agricultural property. Section 115(3) IHTA 1984 provides that the value of the agricultural property is the value that it would have if it were subject to a perpetual covenant (a sort of permanent agreement) prohibiting its use otherwise than as agricultural property. In some cases, the agricultural value of the property may be less than the open market value. This might be because of development value or mineral value, or because the farm is in a desirable part of the country and suitable for commuters such that wealthy non-farmers would be prepared to pay a premium for it.

This fictitious, perpetual covenant provides some indication of how value may be impacted by conservation covenants[10], to the extent the property subject to the conservation covenant may benefit from APR. For example, a property might only be given APR on 70% of its open market value, on the basis that a "lifestyle" purchaser would be deterred from buying the property because it could only be used for agricultural purposes[11]. This could become less of a concern where the agricultural property is subject to a conservation covenant, because a conservation covenant might in practice reduce the open market value of a property (e.g., where it prevents a purchaser from developing the land and using

it in ways that would breach the covenant). This may bring the agricultural value of the property more in line with its open market value, such that APR is available on a higher percentage of the open market value.

So, when is a farmhouse of a "character appropriate" to agricultural land or pasture?

As noted above, farmhouses may benefit from APR provided they meet the required conditions of having been "*occupied for the purposes of agriculture*" and are of a "*character appropriate*" to agricultural land or pasture. There is no statutory definition of a "farmhouse", but case law provides that this is the place from which the farming operations are conducted by the farmer.[12] When considering whether the farmhouse is of a "*character appropriate*", a key factor is that the agricultural land or pasture to which the farmhouse relates is the dominant feature, and the farmhouse must be occupied "*with*" that land. There is currently some doubt as to whether this requires both (i) common ownership of the farmhouse and the agricultural land and (ii) common occupation, or whether just one or the other is sufficient. If common occupation is a requirement, then land let out to a third party (e.g., to a neighbouring farmer or conservation group for rewilding) would not count. To the extent rewilding activities impact the classification of the land to which the farmhouse relates (e.g. such that it is no longer considered to be ancillary to "*agricultural land*"), this could also impact whether the farmhouse is considered to be both occupied for the purposes of agriculture and of a character appropriate to agricultural land or pasture.

APR may be available to tenanted land, provided that the tenant occupied the land for the purposes of agriculture and the ownership period criteria has been met. However, allowing a tenant to "rewild" the land may impact IHT planning, depending on whether the rewilding activity would be categorised as "agricultural". However, business property relief from IHT may be available on certain assets where the tenant and landowner enter into a business or partnership together (e.g., for eco-tourism purposes), provided the partnership is predominantly a "trading" business (i.e., not a property investment business) (see further below).

Whether rewilding land is considered agricultural property which has been used for agricultural purposes will be fact specific. For example, certain pre-existing agri-environmental schemes such as the Farm Woodland Premium Scheme administered by DEFRA have the very purpose of taking land out of agriculture and as such, HMRC's guidance is clear that APR cannot be available. Conversely, a number of 'habitat' schemes[13] which were introduced in England and Wales to help to preserve nature and maintain a habitat for wild animals and birds, which tend to ban agricultural production for long periods, were expressly included as qualifying for APR under s.124C of the IHTA 1984.

EXAMPLE 1

Landowner A is a farmer-landowner seeking to rewild a large part of his property currently used for grazing and crop growing, which is near a local river prone to flooding, as part of a habitat restoration project relating to historic woodlands in the area. Landowner A lives in the farmhouse on his land, which has three broiler houses used for the intensive rearing of chickens, and farm buildings for the cattle he keeps in order to sell the calves.

Landowner A materially reduces his herd of cattle and stops using most of his land previously designated for grazing and crop growing in order to allow natural tree growth, supported where necessary by native tree planting. The impact of his rewilding activity on the APR available when Landowner A passes away may be material. Farm buildings only qualify for APR where they are ancillary to the larger agricultural operation carried out on the land.

The nature of the rewilding undertaken by Landowner A is likely to mean that a substantial part of the property will no longer be classed as "agricultural land". The result may be that the broiler houses do not qualify for APR as they are no longer *ancillary* to land being farmed for agricultural purposes (e.g., if the land on which the cattle now graze is small and the broiler houses dominate the part of the land they occupy)[14].

Similarly, the farmhouse may cease to qualify for APR. APR would likely be available on the land on which the cattle continue to graze[15], and any farm buildings on that land (to the extent they have continued to be "character appropriate"). The non-agricultural woodland might not be considered "ancillary" to the minor portion of agricultural land for the small herd of cattle, even if part of it forms a shelter belt for the agricultural land from flooding risks related to the local river.

However, the woodland may qualify for woodlands relief (providing certain conditions are met, e.g., Landowner A has been beneficially entitled to the woodland for at least five years prior to death). Prior to undertaking the rewilding project, Landowner A might wish to consider the impact on APR as well as the availability of Business Property Relief (see further below).

EXAMPLE 2

Landowner B is a farmer-landowner seeking to rewild farming land by promoting natural regeneration and habitat restoration whilst maintaining its active use as grazing land. She might do so by eliminating her use of high-density, high-intensity grazing by sheep in favour of using fewer, large, low-intensity grazing cattle.

She might additionally fence the perimeter of her farming property while removing all interior fencing to allow low intensity grazing to occur over a larger land area, thereby encouraging the natural regeneration of previously heavily grazed land. Such rewilding activity will complement the use of her farming property as grazing land, as the changes merely make that grazing more sustainable, and such use is likely to fall under the IHTA 1984 definition of agricultural property, with the farmer in occupation of the land for a clear agricultural purpose so that on her death, an inheritor is likely to be able to benefit from APR.

Land which was not previously being used for "*agricultural purposes*" and so did not benefit from APR might start to qualify for APR as a result of rewilding activities. For example, an estate which has been predominantly used for game shooting and fishing, with cottages rented out for leisure holidays. It is unlikely the land on this estate would have qualified for APR, including the cottages on it. However, the landowner decides to undertake a rewilding project including wildflower seeding in selected areas to restore a diversity of habitats to the landscape and introducing low numbers of grazing animals, including cattle, to mimic natural grazing which the landowner combines with meat production from the cattle and pigs. It may be that these activities make the land eligible for APR on the basis of it now being "*agricultural land*". While agriculture is accepted as including the use of land as grazing land, it seems that this would still require some form of agricultural activity to be linked to the grazing – i.e., food production from cattle. While cattle are more obviously considered as farming livestock, arguably this should also apply to animals such as deer, pigs and wild boar to the extent they are also kept primarily for food production, given the statutory definition of "livestock" includes "*any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land*"[16].

2. INHERITANCE TAX: BUSINESS PROPERTY RELIEF

In circumstances where APR does not apply, or where it is not sufficient to relieve the IHT burden on the full open market value of farmland property, an alternative form of IHT relief which may apply is Business Property Relief. Unlike APR, BPR is applicable in respect of the full value of any asset which qualifies as "*relevant business property*" and will reduce the full value of such an asset by 100% or 50% for the purposes of calculating IHT[17]. The amount of relief applicable will depend on the category of relevant business property into which the asset falls.

Typically, a farmer operating their farming business as a sole trader will be able to claim 100% BPR on assets / property relating to that farming business (or at least the remaining value following any applicable APR relief). Where the business is carried on by a partnership in which the transferor was a partner or by a company that the transferor controlled, 50% relief applies to land, buildings, machinery, or plant owned by the transferor and used "*wholly or mainly*" for the purpose of that business. The property must have been owned by the transferor for more than two years (subject to certain relaxations to these rules for transfers between spouses on death, quick succession, and replacement property).

The business must be carried on for gain[18] and be a trading business. It must not be wholly or mainly an investment[19] or a dealing business and so cannot be a business dealing in land or buildings or making or holding investments (e.g., BPR may not be available in respect of furnished holiday lets or residential let properties held as investment property within an agricultural estate but see paragraph 2.5 below).

BPR will usually be available for farming business property such as the business banking accounts, farm machinery/ plant, farmland, woodland (see Section 6 (*Taxation of Woodland*) below), farm buildings and stock as these are clearly used in the trade of farming. Certain assets within a qualifying business may be deemed to be an "excepted asset"[20] if they are not used in the business and not required for future business use.

The questions in this context are therefore whether "rewilding" can be categorised as "farming" trade and thereby qualify for BPR, or if not, whether it can still qualify as a "trade" not prohibited from benefitting from BPR? The answers depend on the factual circumstances. See Section 3 (*Income and Corporation Tax*) below for discussion on whether rewilding activities can be considered farming trade for income tax purposes. If so, they are likely to be eligible for BPR for IHT purposes.

EXAMPLE 1 CONTINUED

Landowner A's rewilding land is unlikely to qualify for BPR as it is likely to be viewed by HMRC as no longer used "wholly or mainly" for the purposes of the farming business as the use of the land is not connected with his farming "trade", being the cattle and chickens.

In addition, Landowner A is not undertaking any activities in respect of the rewilding land with a view to profit (he has not sought to generate an income from the rewilding land in respect of eco-tourism, for example) and so the rewilding land is unlikely to be viewed by HMRC as having been used for a business at all.

However, Landowner A may be able to claim BPR for his three broiler houses in which he rears the chickens, as well as the farm buildings for cattle, to the extent that APR was not available. However, Landowner A is unlikely to be able to claim BPR in respect of the farmhouse as his home because it's unlikely to be viewed as having been used wholly or mainly for the purposes of the business (although BPR may be available for any specific rooms used as an office to run the farm).

As mentioned above, for property to qualify for BPR the underlying business must not be wholly or mainly an investment or dealing business. This point was considered in *HMRC v Brander*[21] (known as the Balfour case), where the application of BPR was assessed in the context of a farming business which consisted of a mix of both trading and investment activities, and which is a helpful reference for rewilding activities, in particular where traditional farming income is supplemented by income from eco-tourism in connection with rewilding land.

In that case Lord Balfour owned the estate in a partnership with his nephew and the estate comprised a mixture of trading and investment activities: two in-hand farms, three let farms, 26 let cottages, two let commercial units and various woodlands, parks and sporting rights. The Executors claimed that the estate was managed as one composite business, but HMRC disagreed, contending that (among other things), as the estate included a large number of rental properties, the partnership was not undertaking a business activity and was instead "*making or holding investments*". However, the Upper Tax Tribunal determined that the estate was run as one whole composite business, with Lord Balfour's involvement across the estate as a whole being an important factor in supporting that conclusion with the result that BPR was available in full against the value of the estate.

The case was helpful in clarifying that where a landowner has diversified their sources of income, various factors are considered when determining if BPR is available across an estate as a whole and not just the property involved in trading activities. Consideration needs to be given to the turnover, profit, time spent on elements within the business and the capital value of the elements and how the accounts are drawn up. This is now known as the "Balfour Principle" and when successfully applied, would mean a whole business benefits from BPR and not only the property involved in the trading activities.[22]

A key element of this and other cases is the landowner's active performance of some activity on the land, in particular where land is let under a grazing agreement. Following the decision in *McCall and Keenan v HMRC*,[23] where grazing agreements are in place, it is important to show that the profit from the land is not simply the rent from letting the land to a third party, but that the owner is still actively farming the land (e.g., by being permitted to graze their own animals alongside the licensee's animals, or by growing grass as a crop which the licensee's animals are permitted to graze on).

EXAMPLE 2 CONTINUED

Landowner B carries out rewilding activities to reduce the impact of historic heavy-grazing and encourage natural regeneration. She may also do this as part of a general push to diversify her use of her farming property.

To compensate for lower farming profits or even initial losses following the elimination of her large sheep herd as part of rewilding efforts, she may decide to engage in various investment activities to generate non-agricultural profits, e.g., using some areas of her farmland for luxury glamping where guests can enjoy the rewilding land amidst the grazing animals.

She also lets out a portion of her land on a grazing licence to a conservation group, with her only responsibility being the maintenance of the boundary of the let land.

Landowner B will need to ensure that a balance is maintained between farming activity and other more diverse means of creating profit from farmland, to prevent inadvertently tipping the balance from farming trade profits to a focus on investment income generated from holiday accommodation. Unless Landowner B undertakes some activity on the land leased to the conservation group, it will likely be excluded from BPR on the basis of generating investment income from the rent. In such circumstances, the availability of APR could be at risk if the diversification results in the land no longer being occupied for "agricultural purposes". Finally, BPR may not be available if her business is viewed as investment activity rather than trading.

3. INCOME AND CORPORATION TAX

For the purposes of both income tax and corporation tax, farming is treated as a trade[24] whether or not the land is managed on a commercial basis and with a view to making a profit (although, if a trade is not carried out with a view to being commercially profitable, this may restrict the availability of loss relief – see further below). Farming is defined in both the Income Tax Act 2007 ("**ITA 07**") and the Corporation Tax Act 2010 ("**CTA 10**") as being "*the occupation of land wholly or mainly for the purposes of husbandry but excluding any market gardening*"[25]. Although for the purposes of defining farming for tax purposes no restriction is put on where the land is situated, the automatic treatment of farming as a trade is restricted to land farmed within the United Kingdom.

There are certain advantages of income being categorised as farming trade income (e.g., in respect of reliefs from capital gains tax (which are outside the scope of this note) and BPR for IHT purposes as explained above). There is therefore a tax advantage where rewilding land can be categorised as an asset occupied and used for the purposes of the farming business.

In connection with rewilding, it is important for farmers to prove the "badges" (i.e. the features) of trade and ensure business plans support this. According to case law, badges of trade include, for example: whether there is a profit seeking motive; the nature of the asset (i.e., is the asset of such a type or amount that it can only be turned to advantage by a sale); and the number of transactions (because evidence of repeated transactions will often support "trade"). It may be that rewilding complements farming in constituting part of a "trade", for example, where rewilding encourages grazing of moors, managing and expanding wetland and retaining winter stubble, and is accompanied by an on-farm butchery and an outdoor rare breed pig and beef business.

As set out above, to be a farmer, a person must satisfy two tests: the person must be in occupation of land (other than market garden land) and the purpose of the occupation must be mainly for husbandry. Case law provides that "farming" for Income Tax purposes generally means *"the carrying on of activities appropriate to land recognisable as farmland"*[26], so that it will generally need to consist of the kinds of agricultural activities that we have discussed above, certainly including *"the raising of [livestock], the cultivation of land and the growing of crops"*[27]. The ITA 07 does not include a complete definition of husbandry but provides that it includes hop growing, breeding and rearing horses, and grazing horses in connection with those activities and the cultivation of short rotation coppice, which is defined as *"a perennial crop of tree species planted at high density, the stems of which are harvested above ground level at intervals of less than 10 years"*.[28]

The ordinary language definition of "husbandry", i.e., the cultivation of crops and breeding of animals, has been extended by the courts, which may be helpful when considering the treatment of rewilding for income tax purposes. In *CIR v Cavan Central Co-operative Agricultural and Dairy Society Ltd*[29] diverse activities such as bread-making, homespun cloth and home-brewed ale were considered examples of husbandry, if carried out by a "husbandman" (i.e., the farmer who tills the soil). The court thought that the origin of husbandry suggested a liberal interpretation that would include some activity on the land whose manifest object was the benefit of mankind and the support of life.

When planning a rewilding project then, you might like to consider selling traditional farming produce such as milk, meat and wool for human consumption and use, as part of the project. Where rewilded plants and grasses are consumed by the animals used for human consumption, this will also be helpful, and may support an argument that income from land let to a third party to operate a rewilding project through a grazing agreement does not fall within the investment exception explained above.

EXAMPLE 3

Landowner A has two plots of farmland. They let one plot to a rewilding organisation on a short-term basis, so that it can operate rewilding activities on this land. The rewilding organisation undertakes non-agricultural rewilding activities such as peatland and wetland restoration, which are unlikely to constitute farming (or any kind of trade at all) for income tax purposes. Any rental payments which Landowner A receives from this rewilding tenancy will likely be chargeable as property income instead of farming income. However, if Landowner A continues to directly work on the other plot of land wholly or mainly for crop farming, they will both be in occupation of that plot of land and their income in respect of that trade will likely be chargeable as farming income.

As can be seen with BPR, for certain tax relief purposes, it is important that a farmer's income generated from the land is specifically recognised as "trading" income and not as "property" income. Income generated from rewilding activities (e.g., in connection with nature tourism) will not necessarily count as farming trade income. This may impact on certain reliefs bespoke to farming trade, such as the one-trade rule which generally allows all farming activities by a particular person in the UK to be treated as one trade, allowing profits and losses from multiple farms to be aggregated for tax purposes.

In addition, farmers' profit averaging relief allows a farmer to choose to average farming income profits over either two consecutive tax years[30] or five consecutive tax years.[31] Averaging is not just available to farmers. Other qualifying trades include the intensive rearing (in the UK) of livestock or fish on a commercial basis for the production of food for human consumption.[32] Averaging can also be applied to trades of market gardening[33]. Averaging only applies to profits chargeable to income tax, so companies liable to corporation tax cannot use these provisions.[34]

Trade loss relief against general income is usually not available where a farmer incurred losses before capital allowances in each of the five preceding tax years[35] (often referred to as the "hobby farming" restriction). However, relief is not denied where the farmer can show that during the period when loss was sustained, the trade was being carried on, on a commercial basis and with a view to the realisation of profit. So, for example, initial farming trade losses due to rewilding efforts will not necessarily act as a barrier to the availability of trade loss relief to a farmer minded to rewild, nor will they definitively cause rewilding or sustainable farming activity to be considered "hobby farming".[36]

Equally, the "hobby farming" restriction does not apply where the loss-making farm is part of, and ancillary to, a larger trading undertaking.[37] For example, a farmer previously used her substantial high-intensity grazing herd of sheep for meat and accounted for them as trading stock. She decides to undertake a major rewilding project by: reducing the size of the sheep herd and using them instead for wool; offering craft classes in spinning, weaving and rug-making using the wool; and building a thriving eco-tourism business including camping and luxury glamping. It may be that if the business of keeping the sheep for their wool is loss-making, trade loss relief is still available on the basis that keeping the sheep for wool is ancillary to the eco-tourism business. The farmer may also account for the retained sheep on the "herd basis", enabling the farmer to treat the herd in most circumstances as a capital asset in accordance with the herd basis rules, such that the cost of maintaining the herd can be charged against tax and any profit on disposal of the herd will be tax-free.[38]

4. CONSERVATION COVENANTS AND OTHER LEGAL MECHANISMS TO PROTECT WILD LAND

Conservation covenants and other legal mechanisms to protect wild land are voluntary arrangements between a landowner and a "responsible body" (e.g., a conservation or rewilding charity) to manage the landowner's land for conservation purposes. In relation to conservation covenants created pursuant to the Environment Act 2021, the government has indicated that it will issue specific guidance in relation to possible tax implications, though it has noted that it "*cannot say conservation covenants will be tax neutral*".[39] See the briefing note titled *Rewilding in England & Wales: Conservation covenants and legal protection of wild land* for more detailed information on conservation covenants and other legal mechanisms to protect wild land.

5. TAXATION OF GRANTS AND SUBSIDIES

The purpose for which a grant or subsidy is paid will usually determine whether it is a trading receipt or a capital receipt. For example, in the case of *Clyde Higgs v Wrightson (Inspector of Taxes)*[40] receipt of a ploughing grant was held to be a trading receipt, whereas in *Watson v Samson Brothers*[41] payments for rehabilitation of flood-damaged land were held to be capital receipts.

Guidance on the taxation of payments to be made under the new ELM scheme has not yet been produced. However, the UK Government has indicated that schemes funded by public subsidies will be eligible for favourable tax.

In contrast, the Landscape Recovery Scheme will involve bespoke agreements and so it is not clear how payments under those agreements might be taxed. It is similarly unclear how payments under the Local Nature Recovery scheme will be taxed.

The government has said that it intends to introduce legislation to provide clarity that the Lump Sum Exit Scheme payments will be treated as capital in nature and will be subject to capital gains tax, or corporation tax in the case of incorporated entities (and that the existing capital gains reliefs will be available where the qualifying criteria are met).

6. TAXATION OF WOODLAND

What is 'commercial woodland' for income and corporation tax purposes?

The 'commercial occupation' of woodlands in the United Kingdom is not a trade or part of a trade for any income tax purpose and is exempt from income tax,[42] and the same is true of corporation tax.[43] Profits or losses from the commercial occupation of woodlands in the United Kingdom are therefore ignored for both income tax and corporation tax purposes.[44] Woodlands are treated as 'commercial' if they are: (a) managed on a commercial basis; and (b) with a view to the realisation of profits. It is not necessary to show profits immediately, given the long-term nature of forestry can make that difficult, but it is important to be able to demonstrate to HMRC the commerciality of the occupation of the woodland in other ways, for example through a woodland management plan, accounts and records. Where the woodland is part of a farm, separate accounts and records should be kept demonstrating the commerciality of the woodland independent from other estate or farm activities (to avoid the activities on the woodland being taxable as farming trade or other income).

There is no clear definition of what constitutes 'commercial occupation' for this purpose and so how HMRC will view an activity depends on the facts; and it is easier to identify what is not covered, than what is covered. The exemption of commercial woodland from income tax and corporation tax does not cover: (a) the sale of short rotation coppice such as willow and poplar; (b) receipts from felled timber where the land is predominantly occupied for farming; and (c) specialist Christmas tree farms, which are nurseries within the statutory definition of market gardening[45] and treated as a trade. Although where Christmas trees are a crop on an ordinary farm, the income from their sale may be included in the farm profits.[46]

What about capital gains tax?

Broadly, the sale of timber or standing timber from commercial woodlands is exempt from income tax, corporation tax and capital gains tax.[47] The sale of the land, however, is not exempt from capital gains tax. Where the woodland is sold as a whole, an apportionment is made between the value of the standing trees, timber and underwood and the value of the land (note that this apportionment is not applicable to agricultural or amenity[48] woodland).

Rollover Relief[49] may be available to woodlands where these are managed by the occupier on a commercial basis and with a view to the realisation of profits. Such relief enables any capital gains tax due on a disposal of the woodland to be deferred when new assets are acquired costing the same as, or more than, the amount realised on disposal of the woodland. Any tax is then postponed until disposal of the new asset. Holdover Relief[50] may also be available in respect of woodlands and applies to gifts. Such relief defers any capital gains tax payable so that none is due when the woodland is gifted to another person, although the recipient will then be liable to meet the cost of any capital gains tax due, when they sell or dispose of the woodland.

What Inheritance Tax Reliefs are available for woodland?

As discussed in Section 1 (*Inheritance Tax: Agricultural Property Relief*), the IHTA 1984 provides for woodland to be eligible for APR where it is "ancillary" to the agricultural land subject to the relief. Ancillary uses include tree nurseries, shelter belts or, for example, short rotation coppice carried out for woodchips, firewood, and fencing.

Commercial woodland can also qualify for BPR, provided the conditions discussed in Section 2 (*Inheritance Tax: Business Property Relief*) above are met (as regards being a business carried on for gain and being owned and occupied for at least two years prior to the transfer). Woods managed as a business could include, for example, those used for

commercial shooting, fishing, residential letting or commercial timber harvesting. As discussed in Section 3 (*Income and Corporation Tax*), the badges of trade will be useful in demonstrating there is a trading business in respect of the woodland. It is also helpful to be able to demonstrate profitability, and given it is not always possible to make a profit in years where, for example, regeneration and planting take place, regular budget reviews and business/management plans are invaluable (for example using the Forestry Commission's Woodland Management Plan template).

Woodland relief

Woodlands relief[51] provides deferral relief so that a charge does not arise until the trees or underwood growing on the land is sold in the future (provided the woodlands are not occupied or ancillary to agricultural land). This form of relief is therefore less valuable than APR and BPR as the tax is deferred and not exempt, in addition to which the relief only applies to the trees and not the land.

Heritage relief

If the woodland is in an area of "*outstanding scenic, historic or scientific interest*", then it may qualify for conditional exemption from IHT[52] (available to both ancient woodland and new plantations). On a transfer of value, it may be exempted on the condition that the new owner agrees to certain 'undertakings' to maintain the woodland and grant access to the public.

Thank you to Clifford Chance LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of July 2022.

ENDNOTES

1. The tax laws referred to in this note apply to land in England and Wales.
2. The Inheritance Tax Act 1984, Part V, Chapter II, s.116 - 117
3. The Inheritance Tax Act 1984, Part V, Chapter II, s.269
4. The Inheritance Tax Act 1984, Part V, Chapter II, s.115(2)
5. Given its ordinary meaning, "intensive rearing of livestock" involves keeping livestock at high stocking densities on a large scale designed to maximise production while minimising costs.
6. Starke v IRC [1995] STC 689
7. The Agricultural Holdings Act 1986, Part VII, s.96(1). In Assessor for Tayside Region v Reedways Ltd (1982, unreported), emphasis was placed on the importance of "tilling, sowing or cultivation" of the soil for land; as the reeds were a natural growth, and all the taxpayer did was cut the reeds down for thatching, this meant the reed beds could not be agricultural due to the absence of any tillage of the soil. In Hemens (Valuation Officer) v Whitsbury Farm and Stud Ltd [1988] A.C. 601, buildings used for the purposes of a stud farm for racehorses were not "agricultural buildings" (which were exempt from rating under the Rating Act 1971 s.1(3)) as animals were not considered "livestock" unless they were kept for the production of food, wool or for use in farming the land. Assessor for Lothian Region v Rolawn Ltd [1989] RVR 146 found that the growing and selling of high-quality turf was an agricultural purpose and the lands were entitled to be derated (note that the land used to grow the turf in this case was cultivated in the same way as that used for many edible crops and most of the machinery involved was also commonly used for agricultural purposes).
8. The Inheritance Tax Act 1984, Part V, Chapter II, s.117(a).

9. As above, s.117(b).
10. See briefing note *Rewilding in England & Wales: Conservation covenants and legal protection of wild land* for discussion on conservation covenants.
11. See Lloyds TSB Banking v IRC [2005] W.T.L.R. 1535.
12. CIR v John Whiteford and Son [1962] TR 157, Rosser v IRC [2003] WTLR 1057.
13. E.g., the Habitat (former Set-Aside Land) Regulations 1994 SI1994/1292, the Habitat (Water Fringe) Regulations SI1994/1291 and the Habitat (Salt-Marsh) Regulations SI1994/1293
14. See Richard Williams (personal representative of Mary Philomena Williams (deceased)) v HMRC [2005] (SpC500) where a claim for APR failed in respect of three broiler houses used for the intensive rearing of chickens because the broiler houses dominated that part of the land they occupied, and there was no evidence of wider agricultural activities on the remainder of the land.
15. Note that the test is whether the land is "agricultural land" and there is no obvious answer as to how many cattle or other livestock would need to be grazing on the land for it to qualify as such.
16. Section 96, the Agricultural Holdings Act 1986.
17. The Inheritance Tax Act 1984, Part V, Chapter I, s.103 - 114
18. The Inheritance Tax Act 1984, Part V, Chapter I, s.103(3)
19. As above, s.105(3).
20. The Inheritance Tax Act 1984, Part V, Chapter I, s.112
21. [2010] UKUT 300 (TCC)
22. See also Vigne (HMRC v The Personal Representative of Maureen Vigne (Deceased) [2018] UKUT 0357), Graham (The Personal Representatives of Grace Joyce Graham (deceased) v HMRC [2018] UKFTT 306 (TC))
23. [2009] NICA 12
24. Income Tax (Trading and Other Income) Act 2005, s.9, the Income Tax Act 2007, s.996(1), Corporation Tax Act 2009, s.36, and Corporation Tax Act 2010 s.1125
25. The Income Tax Act 2007, Part 16, Chapter I, s.996(1), Corporation Tax Act 2010, Part 24, Chapter I, s1125
26. Lowe (Inspector of Taxes) v J. W. Ashmore Ltd [1970] 3 W.L.R. 998 [553]
27. As above
28. The Income Tax Act 2007, s.996
29. (1917) 12 TC 1
30. The Income Tax (Trading and Other Income) Act 2005, Part 2, Chapter 16, s.222(1).
31. As above, s.222A(1).
32. Income Tax (Trading and Other Income) Act 2005, s221(2)(b)
33. Income Tax (Trading and Other Income) Act 2005, s221(2)(a)
34. Income Tax (Trading and Other Income) Act 2005, s221(1))
35. The Income Tax Act 2007, s.67.
36. See BIM85615 – Farming losses: test of commerciality
37. The Income Tax Act 2007, s.67(3)(a)
38. Income Tax (Trading and Other Income) Act 2005, Chapter 8 of Part 2. Note that although the herd basis rules are expressed in terms of farmers, they apply to any person who keeps or has kept a production herd for the purposes of a trade, whether or not the trade is farming (section 111(3))
39. Department for Environment, Food & Rural Affairs, "Consultation outcome: summary of responses and government response" (https://www.gov.uk/government/consultations/conservation-covenants/outcome/summary-of-responses-and-government-response), 23 July 2019, last accessed 18 March 2022.
40. [1944] 1 All ER 488
41. [1959] 38 TC 346
42. Income Tax (Trading and Other Income) Act 2005, Section 11, Part 2
43. Corporation Tax Act 2009, section 37, Part 3
44. Corporation Tax Act 2009, Sections 208 and 980 and Income Tax (Trading and Other Income) Act 2005, section 687 and 768
45. Income and Taxes Act 2007, section 996(5), Jaggers v Ellis [1997] 71 TC 164
46. BIM55205
47. BIM55205, Income Tax (Trading and Other Income) Act 2005, Section 25, Corporation Tax Act 2009, Section 46 and the Taxation of Chargeable Gains Act 1992, Section 250
48. There is no set definition of amenity woodland but broadly speaking it means woodland not used for commercial timber but for other purposes e.g. leisure and recreational activities.
49. Taxation of Chargeable Gains Act 1992, section 152
50. Taxation of Chargeable Gains Act 1992, section 165
51. Inheritance Tax Act 1984, section 125
52. Inheritance Tax Act 1984, section 31

CONSERVATION BURDENS AND LEGAL PROTECTION

CORE TOPICS:

- Conservation burdens: their use for rewilding and how they work.
- Private law protection of rewilding land.

KEY TAKEAWAYS:

- Without legal protection, the restoration of nature achieved by rewilding actions is at risk of being lost.
- There is a statutory regime of conservation burdens which provides one option for protecting wild land into the future.
- Conservation burdens could be used to restrict how land is managed and used under current and future owners.
- The Lifescape Project has developed a private law mechanism which offers an alternative robust solution for long term protection of wild land.

TABLE OF CONTENTS

1. Introduction

2. Conservation burdens and conservation bodies

2.1. What are conservation burdens and why are these special?

2.2. Limitations of conservation burdens

2.3. What is a conservation body and how are these created?

2.4. How could conservation burdens be used to assist Landowners A, B and C?

3. Private law legal mechanism

4. Further information

1. INTRODUCTION

Summary

This note discusses legal mechanisms that may allow rewilders to ensure that the ecological gains made on their land are protected in the future even when ownership of the land changes hands. In particular, this note looks at conservation burdens in Scotland and a novel private law legal mechanism that has been developed by the Lifescape Project with the aim of overcoming some of the shortfalls of other mechanisms (referred to in this note as the "**Legal Mechanism**").

Practical scenarios

There are many different circumstances in which rewilders may wish to consider applying either conservation burdens or the Legal Mechanism to their land. We have set out below three examples of projects which may benefit from such protection.

REWILDING PROJECT A

Landowner A is the heritable proprietor (freeholder) of land they purchased 10 years ago, which includes a lochan. As part of their rewilding efforts Landowner A wants to protect the freshwater ecosystem in the lochan. They have therefore stopped practices such as dredging so those species can recover and flourish.

Landowner A is thinking of selling his heritable (freehold) interest or passing it on to his children. However he wants to ensure that these practices continue to be restricted in order to protect freshwater ecosystem in the long term.

REWILDING PROJECT B

Landowner B inherited the heritable (freehold) interest in some land five years ago. This land has become the habitat of native bird species and Landowner B sees community engagement with the land as a very important aspect of their ownership. Landowner B actively encourages the community to enter their land for birdwatching and invites the community to participate in discussions and activities relating to the management of the land. Landowner B would like to demonstrate to the community that they are committed to this level of engagement and not managing the land for their own benefit.

Landowner B wants to pass the land to their children, but wants to make sure that the land continues to be managed for rewilding, in perpetuity. Landowner B is also committed to ensuring that the current level of community engagement is continued in the future and that the community understands that this commitment has been made.

REWILDING PROJECT C

Landowner C is the heritable owner (freeholder) of land which they have been rewilding for 20 years.

Landowner C wishes to enter into a number of long-term contracts to sell the ecosystem services provided by their land. In particular, Landowner C has identified a local insurance company who would benefit greatly from the ongoing reforestation and peatland restoration on their site. The insurer can see that the reduction in the risk of flooding downstream of the site is likely to reduce its future liabilities during flooding events and is willing to pay for the benefit becoming a reality.

The two parties are negotiating an agreement for the provision of these ecosystem services to the insurer. The insurer has asked Landowner C to evidence their intention to continue to manage their land in a way which is consistent with rewilding principles and which will continue to reduce flood risk into the future for the 50 year duration of the contract. The insurer is also concerned to ensure such management will continue should the ownership of the land change during the next 50 years.

Landowner C is investigating whether there are legal arrangements which could be put in place to satisfy the insurer's requirements.

2. CONSERVATION BURDENS AND CONSERVATION BODIES

2.1 What are conservation burdens and why are these special?

As with land elsewhere in the UK, land use in Scotland can be restricted and governed through the use of title burdens (covenants). These are rights of, or obligations on, a landowner that are recorded in the title of the property (which is a public document).

In general terms, in order to enforce a real burden the enforcing party would need to show both title and interest[1]. Title comes through the ownership of either an interest in the property of concern, or other property in the immediate vicinity. Interest, i.e., the legitimate interest that is protected by the terms of the burden, would be determined on the specific facts and circumstances. In extreme cases where enforcement was required this may require court proceedings in the form of an action for specific implementation or (where seeking to prevent an act) interdict (the Scottish equivalent of injunction).

From a rewilding perspective, a general title burden could comprise a restriction in the title to a piece of land to prevent it from being built upon or developed or used for a specific purpose. However, for a general burden, the enforcer of this right would need to own land in the immediate vicinity to give them title to enforce. This limits the use of straightforward title burdens in a rewilding context, as often a rewilder will not own other land in the vicinity.

However, there is one set of burdens which does not require the enforcer to own other property. These are known as conservation burdens.[2] In short, conservation burdens may (provided the necessary criteria are met – see below) allow restrictions on the use of specific areas of land to be put in place, such as prohibiting actions to be taken which would reverse rewilding with such restrictions binding future owners of the land.

Conservation burdens are **personal rights**, not linked to specific property ownership. This means they are more flexible and can benefit specified organisations which have been designated as a conservation body (see below). As such these burdens would seem ideal candidates as a mechanism for the protection and enforcement of rewilding objectives (subject to the qualifications noted below).

The key characteristics of conservation burdens[3] are that:

- they can be granted by any land owner, but can only be granted in favour of a conservation body or the Scottish Ministers;
- if someone other than a conservation body or the Scottish Ministers wishes to create a conservation burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden;
- they are to be granted for the purpose of preserving, among other things, the **special characteristics** of land derived from the flora, fauna or general appearance of the land;
- as it is not tied to a specific property, the right to enforce the burden can be assigned to subsequent conservation bodies (or the Scottish Ministers)[4], which means that there is flexibility around the actual beneficiary;
- the burden is extinguished if the body which benefits from it ceases to be a conservation body; and
- they must be for the benefit of the public (see comments in the following section).

As these forms of burdens are relatively new there is as yet little guidance as to what specific purposes (or indeed special characteristics) could be covered – this would need to be considered depending on the circumstances of each case. Currently most conservation burdens have been used in the context of the cultural or built environment, rather than "natural" heritage. However, this emphasis may change as rewilding and other similar projects come to the fore. It is a natural progression to foresee burdens which could restrict the use of large areas of land for any commercial purpose and/or prevent certain actions being taken such as draining or exploitation of peat bogs.

Conservation burdens would therefore seem to be an appropriate mechanism to enforce land use restrictions to secure the legacy of a rewilding project. It is worth noting that, as a burden on land, a conservation burden (and indeed any other title burden) applies to any interest deriving from that land e.g. any tenant under a lease should be bound by its terms.

2.2 Limitations of conservation burdens

A conservation burden is a legal burden and is subject to the same requirements for effective enforcement as those noted above (i.e., title and interest – see above). Title would be provided by conservation body status and interest from the substance of the burden itself. This must be either an obligation to do something, or (more likely in the case of rewilding) an obligation not to do something e.g. a prohibition on farming, shooting or development of land.

Real burdens can be relatively inflexible and rigid and will be given a restrictive interpretation, meaning they need to be very clearly drafted.[5] In a rewilding context this would be especially relevant to obligations restricting the use of a property as these are especially strictly enforced. This may cause further challenges as circumstances applicable to a rewilding project may evolve over time as land is left to rewild. Appropriate expert input is recommended to ensure that the burden is as precise as possible to accommodate this evolution and reduce the risk of successful future challenge.

Conservation burdens must also be drafted to operate for the benefit of the public. Unfortunately, this requirement is not clarified in the Land Reform Scotland Act 2003 Act, but it should be assumed that provision would need to be made expressly in the real burden for some public benefit e.g. a statement that the purpose of the Burden is to facilitate the Right to Roam, or the protection of a specific natural feature, so that it could be demonstrated that that the public benefit test was met.

As with any land burden, conservation burdens are open to challenge. Primarily this would be if the burden was not clearly drafted, as there is a presumption that any burden would be applied in the least burdensome manner as it impacts on the right of an owner to deal with their property. Rewilders should note that conservation burdens for the protection of the natural environment are new and as yet untested with most existing conservation burdens relating to the built, rather than the natural environment.

The Lands Tribunal for Scotland has the power to vary or discharge **any** land obligations, including conservation burdens, on the application of a property owner whose title is affected. A consideration of all of the factors which must be taken into account in any decision of the Lands Tribunal is outwith the scope of this briefing note. However, Section 100 of the Title Conditions (Scotland) Act sets out the specific factors which must be considered by the Lands Tribunal in making their decision. These are not applied in any particular order with the exception that the Tribunal has stated that it will look first at the **purpose** or intention behind the original imposition of the title condition – in this case rewilding.

If at any point the land was incorporated into plans for a major infrastructure project or development seen as key to an area's development in the eyes of a Local Planning Authority, the land could be subject to a compulsory purchase order, which would effectively wipe out the conservation burden on completion of the acquisition. There are ways to challenge such a decision, including judicial review (which are outwith the scope of this briefing note). However the prospects of successful claim in these circumstances are often low.

It is also worth understanding that as conservation burdens are created under public law, it is possible that in the future the regime established by the Title Conditions (Scotland) Act 2003 may be altered by government, potentially strengthening or weakening its impact.

Conservation burdens can be amended, either by agreement of the parties or by the Lands Tribunal for any reason on the application of an affected party. This means that the future strength and enforcement of a conservation burden can never be absolutely certain.

2.3 What is a conservation body and how are these created?

The Scottish Ministers may by order[6], prescribe such a body as they think fit to be a conservation body. However, these powers may only be exercised in relation to a body if the object, or function, of the body (or, as the case may be, one of its objects or functions) is to preserve, or protect, certain characteristics of land for the benefit of the public, including a special characteristic derived from the flora, fauna or general appearance of the land.

To date (2022) only around 30 conservation bodies have been constituted. A full list can be found at: The Title Conditions (Scotland) Act 2003 (conservation bodies) Order 2003 (legislation.gov.uk)

The Lifescape Project is hoping shortly to join this list as it is currently well advanced in the process of registering as a designated conservation body. Lifescape would be open to discussions with interested landowners to facilitate the creation of conservation burdens (the benefit of which would be held by Lifescape) to protect current and future rewilding projects by this mechanism.

2.4 How could conservation burdens be used to assist Landowners A, B and C?

The landowners in Rewilding Projects A, B and C may want to consider whether conservation burdens could be useful and applicable to them.

REWILDING PROJECT A

Landowner A owns the heritable interest (freehold) of their land and wants to work with a charity which is registered as a conservation body to protect their land against dredging should they sell it in the future.

They are already working on a written agreement (Deed of conservation burdens) which is to be signed by the parties and registered against Landowner A's title to the land. This Deed will contain obligations specifying that the Landowner (including future landowners following any sale) is prohibited from practising (and permitting) dredging in the lochan in order that the freshwater ecosystem is preserved. This protection/ preservation of nature would in turn be for the benefit of the public. Once in place the obligations in the Deed of conservation burdens would be enforceable by the conservation body against any future owners. Landowner A should be careful in their choice of partner body to ensure that they have similar aims and are appropriately funded to allow them to take any necessary action to enforce the conservation burdens placed on their land in the future.

REWILDING PROJECT B

- Landowner B owns the heritable interest (freehold) of her land and wants to protect wild habitats and demonstrate an ongoing commitment to community engagement, including when their interest in the land is passed onto their children.
- Relevant conservation burdens may be an attractive option to help preserve any special characteristics of this habitat, for example by prohibiting future development and the erection of buildings or wind turbines etc and obliging the **owners** to support the wild habitat. A carefully prepared and properly constituted Deed of conservation burdens registered against Landowner B's title to the land will ensure some of Landowner B's aims are enforceable through a recognised legal process (whilst maintaining the ownership of the land for the benefit of her children). As part of this process Landowner B will need to ensure that the charity they are working with isa conservation body (a status that a charity could apply for if its main function is conservation work).
- However, Landowner B's second aim of demonstrating commitment to community engagement is less tangible as it relates more to the relationship of the owner of the land with the local community (and not the land itself). This is not something which could achieved using a conservation burden.

Conservation burdens are designed to facilitate enforcement of a landowner's obligations, rather than any active management role for the partner conservation body itself (albeit rights to step-in and make good breaches may also be enforceable). If a more active involvement of the conservation body is what Landowner B is looking for, she may be better to consider the Legal Mechanism (see below).

REWILDING PROJECT C

Landowner C owns the heritable interest (freehold) of his land and is investigating how different legal mechanisms could be used to demonstrate to buyers of ecosystem services that the land will be managed in a way that continues to provide such ecosystem services for the duration of the relevant contracts, including through any change in ownership of the land. Conservation burdens may be an option that Landowner C could consider, if a suitable conservation body partner could be found.

In order to achieve this, Landowner C would need to enter into a signed written agreement (Deed of conservation burdens), with an organisation which is registered as a conservation body. This Deed would be registered against Landowner C's title to the land and would oblige Landowner C (and any future owners of the land) to undertake certain specific actions to manage the land in a way which would ensure the continued provision of the relevant ecosystem services.

To ensure that these actions qualify as conservation burdens, and are enforceable as such, they would need to be presented as actions to preserve the special characteristics of the land derived from its flora and fauna or the general appearance of the land and as being for the benefit of the public. As there is an element of commerciality involved here (i.e. the insurer has a commercial interest and may be paying for that) this would need to be very carefully considered in the drafting of the Deed, so that it is clear that the burdens the Deed is seeking to enforce are for the ultimate benefit of the public.

Expert advice at the outset as to how the ecosystem services could be provided and managed would be vital here as the conservation burden mechanism is relatively inflexible and does not lend itself well to changing circumstances. If these are to be a concern, again the Legal Mechanism may be a more suitable option for Landowner C.

For this project, Landowner C's obligations will be owed to, and enforced by, the conservation body. The insurer or other buyer of ecosystem services would not have any direct involvement, obligations or rights under the Deed of conservation burdens. However they would be able to take comfort from it as a form of assurance that the land will continue to be managed so as to provide the relevant ecosystem services and that, subject to the terms of the Deed, this will continue should ownership of the land change in the future.

This structure also has the potential to provide payments to the partner charity, by the insurer, which could help to facilitate agreement to these arrangements and enforcement of the terms of the Deed of conservation burdens (should that ever be required). However this would need to be carefully considered so as not to cut across the pre-requisite of the conservation burdens being demonstrably for the public benefit.

In relation to each of these projects, the landowners will also need to consider that agreeing to an onerous conservation burden binding all successive owners could make it more difficult to sell or secure their land and could reduce its value. Further, careful thought will have to be given as to the terms of the conservation burden agreement in light of this mechanism's relative inflexibility and the uncertainty inherent in rewilding projects. It may be impossible to predict the outcome of nature-led processes in Rewilding Projects A and B from the outset, and the actions needed (if any) to support the land or the wildlife on it may change over time. In order to ensure enforcement the partner conservation body must be carefully chosen and, where possible, steps taken to ensure they are adequately funded for the task.

Before deciding if a conservation burden is the best option to achieve their objectives, Landowners A, B and C should consider the risk that any conservation burdens they put in place may be altered or amended in the future by agreement between the parties or by an action brought through the Lands Tribunal, or may even be removed altogether if there is a compulsory purchase of the land. As a relatively untested form of land restriction a conservation burden may also be open to challenge – albeit careful preparation should minimise this possibility. There is also the inherent risk in public law mechanisms that future governments may alter the underlying legislation and that any changes may both weaken or strengthen the applicable regimes.

3. PRIVATE LAW LEGAL MECHANISM

Given the challenges which might face the constitution and enforcement of conservation burdens, Lifescape have been working in conjunction with Clifford Chance LLP in England and Burness Paull LLP in Scotland to develop the Legal Mechanism. This is designed to offer comfort to landowners through the knowledge that a 'guardian charity' (equivalent toa conservation body referred to above) of their choice will have the enforceable legal right to preserve their original conservation vision.

Two different structures are envisaged under the Legal Mechanism, both of which rely on long established principles of heritable (freehold) and leasehold interest in land:

- The first requires the transfer of the heritable (freehold) interest in the land to the guardian charity and the creation of a long-term[7] leasehold interest (175 years) in favour of the landowner. Under this structure, it will be the leasehold interest which is passed on to all future "owners", with the heritable (freehold) interest being retained by the guardian charity, including at the end of the 175-year lease.

- The second envisages the heritable (freehold) interest staying with the landowner with the land leased to the guardian charity and then under-leased back to the landowner. This second structure ensures that the heritable (freehold) interest would remain with the landowner's successor in title with the leasehold, and under-leasehold, interests terminating at the end of the 175-year period.

Both structures should allow the landowner (and the successors to their interest in the land) to retain day to day control, with the guardian charity being able to enforce obligations as to the management of that land.

In either structure, the leasehold agreement between the landowner and the guardian charity will set out obligations for maintaining biodiversity etc., on the relevant land and restricting its future use in accordance with rewilding principles. These terms are fully negotiable between the landowner and the guardian charity and do not need to meet any of the technical criteria required for statutory conservation burdens, albeit they would still be subject to potential challenge through the Scottish Land Tribunal.

The Legal Mechanism (in either form) would be applied to land using precedent legal documents developed by the Lifescape Project and Scottish lawyers.

In much the same way as for conservation burdens, the guardian charity (e.g. the Lifescape Project or another elected charity) would then enforce the agreed obligations and protections over the land in the future, particularly once the land has passed out of the original landowner's hands (i.e. on an open sale or successor in title).

This structure has been designed to provide comfort to donor landowners that their conservation or rewilding legacy would be protected. In particular, when compared to conservation burdens, the proposed mechanism:

- limits controls by the Scottish Government as to who can be the guardian charity;
- limits potential future government interference through the removal of bodies from the list of conservation bodies;
- limits the cancellation of conservation burdens by government action if policy objectives change; and
- may also be able to prescribe more detailed management obligations on the land compared to conservation burdens.

REWILDING PROJECTS A, B AND C

Each of Landowners A, B and C would be able to achieve their objectives by using the Legal Mechanism and appointing a guardian charity such as the Lifescape Project. Compared to entering into a statutory conservation burden, the Legal Mechanism will offer greater freedom to agree (and vary) the terms of the protection without needing to consider whether the agreement meets the technical requirements of the Title Conditions (Scotland) Act 2003. The Legal Mechanism also offers greater certainty of future protection, both because it is harder to amend or overturn in the future but also because the underlying regime cannot be altered by future governments in the same way as statutory conservation burdens.

4. FURTHER INFORMATION

We encourage landowners and rewilders who are interested in these two concepts to reach out to the Lifescape Project team to discuss potential application of either of these two useful approaches. Please contact Elsie Blackshaw-Crosby at the Lifescape Project on elsie.blackshaw@lifescapeproject.org

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of October 2022.

ENDNOTES

1. Title Conditions (Scotland) Act 2003
2. Governed by Part 3 of the Title Conditions (Scotland) Act 2003.
3. Title Conditions (Scotland) Act 2003 (S38).
4. Title Conditions (Scotland) Act 2003 (S39).
5. This is because in Scots Law there is a limited ability to refer to other documents when defining the real burden (i.e., the obligation that falls on the land owner under the terms of the conservation burden), and generally only those documents that are "public" documents (e.g. a statute, or a deed registered in public register) can be referred to.
6. Title Conditions (Scotland) Act 2003 (conservation bodies) Order 2003.
7. Under Scots law the length of a lease is limited by statute to a maximum of 175 years (S67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

DEVELOPING LAND

CORE TOPICS:

- Planning permission and when it is required.
- Exceptions for rewilding projects.
- Environmental Impact Assessments and when they are required.

KEY TAKEAWAYS:

- All land and buildings in Scotland have a dedicated registered use (e.g. agricultural, forestry, commercial etc) and any change in use may require planning permission.
- "**Development**" of land will usually require planning permission.
- Environmental Impact Assessments (EIA) are required for specified activities which are either of a certain scale or are taking place in sensitive areas and may negatively impact the environment.
- There is a separate EIA regime specifically applicable to certain forestry projects.
- Additional specific permissions and licences may be required for any activities impacting water courses.

TABLE OF CONTENTS

1. Introduction
2. Planning permission
2.1 Overview
2.2 When is planning permission generally required?
2.3 Are there any exceptions to planning permissions that may apply to rewilding projects?
3. What does this mean for rewilders?
4. Environmental Impact Assessments
4.1 What are EIAs?
4.2 When are EIAs required?
5. Forest and woodland management
5.1 Felling permissions
6. Management of moorland
7. Activities impacting water
8. Practical scenarios

1. INTRODUCTION

A key purpose of many rewilding projects is to restore the land to a wilder landscape and in doing so, rewilders should be aware of various land use issues, particularly with regards to planning permission and environmental impact assessments. This note aims to provide a high level overview of these issues.

2. PLANNING PERMISSION

2.1 Overview

Planning permission from the relevant planning authority is required for any development of land[1] in Scotland subject to some exceptions. Development of land means the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in use of any buildings or land[2]. A key exception to planning permission are developments which are classified as "permitted developments"[3], as further explained in this note.

Below we have set out planning law considerations that rewilding projects should be considering when rewilding land. Note that, as described below, many planning permission obligations do not apply to land used for agricultural or forestry purposes as they are excluded from the statutory definition of "development".

There are also a few general points that it is worth being aware of when considering what planning permission may be required for rewilding activities:

- All applications for planning permission in Scotland must be in accordance with the relevant planning authority's Local Development Plan ("**LDP**"). LDPs guide decisions on all planning applications and contain the relevant planning authority's planning policies.
- Please be aware that the Scottish Government are currently preparing their Fourth National Planning Framework (the "**NPF4**")[4]. This Framework provides guidance to planning authorities on the requirements for LDPs.
- LDPs allocate sites in a planning authority area to be protected as Green Belt areas. The Draft NPF4 at Policy 8 sets out that development proposal within a green belt should not be supported unless it falls within the listed exceptions. Some rewilding practices may fall within the list of exceptions (the list includes development relating to agriculture, woodland creation, forestry, flood risk management and horticulture). However, this will be dependent upon the relevant planning authority's LDP and the exact rewilding activity that is to take place.
- The Draft NPF4 at Policy 4, sets out the Scottish Government's high expectations of LDPs to protect natural spaces. This may positively impact landowners applying for planning permission as planning authorities' LDPs will have to promote the protection and restoration of natural assets, which rewilding can do.

2.2 When is planning permission generally required?

The basic rules mean that planning permission is required for:

- **Building operations**, which include demolition of buildings, rebuilding, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder.[5]
- **Engineering operations**, which are defined as operations usually undertaken by or under the supervision of an engineer or which would require engineering skills, irrespective of whether an engineer is actually involved.
- **Other operations**, for which there is no definition in the Act. It has been suggested that these are operations of a positive, constructive and identifiable character which result in some physical alteration of the land.[6] In a rewilding context, this could involve e.g., blocking land drains or other activities impacting groundwater levels.
- **Material change in land use**: all land in Scotland has a designated use in accordance with the use classes set out in The Town and Country Planning (Use Classes) (Scotland) Order 1997 (the "**UCO**"). Certain changes of use are declared to be material and therefore require planning permission (e.g. sub-division of a single dwelling house resulting in its house as two or more separate dwellinghouses) whereas some changes are considered not to involve development and, therefore, do not require planning permission (e.g., a change of use within any class specified in the UCO, or the change of use to agricultural or forestry use (see below)).

The practical application of these definitions is considered in the practical scenarios at the end of this note.

2.3 Are there any exceptions to planning permissions that may apply to rewilding projects?

Maintenance and improvement works

Works for the maintenance, improvement or other alternation of any building do not constitute "development" and therefore do not require planning permission to the extent they only affect the interior of the building or do not materially affect the external appearance of a building[7].

Permitted developments – general

There are a number of types of development which are generally "permitted" and therefore do not require specific planning permission.[8] The permitted development rights in relation to agricultural and forestry land (see below) are likely to be some of the most relevant for rewilders. However, depending on exactly what development is being planned, other permitted development rights may also be applicable.

It is important to note that, whilst permitted development generally does not require planning permission, certain categories – including agricultural and forestry buildings and operation, and demolition – still require completion of a prior notification and approval process. This process allows a planning authority to consider whether a proposal requires closer scrutiny before it is approved.

Permitted Developments on agricultural and forestry land – Use Classes 18 and 18C

The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (the "**GPDO**") allows a wide range of developments to proceed on agricultural and forestry land without the need for a full planning application. Some temporary uses of land are also permitted if they run for no more than 28 days in a year.

For the purposes of the GDPO, agricultural land means:

"Land which, before development permitted under Order is carried out, is land in use for agriculture and which is used for the purposes of trade or business and excludes any dwellinghouse or garden or any land used for the purposes of fish farming."[9]

It will be a question of fact as to whether or not the activities of a particular rewilding project fall within this definition of "agricultural land". See below for what is meant by "agriculture".

Under Class 18, permitted agricultural development rights apply to: erecting, extending or altering buildings (other than dwellinghouses); forming, altering or maintaining private roadways, and excavation or engineering operations (although, additional conditions relating to size, nature and location of a development apply and should be referred to in the GDPO).

Permission is only granted for development which is "requisite" for the purposes of agriculture on agricultural land comprised within an agricultural unit. The word "requisite" has caused issues with interpretation in the past and has been understood to mean "reasonably necessary" for agriculture in certain cases.[10]

In addition, Class 18C now allows the conversion of agricultural buildings to a 'flexible commercial use', subject to certain conditions and limitations. 'Flexible commercial use' is defined and includes use for (among others): shops, food and drink, business, storage or distribution and 'non-residential institutions'. This last use category has its own detailed definition which includes activities relating to education and the use as a public hall, among others. The building must have been used solely for agricultural use on or prior to 4 November 2019.

Class 22 gives permitted development status to forestry buildings and operations, similar to those permitted for agricultural purposes by Class 18, and subject to similar conditions.

Exceptions to change of use rules for agriculture and forestry (including afforestation)

As discussed above, certain changes of use are declared to be material and therefore require planning permission. However, an important exception to this rule, and one which may be important for rewilders, is any change of use to agricultural or forestry.

A change from any use to agricultural use, or between agricultural uses does not require planning permission,[11] (although any associated building or other work is considered separately and may require planning permission, unless,of course, it is a permitted development as discussed above). Provided the primary use is agricultural, no planning permission is required for ancillary uses either, such as the sale of farm produce to the public on a farm (although if produce is brought in for sale, the retail element may become a separate use in its own right and, therefore, require planning permission).

Agriculture has a statutory definition that includes:

"horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins or fur, or for the purpose of its use in the farming of land), the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes."[12]

In addition, the purposes of agricultural use have been held to include the grazing of horses[13] and the keeping of allotments[14]. Even where the agricultural activity takes place entirely within a building or buildings (although this is unlikely to be the case on a rewilding project), this still counts as the use of 'land' for the purpose of agriculture and falls within the exemption.[15] Please note that the carrying out of drainage for agriculture or of any other water management project for that purpose (excluding irrigation work) also does not require planning permission.[16]

In terms of forestry, we are given no statutory definition apart from the fact that forestry includes afforestation. Forestry has been held to include "the science and art of forming and cultivating forests, management of growing timber";[17] it has also been held that forestry and use of land as woodlands does not cease when the timber is grown but may well include operations necessary to render the timber marketable or disposable to profitable use as timber.[18]

3. WHAT DOES THIS MEAN FOR REWILDERS?

Much of the land used for rewilding projects will be agricultural or forestry land, and exemptions and permitted rights like those discussed above may help streamline the planning process for some rewilding projects if the activities continue to count as "agriculture" or "forestry". However, these exemptions are not unlimited, and many conditions apply. 'Rewilding' has yet to be defined in statute, which means that there is still a degree of uncertainty as to how rewilding activities, and land used for rewilding projects, fits within current planning laws.

Rewilders may find it helpful to consider the following when determining whether a project requires planning permission, although in each case we would advise seeking guidance from the relevant local planning authority:

- Whilst the definition of 'agricultural' under the Act is wide, rewilding activity will not necessarily fall within its scope. For example, it may be argued that an activity is agricultural in nature, and, although there may be certain linkages, it still might prove difficult to convince a planning authority. Rewilders should also be aware of the definition of 'agricultural land' and the potential for land to fall outwith its scope.
    - In addition, there are rules which apply to specific types of land: for example, agricultural activity on historic battlefields or land within 25m of the metalled portion of a trunk or classified road will require planning permission. The 1997 Act should be closely referred to in each case.
- Rewilders should keep in mind that some rewilding projects may constitute a change of use. A change from any use to agricultural use, or between agricultural uses does not require planning permission; however, if a project materially changes the agricultural site's land use so that all agricultural activity ceases, planning permission may be required.
    - Be aware that the character of the use of land is determined by the primary or main use. Once an ancillary or incidental use is no longer subordinate and linked to the main use, or becomes a main use in its own right, a material change of use may have occurred.
- Permitted development rights are extensive, but there are also limitations. For example, even if a new building is designed for agricultural purposes, it must still meet the various conditions set down in the Act. It is also important to remember that the GDPO introduced a prior notification and approval procedure in respect of certain categories of permitted development, and this includes agricultural and forestry buildings and operations.
- Regarding forestry, without the matter being tested and in the absence of a statutory definition, it is unclear whether planting a forest for its biodiversity and climate benefits, with no intention to fell the trees, constitutes "forestry" for these purposes – however, it is arguable that this still falls within "forming and cultivating forests". To avoid breaching planning law, rewilders should exercise caution. We would advise seeking advice from the local planning authority in each case.

4. ENVIRONMENTAL IMPACT ASSESSMENTS

4.1 What are EIAs?

Environmental Impact Assessments (EIA) are a means of drawing together, in a systematic way, an assessment of the likely significant environmental effects arising from a proposed development.

The aim of EIAs is to protect the environment to ensure that the environmental implications of decision making on development proposals, both positive and negative, are known by the planning authority and are taken into account before decisions are made. EIAs require options to prevent, reduce or mitigate any adverse impacts to be considered and included, to off-set any significant environmental impacts that are identified.

4.2 When are EIAs required?

EIAs under the Town and Country Planning (Environmental Impact Assessment) Scotland Regulations 2017 (the "2017 Regulations")[19]

An EIA is always required by developments covered by Schedule 1 of the 2017 Regulations: this focuses on larger developments, such as airports or motorways and is unlikely to be relevant to rewilding projects.

Developments under Schedule 2 of the 2017 Regulations may require an EIA. An EIA will only be required for development that is likely to have significant effects on the environment by virtue of among other things, its nature, size or location. It is for the planning authority (or, in some cases, the Scottish Ministers) to determine whether an EIA is required. As such, it is possible that some activities undertaken within a rewilding project could be a Schedule 2 development and require an EIA.

This is determined through what is known as a screening opinion. If the authority adopts a screening opinion that the development is likely to have significant effects on the environment, then it becomes what is known as an 'EIA development' and an assessment is required.

The more environmentally sensitive the location, the more likely it is that the effects on the environment will be significant and will require an EIA. Certain designated sites are defined in regulation 2(1) as sensitive areas – for example, sites of special scientific interest (SSSIs) and national parks – and these will require an EIA in most cases of Schedule 2 developments.

We have highlighted below examples of Schedule 2 development that may be relevant to rewilders and which require EIAs in circumstances where they meet various size thresholds or are being undertaken in sensitive areas:

- Water management (excluding irrigation projects);
- Permanent camp sites (that exceed 1 hectare); and
- Reclamation of land from the sea[20].

For more detailed guidance on whether an EIA is required for a specific rewilding project please refer to NatureScot's Environmental Impact Assessment Handbook V5[21] and seek independent legal advice on whether an EIA is required.[22]

EIAs for forestry projects

There is a specific EIA regime applicable to forestry projects which are likely to have significant effects on the environment by virtue of factors such as nature, size or location and which meet various other criteria[23].

Note that if a forestry project requires an EIA this must also be submitted to Scottish Forestry. Please refer to their guidance when making an application[24].

5. FOREST AND WOODLAND MANAGEMENT

5.1 Felling Permissions

The felling of trees in Scotland is regulated through the issuing of Felling Permissions[25]. A Felling Permission provides legal authority to fell the trees covered by the permission and may include conditions for example to ensure trees are replanted.

There are a number of specified circumstances in which Felling Permissions are not required. A full list is available. Of likely most relevance to rewilding, Felling Permissions are not required to cut:

- up to 5 cubic metres of timber in any set calendar quarter (not including native broadleaved woodland and Caledonian Pinewood Inventory sites);
- any trees with a diameter of 10cm or less, as measured at a height of 1.3m;
- trees in orchards, gardens, churchyards, burial grounds and public open spaces;
- to prevent immediate danger to persons or to property;
- dead trees; and
- elm trees affected by Dutch elm disease where the greater part of the crown is dead.

Note that there is not a general exemption permitting the felling of trees affected by ash dieback. This guidance note provides useful information on permissions required for felling trees affected by this disease.

Therefore, for example, if a rewilder intended to fell a monoculture plantation of sitka spruce and replace it with a mix of native broadleaf and conifer trees, a Felling Permission would be required (which may include conditions as to replanting) unless the trees are still young and have trunks of less than 10cm at a height of 1.3 metres above ground level.

6. MANAGEMENT OF MOORLAND

Rewilding projects in Scotland should be aware that 38% of Scotland is moorland. Although it's unlikely to form part of rewilding activities, should any burning of moorland vegetation (including grass and gorse) be planned, it will need to comply with the provisions of the Hill Farming Act 1964.

The Muirburn Code, produced for the Scottish Government by Scotland's Moorland Forum, provides good practice guidance for burning and cutting of vegetation. It also sets out statutory restrictions, and to highlight these the word MUST is used. If these restrictions are not followed, the muirburn activity will be in breach of statute.

7. ACTIVITIES IMPACTING WATER

Any activities which may affect Scotland's water environment (including groundwater) are subject to very detailed regulations which are beyond the scope of this note. If you intend to undertake any activities including e.g. creating new bodies of water or re-naturalising rivers and streams, you may need additional licences and authorisations. Please consult the Scottish Environment Protection Agency (SEPA) website for information.

8. PRACTICAL SCENARIOS

The following hypothetical examples illustrate how planning law may apply in practice.

Landholder A holds mixed land. Some of it is arable (on which she currently grows cereal crops), some of it is pasture (on which she grazes sheep and cattle) and there is a large area of upland heath where the sheep graze in the summer months. Part of the upland heath is a SSSI due to the fact that it is important foraging territory for raptors and a good example of dwarf-shrub heath plant communities. There is also a barn where the sheep are lambed and sheared as well as some sheds where the cattle are housed in winter. Finally, there is a 4 hectare plantation of mature larch.

EXAMPLE 1: EXTENSIVE GRAZING OF EX-ARABLE LAND

Landowner A intends to stop growing cereal on her arable land and allow natural succession, plant a few individual trees and allow extensive grazing with the purpose of creating a 'shifting mosaic of habitats', i.e., it will be a dynamic habitat, neither permanent woodland, scrub nor open. Selective tree planting and grazing will be used to realise that purpose. The fences in the ex-arable land will be removed and gaps broken into hedges so that the ex-arable land can be extensively grazed. A part of it, about 1 hectare, will be fenced off and made into a campsite with yurts in the summer months and a permanently plumbed in toilet block.

In respect to the land, this shifting mosaic may be interpreted as agriculture under the statutory definition, as case law has previously interpreted agriculture to include the grazing of horses and keeping allotments to fall within this definition. If this is correct and given that the land is already being used for agriculture, there would be no change of use of the land and planning permission should not be required.

On the other hand, the use of the land as a campsite would not be interpreted as agricultural activity and may constitute a change of use requiring planning permission. If it is a permanent campsite which exceeds 1 hectare, then an EIA will also be required.

Lastly, in respect of the yurts and toilet block, planning permission will likely be required. Any buildings, structures or works not designed for agricultural purposes are excluded for the purposes of permitted development on agricultural land. This is a long-established principle.

In all these scenarios, it would be prudent for Landholder A to take professional advice and consult her local planning authority.

EXAMPLE 2: GRAZING ANCIENT BREED CATTLE

Landowner A intends to continue to graze the grazing land (together with the ex-arable land), but to have ancient breed cattle. The livestock will graze extensively and become hefted (i.e., become accustomed to living on that particular piece of land without human assistance). The ex-grazing area will be nudged towards developing into woodland pasture - some of the individual trees and clumps of trees will be fenced off to protect them from the stock. The cattle and sheep will be sold for meat.

This use of cattle and sheep may be considered to be agriculture, particularly given that their meat is to be sold, meaning that these activities are unlikely to require planning permission as they will not constitute a change in land use.

As regards the fenced off woodland pasture, the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes is also considered to be agriculture under the Act. Given that this woodland will be planted alongside the sheep and cattle, planning permission is probably not required (provided that the use as woodland continues to be ancillary to the farming aspects).

EXAMPLE 3: REWETTING PEAT AND RE-ESTABLISHING OSIER WILLOW

Landowner A intends to block the land drains on her upland heath with the aim of rewetting the peat. This may cause seasonal heathland ponds to appear (i.e., they will fill up in the winter and then evaporate/drain in the summer).

Landowner A also intends to exclude the sheep from the heath for five years to allow osier willow to re-establish, to be harvested for withies (used in the craft barn). The sheep will be allowed back onto the heath, in smaller numbers once the willow is re-established.

Peatland restoration is a key policy aim of the Scottish Government, and the Town and Country Planning (General Permitted Development and Use Classes) (Scotland) Amendment Order 2020, introduces new Class 20A, specifying permitted development rights for peatland restoration projects. This means that planning permission may not be required (although, the project will still have to go through the prior notification/prior approval process).

As such activities may impact groundwater, additional authorisations or licences may be required from SEPA.

Osier land is within the statutory definition of agriculture, and this would include the five years where they were re-establishing without the presence of sheep and so this would be unlikely to require planning permission.

EXAMPLE 4 : CONSTRUCTION OF BIRD HIDE

Landowner A intends to construct a small, temporary bird hide overlooking the heath, for winter bird watching together with a short, raised wooden walkway to access the hide.

Whether or not the construction of the bird hide requires planning permission probably depends on how long it will be in situ. Class 15 authorises the use of land (other than a building or the curtilage of a building) for any purpose except as a caravan site or an open-air market for a maximum period of 28 days in any calendar year, as well as the erection or placing of moveable structures on the land for the purposes of that use. If the hide will be erected for less than 28 days in one year, it may benefit from this authorisation. However, if it will be in place for more than 28 days in one year, planning permission may be required.

EXAMPLE 5: USE OF BARN FOR YOGA AND CRAFT WORKSHOPS

Landowner A intends to continue to use the barn for lambing, shearing and storing hay, but at other times to let the barn for yoga workshops and craft demonstrations.

The new use Class 18C permits conversion of agricultural and forestry buildings to a commercial use, which means that planning permission may not be required. Detailed rules govern these new permitted development rights, for example, the building must have been used solely for agricultural use on or prior to 4 November 2019, the cumulative floor space of any buildings developed under this class must not exceed 500sqm, and the building to be converted cannot be listed. This list is not exhaustive, and Landholder A should take professional advice and consult her local planning authority.

EXAMPLE 6 : VARIOUS CONSTRUCTIONS TO FACILITATE ACCESS TO CAMPSITE AND BARN

Landowner A intends to demolish the cattle shed and pave over the track from the public road to the barn to create better access to the barn and camp site and use the area of the demolished sheds for parking.

Class 70 of the GDPO grants planning permission for the complete demolition of buildings (subject to certain limitations and conditions). Despite this, unless the demolition is urgent or necessary on the grounds of safety, there is generally a requirement to apply to the planning authority for prior approval (although not to submit a full application). If the demolition works are likely to have significant effects on the environment, then an EIA may also be required.

In terms of the paving work, if it is not either made of a porous material or designed to let water run off to a porous area, planning permission will need to be applied for. You should always check with your council's planning department to see whether you need to apply for planning permission.

EXAMPLE 7: FELLING OF LARCH AND NATURAL SUCCESSION UNDER GRAZING

Landowner A intends to fell the larch and allow natural succession under grazing, to create woodland pasture.

Felling permission may be required unless one of the exemptions listed is available. A forestry EIA may also be required depending on the specific nature of the forest.

As regards the use of land for grazing, this is included within the definition of agriculture, as well as the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes. If this is correct, there would be a change of use of the land from forestry to agriculture. Given that any change of use to agriculture does not require planning permission (see above), planning permission should not be required.

However, as in all these scenarios, it would be prudent for Landowner A to take professional advice and consult her local planning authority.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of November 2022.

ENDNOTES

1. s28 of the Town and Country Planning (Scotland) Act 1997 (“**the 1997 Act**”)
2. s26 the 1997 Act
3. Section 26(2) of the 1997 Act As defined in The Town and Country Planning (General Permitted Development) (Scotland) (Order) 1992. The Scottish Government is currently consulting on permitted development rights Review of permitted development rights - phase 2 consultation - Scottish Government - Citizen Space. The proposals relate to Electric vehicle charging infrastructure, Changes of use in city, town and local centres, and Port development. Town and Country Planning (Use Classes) (Scotland) Order 1997 (“**the Order**”) sets out the uses of land.
4. Scotland 2045: Our Fourth National Planning Framework (www.gov.scot)
5. S 26(4) of the 1997 Act
6. Parkes v Secretary of State for the Environment [1978] 1 WLR
7. s26(2)(a) of the 1997 Act
8. These are set out in The Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (the “**GPDO**”)
9. Sch 1 Part 6, GDPO 1992
10. *R v Secretary of State for the Environment ex parte*
11. s 26(2)(e) of the 1997 Act
12. s 277(1) of the 1997 Act
13. *Sykes v Secretary of State for the Environment* [1980] 42 P
14. *Crowborough Parish Council v Secretary of State for the Environment* [1980] 43 P
15. *North Warwickshire Borough Council v Secretary of State for the Environment* [1985] 50 P&CR 47
16. Sch 2, Classes 18A, 19, 20 and 21, GDPO 1992
17. In *Farleyer Estate v Secretary of State for Scotland* [1992] SCLR 364 the court quoted with approval part of a dictionary entry in *The New Oxford English Dictionary*.
18. Adopted in *Farleyer Estate v Secretary of State for Scotland* [1992] SCLR 364
19. Schedule 1 and 2 of The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 lists when EIAs are required. Further Guidance to these regulations is set out in the Planning Circular 1/2017: Environmental Impact Assessment Regulations.
20. Regulation 4 of The Agriculture, Land Drainage and Irrigation Projects (Environmental Impact Assessment) (Scotland) Regulations 2017
21. Publication 2018 – Environmental Impact Assessment Handbook V5.pdf (nature.scot)
22. Environmental impact assessment—flowchart - Lexis®PSL, practical guida... (lexisnexis.com)
23. Regulation 5(1) of The Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017. See in particular the definition of “EIA forestry project” in section 2. See also the Scottish Government’s Control of Woodland Removal Policy.
24. 678 (forestry.gov.scot)
25. Forestry and Land Management (Scotland) Act 2018 provides the legal basis for the regulation of forestry in Scotland, and includes the requirement to be in possession of a Felling Permission to fell trees. The Forestry (Exemptions) (Scotland) Regulations 2019 and The Felling (Scotland) Regulations 2019 include further detailed provisions about the operations of Felling Permission procedures.

INVASIVE AND PROTECTED PLANTS

CORE TOPICS:

- Obligations to control the spread onto agricultural land of native plants that can be toxic to livestock or interfere with the growing of crops (including ragwort).
- Offences relating to growing certain non-native species in the wild.
- Protected species of plant and the implications for landowners.

KEY TAKEAWAYS:

- You may need to consider whether there is a risk of invasive *native* species – such as ragwort – spreading to agricultural land and if so, which control methods are best aligned with the values of your rewilding project.
- There is no general duty to remove, eradicate, treat or report invasive *non-native* species – such as Japanese knotweed – that are present on land. However, it is an offence to plant or otherwise cause these plants to grow in the wild.
- Certain plants are protected and actions such as picking them or uprooting are unlawful unless you hold a relevant licence.

TABLE OF CONTENTS

1. Responsibilities in relation to "weeds" and Invasive Native Species (INS)

1.1. Responsibilities and liability

1.2. Offences and enforcement action

2. Invasive non-native species of plants (INNS)

2.1. Responsibilities and liabilities (INNS)

2.2. Species control agreements and orders

2.3. The invasive alien species regulations

2.4. Enforcement action

2.5. Defences

3. Protected wild plants

3.1. Offences and enforcement action under the Wildlife and Countryside Act

3.2. Responsibilities and liabilities under the Wildlife and Countryside Act

3.3. Protection of species offences under the Habitats Regulations

1. RESPONSIBILITIES IN RELATION TO "WEEDS" AND INVASIVE NATIVE SPECIES (INS)

1.1 Responsibilities and liability

The Weeds Act controls certain designated plants that may be harmful to grazing livestock or growing crops in Great Britain and are referred to in the law as "injurious weeds". These are:

- spear thistle (*cirsium vulgare*);
- creeping or field thistle (*cirsium arvense*);
- common ragwort (*senecio jacobaea*);
- curled dock (*rumex crispus*); and
- broad-leaved dock (*rumex obtusifolius*).

Occupiers are permitted to have these plants growing on their land; however, they must:

- stop them from spreading onto agricultural land, particularly grazing areas or land used for forage;
- not plant them in the wild outwith their native range; and
- select the most appropriate control method, if required.

Where land is affected by common ragwort, the owner/occupier should make an assessment to determine whether action should be taken to prevent its spread to neighbouring land by establishing the risk posed to grazing animals. Ragwort can be fatal in horses, as well as damaging to other livestock.

The Scottish Government has issued guidance on how to prevent the spread of common ragwort where there is a threat to the health and welfare of animals (the '**Ragwort Guidance**'.[1] It provides comprehensive information on when, where and how to control ragwort, but pays specific attention to the needs of the environment and the countryside as part of the process. In particular, it recognises the important contribution that ragwort makes to biodiversity, balancing this with the risk to animal welfare. Please refer to Example 1 below, which considers what an owner/occupier of land containing ragwort may need to do if there is a risk of it posing a threat to the health and welfare of animals.

1.2 Offences and enforcement action

If a designated "weed" (see the list of plants above) is growing on any land, the Scottish Ministers can serve a written notice on the occupier requiring them to take action to prevent it spreading. An unreasonable failure to comply with a notice is an offence.[2]

Where a notice is served and no action is taken, the Scottish Ministers may enter the land to remove the "weeds" and charge the occupiers or landowners the reasonable costs of doing so.[3]

The Rural Payments and Inspections Division of the Scottish Government gives priority to investigating complaints where there is a risk of "weeds" spreading to land used for grazing or livestock, land used for forage productions and other agricultural activities.[4]

Where ragwort has spread onto neighbouring land, rewilders should work with neighbours to adopt the recommendations of the Ragwort Guidance.

EXAMPLE 1

A rewilder notices that ragwort is growing within 50 metres of the boundary of adjoining private land. What will happen if the rewilder decides to do nothing about the ragwort? Is the rewilder responsible for removing the ragwort from the neighbour's land if it spreads further and grows there?

Where land is affected by ragwort the owner/occupier should make an assessment to determine whether action should be taken to prevent the spread of ragwort to neighbouring land by establishing the risk posed to grazing animals, if any.

The Ragwort Guidance sets out the following three risk categories for assessing risk:

I. High Risk: Ragwort is present and flowering/seeding within 50m of land used for grazing by horses or other animals or land used for feed/forage production;

II. Medium Risk: Ragwort is present within 50m to 100m of land used for grazing by horses or other animals or land used for feed/forage production; and

III. Low Risk: Ragwort or the land on which it is present is more than 100m from land used for grazing by horses or other animals or land used for feed/forage production.

Assuming the rewilder is confident that the type of ragwort is Common Ragwort (*Senecio jacobaea*), which is the only type covered by the Weeds Act, the rewilder will then need to establish whether the neighbour's land is used for grazing animals or forage production.[5] If so, the proximity of ragwort to the boundary is likely to be categorised as a high risk case, requiring the rewilder to take immediate action to control the spread of ragwort using an appropriate control technique, taking account of the status of the land and the Ragwort Guidance. In addition, the Scottish Ministers, if satisfied that weeds are growing upon the land, can serve a notice requiring the occupier to take action to prevent the spread of those weeds. An unreasonable failure to comply with such a notice is an offence.

2. INVASIVE NON-NATIVE SPECIES OF PLANTS (INNS)

2.1 Responsibilities and liabilities (INNS)

Non-native species are those plants which have been moved to a location outwith their native range by human action, whether intentionally or not, to an area in which they do not naturally occur.[6] Invasive non-native species of plant (INNS) are non-native plants of a type which, if not under the control of any person, would be likely to have a significant adverse impact on:

- Biodiversity;
- Other environmental interests; or
- Social or economic interest.[7]

Whilst there are many non-native plant species in Scotland, only a minority are considered invasive, but these can have serious negative impacts.[8] Some of the better known INNS that you may come across are:

- Japanese knotweed;
- Giant hogweed; and
- Himalayan balsam.[9]

Individuals are required to act responsibly within the law to ensure that INNS under their ownership, care or management do not harm the environment. The Scottish Government has published a Code of Practice on Non-Native Species under section 14C of the Wildlife and Countryside Act 1981 (W&C Act) – (the "**Code**")[10] which sets out how to act responsibly within the law to ensure that non-native species do not cause harm to the environment. The Code advises taking a precautionary approach by:

- carrying out risk assessments;
- seeking advice and following good practice; and
- reporting the presence of non-native species.

This approach is guided by a three-stage hierarchical approach set out in the Code:

- **Prevention:** preventing introduction in the first place;
- **Rapid response:** eradication to avoid the establishment of the species where prevention of introduction has failed; and
- ***Control and containment***: to minimise impact where both prevention and eradication have failed and a species is established.[11]

There are four main offences under the W&C Act:

- ***Planting or causing to grow outwith native range***: Under Section 14(2), any person who plants, or otherwise causes to grow, any plant in the wild at a place outwith its native range (i.e., including an INNS) is guilty of an offence.
  - 'In the wild' encompasses both natural and semi-natural habitats in both rural and urban environments.[12]
  - You can find out whether a plant is outwith its native range on the NatureScot website.[13]
  - There are specified plant species to which this offence does not apply. The current list of exceptions is available in the Scottish Ministers' Order.[14] The plants listed in the order are permitted to be planted or grown to the geographical extent listed in the table, which may range across the whole of Scotland or be limited to the mainland, Orkney and/or Shetland, for example.
  - A list of the Orders made by the Scottish Ministers in respect of the W&C Act can be found on the Scottish Government website.
- ***Keeping invasive species***: Under Section 14ZC, any person who keeps, has in their possession, or has under their control any invasive plant specified in an Order of the Scottish Ministers, is guilty of an offence. At present, we are not aware of any Orders under section 14ZC being in force.
- ***Selling invasive species***: Under Section 14A, a person commits an offence if they:
  - sell;
  - offer or expose for sale;
  - have in their possession or transport for the purposes of sale; or
  - publish, or cause to be published, any advertisements for the purchase or sale;
  - any invasive plant specified in an Order made by the Scottish Ministers. At present, we are not aware of any Orders being in force under section 14A.
- ***Notification of invasive species***: Section 14B enables the Scottish Ministers to make an Order creating the requirement to notify the presence of any invasive non-native plant.
  - These Orders may specify the types of invasive plants that must be notified, the persons who must make a notification, and in what circumstances.
  - The duty to notify in such an Order may only be conferred on a person who has or should have knowledge of, or is likely to encounter, the plant to which the order relates.
  - Any person who, without reasonable excuse, fails to make a notification in accordance with any order made is guilty of an offence.
  - At present, we are not aware of any Orders being in force under section 14B.

EXAMPLE 2

A rewilder wants to introduce different species of plants to boost the natural biodiversity of the rewilding land. What should the rewilder be mindful of?

Any person who plants, or otherwise causes to grow, any plant in the wild at a place outwith its native range is guilty of an offence under section 14(2) of the W&C Act unless permitted by a licence. This does not apply to the plants listed here. The only defence is that the accused took all reasonable steps and exercised all due diligence to avoid committing the offence.

Animals and plants that were once native in a location but have become extinct are considered to be "former natives". For the purposes of the W&C Act former natives are considered to be outwith their native range and it is therefore an offence to release a former native without a licence. Licensing allows named individuals to carry out actions that could otherwise constitute an offence.

If you're planning any activities that could involve the release of a non-native species, you must make sure you stay within the law. Conservation translocation proposals may also involve moving species, including former native species, beyond their native range. NatureScot is the licensing authority for all non-native species. For some actions, you may also need permissions from other agencies such as the Scottish Environmental Protection Agency ('**SEPA**').

2.2 Species control agreements and orders

Under Section 14D to 14O, where the Scottish Ministers, NatureScot (previously Scottish Natural Heritage), SEPA or Forestry and Land Scotland is aware of a situation in which there is an invasive plant outwith its native range, and where control is considered by the relevant body to be both viable and of sufficient priority, it must first attempt to make a Species Control Agreement ('**SCA**') with the owner or any occupier of the land.

A SCA is voluntary and should set out what should be done by whom and by when, in order to control an invasive non-native plant. There is no penalty for non-compliance (although it may result in a Species Control Order ('**SCO**') or Emergency Species Control Order ('**ESCO**') being made (see below).

Special Control Orders ('**SCOs**') can be made in the following circumstances:

- where an owner/occupier has not signed up to a SCA that has been offered;
- where an owner/occupier has failed to comply with the terms of a SCA;
- where the relevant body has been unable to find out the name or address of the owner or any occupier and has not therefore been able to offer a SCA; or
- where action is considered urgent – in which case an ESCO can be made.

Section 14K makes it an offence to:

- fail, without reasonable excuse, to carry out an operation required under an SCO / ESCO in the manner required by the SCO;
- carry out, or cause or permit to be carried out, an excluded operation without reasonable excuse; or
- intentionally obstruct any person from carrying out an operation required to be carried out under a SCO / ESCO.

2.3 The invasive alien species regulations

Finally, under Section 14AA of the W&C Act, a person commits an offence if they contravene Article 7(1) of the Invasive Alien Species Regulations[15] even if such activity does not constitute an offence under the sections of the W&C Act described above. Article 7(1) of the Regulations makes it an offence to intentionally permit invasive alien species to reproduce, or grow or to cultivate them (including in a contained holding), or to release them into the environment.

An "invasive alien species" includes all those species, sub-species or lower taxon of animal, plant, fungus or micro-organism included on the Scottish List of Species of Special Concern.[16]

2.4 Enforcement action

A person found guilty of any of the above offences may be sentenced to up to a year in prison or fined up to £40,000. If the offence is considered especially severe and the person is convicted on indictment, they can be imprisoned for up to five years, and/or be given a fine.

However, an offence is not committed if actions are conducted in accordance with the terms of a relevant licence granted by the appropriate authority (being either NatureScot or SEPA) or authorised by an Order made by the Scottish Ministers.

Planting or causing the growth of invasive, non-native species of plants under the various sections of the W&C Act described above is a strict liability offence. Strict liability means intention, knowledge, recklessness or negligence do not need to be proven. However, there are defences available as described below.

Allowing INNS to spread may also amount to a common law nuisance according to which neighbours occupying affected nearby properties may be able to pursue you for damages.

2.5 Defences

The W&C Act offers the defence 'that the accused took all reasonable steps and exercised all due diligence to avoid committing the offence.' This allows the Scottish Ministers, NatureScot, SEPA or Forestry and Land Scotland to enter into a SCA with the owner/occupier of land to control or eradicate invasive plants outwith their native range growing on the land. Entering into and complying with such an agreement may be sufficient evidence of taking all reasonable steps to avoid committing an offence should the spread of the non-native species be exacerbated.

EXAMPLE 3

A rewilder is considering removing the large swathes of rhododendron (an invasive non-native species/INNS) from rewilding land as it is outcompeting and displacing all other vegetation and local fauna. Is the rewilder allowed to remove it and, if so, how can they dispose of the INNS without incurring liability?

Early eradication or removal from the environment is the Scottish Government's preferred response to INNS. Invasive plant material and contaminated soils are types of 'controlled waste'. Legally, you may only dispose of such waste at an appropriately SEPA licensed landfill site.

3. PROTECTED WILD PLANTS

3.1 Offences and enforcement action under the Wildlife and Countryside Act

It is an offence under s13(1) of the W&C Act, as it applies to Scotland, if any person

- intentionally or recklessly picks, uproots or destroys –
- any wild plant included in Schedule 8; or
- any seed or spore attached to any such wild plant; or
- not being an authorised person, intentionally or recklessly uproots any wild plant not included in that Schedule 8.

A "wild plant" means "*any plant which is or (before it was picked, uprooted or destroyed) was growing wild and is of a kind which ordinarily grows in Great Britain in a wild state.*"[17]

Schedule 8 of the W&C Act as it applies to Scotland lists the species of protected wild plants.

3.2 Responsibilities and liabilities under the Wildlife and Countryside Act

A person shall not be guilty of the above offence if;

- the unlawful act was the incidental result of a lawful operation or other activity;
- the person who carried out the lawful operation or other activity
    - took reasonable precautions for the purpose of avoiding carrying out the unlawful act; or
    - did not foresee, and could not reasonably have foreseen, that the unlawful act would be an incidental result of the carrying out of the lawful operation or other activity; and
- that the person who carried out the unlawful act took, immediately upon the consequence of that act becoming apparent, such steps as were reasonably practicable in the circumstances to minimise the damage to the wild plant in relation to which the unlawful act was carried out.[18]

3.3 Protection of species offences under the Habitats Regulations

Under regulation 43 of the Conservation (Natural Habitats, &c.) Regulations 1994 (the "**Habitats Regulations 1994**")[19] it is an offence to deliberately pick, collect, cut, uproot, destroy, or sell any wild plant of a European protected species. These species are listed in Schedule 4 to the Regulations.

Offenders under this legislation may be prosecuted though there are defences available.

ENDNOTES

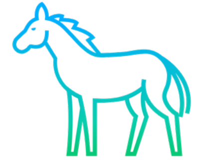
1. Scottish Government guidance on Common Ragwort: https://www.gov.scot/publications/scottish-government-guidance-prevent-spread-ragwort/
2. Section 2 of the Weeds Act
3. Section 4 of the Weeds Act
4. See the Ragwort Guidance.
5. Note that the Weeds Act only applies to common ragwort. Whilst other species of ragwort may be equally toxic to animals, they are less common and some species such as fen ragwort are protected. It is therefore important to make correct identification of ragwort before considering any control measures. In addition, where ragwort is identified on land protected through environmental or ecological designation or by means of other land management agreements, the required obligations and restrictions must also be fully considered and discussed with the appropriate authorities before control action is initiated. See the Ragwort Guidance for more information.
6. Further information on the law governing non-native species in Scotland, including a link to the "NatureScot Guidance Notice: Native Range", which lists in section 4.1 authoritative sources that can be consulted in order to determine if a species is within its native range, is available at https://www.nature.scot/professional-advice/protected-areas-and-species/protected-species/invasive-non-native-species/law-non-native-species-scotland
7. As defined at Section 14P of the W&C Act
8. https://www.sepa.org.uk/environment/biodiversity/invasive-non-native-species/invasive-non-native-species-faqs/
9. As above.
10. https://www.gov.scot/publications/non-native-species-code-practice/documents/
11. See page 7 of the Code.
12. See Chapter 5 of the Code from page 28 onwards.
13. https://www.nature.scot/
14. The Scottish Ministers may, by Order, specify types of plants to which Section 14(2) does *not* apply, and the Schedule to the Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Amendment Order 2012 sets out a list.
15. Regulation (EU) No 1143/2014 of the European Parliament and of the Council on the prevention and management of the introduction and spread of invasive alien species.
16. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1141
17. Section 27(1) of the W&C Act
18. Section 13(3) of the W&C Act as it applies to Scotland
19. https://www.legislation.gov.uk/uksi/1994/2716/contents

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of December 2022.

LIABILITY FOR DAMAGE CAUSED BY ANIMALS



CORE TOPICS:

- Liability for damage caused by animals under common law and statute.
- Defences available to rewilders responsible for animals.

KEY TAKEAWAYS:

- If you own or are responsible for an animal, you should take steps to ensure it does not cause injury or damage to third parties (including employees) or their property.
- There are important practical steps that should be taken to avoid accidents in the first place and minimise the risk of liability when they do occur.
- Damage or injury caused by animals may result in civil or criminal liability.
- Liability will always be fact dependent and may arise under common law and different legislation.

TABLE OF CONTENTS

1. Practical tips to limit or avoid risk of liability

2. Liability under the Animals (Scotland) Act 1987

2.1 Liability

2.2 Exceptions to liability under the ASA87

3. Liability under common law

4. Liability under the Health and Safety At Work Act 1974

5. Occupiers' liability

6. Application in practice

1. PRACTICAL TIPS TO AVOID OR LIMIT POTENTIAL LIABILITY

There are some practical steps that can be taken to reduce the risk of being held financially and/or criminally liable for damage or injury caused by animals. In particular, a rewilder should:

- undertake regular and thorough risk assessments in relation to the risks posed to visitors by animals, taking into account areas of the project to which members of the public have access. The HSE has published important guidance on the interaction between animals and public access which should be followed. Key examples from this guidance which relate to animals and public access are highlighted in the *Rewilding in Scotland: Public Access* briefing. Acting in accordance with these risk assessments will help rewilders to demonstrate that they have acted in accordance with the duty owed to members of the public under the HSAW Act, the common law and also the Occupiers' Liability Act;
- ensure that they have the right insurance in place which covers any civil liability for damage or harm caused by animals;
- make explicitly clear, via signs or other notifications, whether the rewilding project is publicly accessible or not, if there is risk of harm by animals. This is to reduce the risk of animals causing damage or injury to members of the general public, and may help to fulfill a rewilder's duty of care towards third parties entering their land. Remember that the Land Reform (Scotland) Act 2003 gives everyone in Scotland the right to cross land, and access land for recreational, educational and limited commercial purpose; therefore, rewilders must be careful not to limit or restrict these access rights in the process. A landowner must act responsibly and balance their obligations to manage access, and health and safety considerations;
- erect/maintain fencing and/or other suitable barriers to ensure livestock, horses and other animals cannot escape and cause damage to neighbouring land or property or injury to third parties;
- seek targeted legal advice when the rewilding project is set up and the (re)introduction of animals is being considered. This may also include seeking evidence from experts that can ascertain whether an animal belongs to a "dangerous species"; and
- seek targeted legal advice if an animal causes damage or injury, including with respect to which defences may be available. This may also include seeking evidence from experts (biologists, veterinarians and other specialists) that can ascertain whether an animal belongs to a "dangerous species" or not.

2. LIABILITY UNDER THE ANIMALS (SCOTLAND) ACT 1987

2.1 Liability

The Animals (Scotland) Act 1987 ('**ASA87**') establishes strict liability offences which mean that the 'keeper' of certain types of animals could be required to pay monetary compensation for damages (including injury or death in certain instances) caused by those animals.

In order for liability to be established under the ASA87, three conditions must be met:

- the person involved must be the 'keeper' of the animal;
- the animal must be of a species covered by the Act; and
- the injury or damage must be directly referable to the physical attributes or habits of the animal concerned.[1]

We will address each of these in turn.

First, a keeper of an animal is defined as someone who owns or has possession of that animal.[2] A person is not regarded as having possession of an animal by 'temporarily detaining it for the purpose of protecting it'. However, the keeper of the animal remains the keeper, even if the animal has been abandoned or has escaped, until someone else becomes the owner or possessor. When an animal is owned by one person, but another person is in possession of the animal, both parties can be jointly and severally liable. Therefore, a rewilder who owns livestock would be a keeper even if those livestock are grazed on someone else's land (i.e., someone else is in possession of them).

Second, the animal must belong to a 'species whose members generally are by virtue of their physical attributes or habits likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent'[3] (a 'Relevant Species'). This is a general definition and it will be for the court to decide in each case whether or not the animal concerned falls within the definition. Note that 'species' is widely defined to include 'a form or variety of the species or a subdivision of the species, or the form or variety, identifiable by age, sex or other such criteria as are relevant to the behaviour of animals ...'[4]

However, the ASA87 expressly defines two categories of animals which are deemed to satisfy the definition:

- The first category is dogs, and dangerous wild animals listed in the Schedule to the Dangerous Wild Animals Act 1976 ('**DWAA**')[5] ("**Dangerous Wild Animals**"). The ASA87 states that this category of animals shall be deemed to be species which are likely 'to injure severely or kill persons or animals by biting or otherwise savaging, attacking or harrying'. Rewilders should note that whilst most of the animals listed in the Schedule to the DWAA are exotic, there are a number of native species which may be relevant to rewilders including wild horses, bison, reindeer, wolves, lynx and wild boar.

- The second category is 'cattle, horses, asses, mules, hinnies, sheep, pigs, goats and deer' in the course of foraging which are deemed likely 'to damage to a material extent land or the produce of land' (e.g., crops).[6]

Therefore, a rewilder may be strictly liable if their grazing animals damage a neighbour's land or crops while foraging. However, they will not be strictly liable for injury or death caused by one of these species unless the court decides that the animal belongs to 'a species. ... likely ... to injure severely or kill' (see full definition above), and this will be considered on a case-by-case basis.

In contrast, where a rewilder is a 'keeper' of a dog, or a Dangerous Wild Animal, they will be strictly liable for any sort of damage, injury or death which is caused by that animal to the extent the damage is "directly referrable to their physical attributes" (see below).

Third, the injury or damage must be directly referable to the physical attributes or habits of the animal concerned. The Act does not explain what this means, however, the obvious implication is that if the damage is only indirectly referable to the animal or if the damage does not arise from its attributes or habits, then the keeper will not be liable under the Act.

The 'strict liability' nature of offences under the ASA87 means that liability is effectively automatic if the three tests described above are satisfied. In addition, if a court were to consider whether such liability existed, it would not take into account whether the damage was foreseeable, or whether the keeper of the animal had taken steps to prevent such damage occurring, i.e., whether their actions were based upon negligence.

Finally, the ASA87 contains two limitations on the type of damage for which liability can be found under the Act. Under s.1(4), the Act 'shall not apply to any injury caused by an animal where the injury consists of disease transmitted by means which are unlikely to cause severe injury other than disease' and under s.1(5) the Act 'shall not apply to injury or damage caused by the mere fact that an animal is present on a road or in any other place'. This second limitation could be particularly important in situations where animals are free to roam on land crossed by public roads.

The legal position will be clear cut in some instances, and far more complicated and fact-specific in others. Litigation over the ASA87 for non-dangerous species may be particularly complex, since there are numerous tests that a case must pass before liability can be shown on the part of the owner or keeper of the non-dangerous animal.[7]

2.2 Exceptions to liability under the ASA87

There are three exceptions to liability set out in the ASA87[8]. A person will not be liable where:

- the injury or damage was due wholly to the fault of the person sustaining it; or in the case of injury sustained by an animal, the keeper of the animal;
- the person sustaining the injury or damage willingly accepted the risk of it; or
- the injury or damage was sustained on land which was occupied by a person who was a keeper of the animal which caused the injury or damage; and the person or animal sustaining the injury or damage was not authorised or entitled to be on that land.

The 'keeper' of the animal in question would have to prove only one of these three exceptions to avoid being held liable for the damage caused by that animal. However, these exceptions will not apply if the animal causing the injury or damage was kept on the land for the purpose of protecting persons or property, unless this is deemed reasonable in the circumstances, or the animal was a guard dog within the meaning of the Guard Dogs Act 1975.

To reduce or mitigate the risk of being held financially liable for damage caused by animals, it is advisable to take the practical steps discussed later in this note.

3. LIABILITY UNDER COMMON LAW

The ASA87 replaced old common law rules relating to strict liability for damage caused by animals. However, it is still possible for a person to be found liable for damage caused by animals under the common law rules, where it is established that a person's careless actions or omissions caused reasonably foreseeable damage, i.e., that they were based upon negligence.

This means that incidents which are not covered by the ASA87, may be covered by common law. For example, section 1(3) of the ASA87 establishes that strict liability applies for an animal that by virtue of its physical attributes or habits is likely to injure people. The Act goes on to state in section 1(3)(a) that dogs are deemed in law to be likely to injure people by 'biting, savaging, attacking or harrying'. However, what happens when a dog causes injury in a manner other than by attacking?

This was discussed in *Welsh v Brady* [2009][9]. In this case, the pursuer was walking her dog in a field commonly used by dog walkers and was struck by a dog running off the lead. As a result, the pursuer fell and suffered injury. The dog had caused damage, but not by 'biting, savaging, attacking or harrying'. The judge held that Section 1 of the ASA87 did not apply and that the case needed to be considered under common law negligence on the part of the owner.

On the facts, negligence was not established in that case: it was held that the likelihood of injury by a dog running free was not significant enough to impose a duty upon the defender to prevent it. However, had the damage been reasonably foreseeable, common-law liability would have been established. Rewilders should therefore be aware that, notwithstanding the ASA87, liability relating to damage caused by animals may be established under common law.

4. LIABILITY UNDER THE HEALTH AND SAFETY AT WORK ACT 1974

Under the Health and Safety at Work Act 1974 ("**HSAW Act**"), anyone undertaking rewilding as some form of business or operation which otherwise generates income (including on a self-employed basis), owes a duty of care to ensure that any person who may be affected by the rewilding activities is not exposed to risks to their health or safety.

Liability under the HSAW Act is criminal liability and is typically enforced by the Health and Safety Executive (the "**HSE**"). If an offence is established, the person found to be in breach could be ordered to pay a fine and/or face up to two years imprisonment.

Landholders including rewilders should be aware that the HSE regularly investigates incidents involving cattle and members of the public, with the two most common factors in these incidents being cows with calves and walkers with dogs.[10] The HSE has also previously prosecuted farmers where a member of the public has been killed by livestock.[11]

Landholders including rewilders must undertake adequate risk assessments to ensure that their duty under the HSAW Act is complied with.

For further details on liability under the HSAW Act, please see the *Rewilding in Scotland: Liability to Visitors and Neighbours* and *Rewilding in Scotland: Public Access* notes published in this series of briefings.

5. OCCUPIERS' LIABILITY

The Occupiers' Liability (Scotland) Act 1960 establishes that occupiers owe a duty to a person on his/her premises to take reasonable care to avoid acts or omissions which they could reasonably foresee may result in harm or injury.

This duty of care and associated liability could apply to the keeping of animals and livestock.

Please see the *Rewilding in Scotland: Liability to Visitors and Neighbours* note for details of this Act and how it may apply to the keeping of animals and livestock.

6. APPLICATION IN PRACTICE

EXAMPLE 1

As part of a rewilding project large herbivores are released into a project landscape, to roam free across the land with minimal human contact or management. One of the animals escapes the boundaries of the project, crosses a nearby road and is hit by a car, causing serious injury and damage.

ASA87

If the injury and damage arose from the mere fact that the animal was present on the road, then under s.1(5) ASA87, there should be no liability under the Act.

If the facts were more complicated and this exception could not be relied upon, whether or not there could be liability for this injury or damage under the ASA87 would depend on what particular species of animal was hit by the car. It would need to be of a Relevant Species meaning a species that 'generally are by virtue of their physical attributes or habits likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent'. This would be a question of fact because the two deemed applications do not appear to apply on these facts: the damage and injury caused is not as a result of the animal attacking a human (so the Dangerous Wild Animals provision is irrelevant) nor has the damage been caused to land or the produce of land (meaning that the foraging provision is irrelevant).

It appears arguable that in these circumstances, the damage and injury suffered is not directly referable to the physical attributes or habits of the animal concerned but instead simply because the animal was on the road.

Liability under the ASA87 would also only be incurred if the rewilder was shown to be the 'keeper' of the animal. The fact that these animals are (or should have been) enclosed within the project area suggests that the rewilder would be the keeper.

Common law

There could also be a case for liability under common law, provided the pursuer is able to prove negligence on the part of the owner of the herbivores. For example, the case of *Sandison v Coope* involved a cyclist riding her bike on a quiet country road. The defender, who had trained his dog to respond to his command, called his dog, who then ran in front of the cyclist. The cyclist was unable to avoid the dog, striking it, and was injured.

In that case, the court held that an owner's carelessness in allowing his dog to cross a public road at a blind corner without first checking for other hazards amounted to negligence under common law. Whilst under ASA87, damage and injury suffered must be directly referable to the 'physical attributes or habits' of the animal concerned, under the common law rules of negligence, it was not suggested that the nature of the defender's dog had any bearing on the circumstances which gave rise to the collision. Therefore, liability on behalf of the owner was established under common law (albeit, in

that case it was conceded that animals were a potential hazard on quiet country roads and that as a result the cyclist should contribute 30% of the damages).

In this case, it is not clear the extent to which the owners of the herbivores are at fault for the collision. This would be for the judge to consider using the precise facts of the case.

HSAW Act

Whether or not the keeper could be held liable for the injury under the HSAW Act would depend on whether (a) they were carrying out a business or income producing operation and (b) they took all 'reasonably practicable' steps to comply with sections 2 and 3 of the Act.

Occupiers' Liability

Again, for the keeper to be held liable, a duty of care towards the road user would have to be established. This is unlikely given that the damage was sustained outwith the boundaries of the project.

EXAMPLE 2

An area of rewilding land is left open and unfenced and wild animals are able to enter and exit the land as they see fit. A herd of wild deer that has been living on the land then roams onto a nearby road and one is hit by a passing car.

ASA87

There would be no liability in these circumstances because the deer are wild animals which do not have a keeper and can roam freely. In any case, there is no liability under the Act for damage caused by the mere fact that an animal is present on a road.

Common Law

For liability to arise, there would have to be negligence on behalf of the rewilder. However, these are wild animals which have wandered on to the road by chance. It would therefore be difficult to argue that the damage caused was reasonably foreseeable.

HSAW Act and Occupiers' Liability

Again, the foreseeability of this damage is probably far too remote for any kind of duty of care to be owed.

EXAMPLE 3

A rewilding project includes a sanctuary into which wolves are introduced and allowed to roam. The sanctuary is fenced off with high level fencing (as required to comply with the DWAA licence for keeping the wolves) and signs are erected around the enclosure which explain that wolves are living without restriction or human control in the enclosed area and warn against entering the enclosure. A passing walker ignores these and climbs the fence and is attacked by the wolves.

ASA87

This type of injury caused by wolves will fall within the scope of the ASA87 because wolves are a Dangerous Wild Animal, meaning that to the extent any injury is due to attacking or mauling another being, they will be assumed to be of a Relevant Species for the purpose of the Act.

The rewilder is also clearly the 'keeper' of the wolves and the injury suffered is directly attributable to the wolves' physical characteristics and attributes.

However, subject to more detailed information about the facts (e.g., was the fencing adequate? Did the walker accept the risk? Did the walker have a right to roam into the area? Did the keeper comply with a DWAA licence? Etc.), the keeper may not be liable under ASA87 because at least two of the exceptions set out in the Act are triggered by these facts: the injury was wholly due to the fault of the walker who appears willingly to have accepted the risk of injury.

In these situations, it is important that notices contain the necessary information to allow individuals to understand the risk rather than just saying e.g., 'do not enter'or 'trespass prohibited'.

Common law

As for common law liability, this will only be established through negligence on behalf of the keeper. Again, whether the keeper here has taken all precautionary measures to keep walkers safe from the enclosed wolves will depend on the specific facts of the case.

HSAW Act

Whether or not the keeper could be held liable under the HSAW Act will depend on whether (a) they were carrying out a business or income producing operation and (b) they took all 'reasonably practicable' steps to comply with sections 2 and 3 of the Act. Here, the keeper has taken several measures to protect members of the public from the wolves.

Occupiers' liability

If it is reasonably foreseeable that a certain danger to third parties exists on the premises (as is the case here), then the occupier will owe a duty of care in respect of this to third parties entering on the land. Given the keeper has put up fencing, and signs, and that it is only by virtue of the fact the walker ignores these that he is injured, it is likely that the requisite standard of care has been met.

EXAMPLE 4

As part of a rewilding project highland cattle are introduced. Fences are erected but a walker using a right of way leaves a gate open and one of the cows wanders onto neighbouring land to forage for food and damages crops and property.

ASA87 and common law

In these circumstances, the keeper of the highland cattle could be held liable for the damage under the ASA87 as long as the damage was "to a material extent". This is because highland cattle fall within the second category of animals, i.e., those that are deemed likely to cause damage to land and to the produce of land while foraging.

The strict liability nature of offences under the ASA87 means that the keeper of the cattle would not be able to point to the fact that the damage only occurred because a gate was left open by a third party. These facts would, however, be relevant to a determination as to whether any common law liability could also arise.

EXAMPLE 5

A member of the public is crossing the rewilder's land on a right of way with a dog not on its leash. The dog approaches a herd of cows and attacks and injures one of the cows.

ASA87

It is a criminal offence for an owner (or person in charge) to allow a dog to worry livestock on any agricultural land under the Dogs (Protection of Livestock) Act 1953. The definition includes attacking livestock as well as chasing them in such a way that a dog is expected to cause injury or suffering.

There would probably also be civil liability for the keeper of the dog under the ASA87 as, under the Act, a dog is deemed to be an animal likely to cause injury.

Common law

The fact that the dog is not on a lead may amount to negligence on behalf of the owner, if it can be proven that the injury caused by the dog was reasonably foreseeable.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

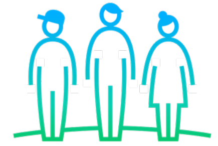
This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of December 2022.

ENDNOTES

1. ASA87 s 1(1).
2. ASA s 5.
3. ASA87 s 1(1)(b). Note that the ASA87 expressly excludes from the definition of 'animal' viruses, bacteria, algae, fungi and protozoa. A(S)A 1987, s 5(1)(a).
4. ASA87, s (2)(a)
5. ASA87 s 1(3)(a)
6. ASA87 s (3)(b)
7. These steps are discussed in Welsh v Brady [2009] CSIH 60 at para. [13]
8. ASA87 s 2.
9. Welsh v Brady [2009] CSIH 60
10. Cattle and public access in Scotland: Advice for farmers, landowners and other livestock keepers AIS17 (hse.gov.uk)
11. See e.g., https://www.farminguk.com/news/farmer-receives-prison-sentence-after-cattle-killed-walker_59818.html

LIABILITY TO VISITORS AND NEIGHBOURS



CORE TOPICS:

- Responsibilities owed by landowners to visitors and third parties on their land, and how to mitigate those risks.
- Criminal liabilities of landowners, and how to discharge criminal liability.

KEY TAKEAWAYS:

- "Occupiers" of land must take reasonable care to protect visitors and third parties from risks present on their land.
- Separately, landowners who "conduct an undertaking" may need to comply with health and safety legislation which requires them to conduct their undertaking in such a way so that they do not expose employees and third parties to health and safety risks.
- As a general principle, landowners etc, must not use their land in a way which negatively impacts their neighbour's enjoyment of their land to an extent that is more than tolerable.

TABLE OF CONTENTS

Part A: Responsibilities owed to visitors and third parties accessing land

1. Occupiers' liability

1.1 Who can be classed as an "occupier"?
1.2 Persons entering onto the premises
1.3 Reasonable care
1.4 Dangers due to the state of the premises
1.5 Freely-consented risks
1.6 Contributory negligence
1.7 Notices

2. General Duty of Care

3. Criminal liabilities under Section 3 Health and Safety at Work Act 1974 (the "HSWA")

3.1 Scope of Section 3 of the HSWA
3.2 What is an "undertaking" and when will HSWA apply to landowners?
3.3 What is required to comply with Section 3 HSWA duty?
3.4 How can you discharge liability under the HSWA?
3.5 What happens when there is a breach of the HSWA?

Part B: Responsibilities and duties owed to neighbouring land

4. Neighbouring land

4.1 Application in practice

PART A: RESPONSIBILITIES OWED TO VISITORS AND THIRD PARTIES ACCESSING LAND

Responsibilities and a duty of care owed to visitors and third parties accessing land may arise under (i) the Occupiers' Liability (Scotland) Act 1960; (ii) a general duty of care; and (iii) health and safety legislation. Each of these are described below.

1. OCCUPIERS' LIABILITY

The relevant law in Scotland is the *Occupiers' Liability (Scotland) Act 1960* (the "1960 Act"). The 1960 Act sets out the level of care required to be demonstrated by the person (or body) who occupies or controls land or premises to any third party who may access the property.

1.1 Who can be classed as an "occupier"?

An occupier is anyone occupying or having control of land or premises. Possession of the property is a factor. This means that, in addition to the owner of a property, the occupier could be a tenant. Separate from possession, a person can still be considered the "occupier" if they have the power to exclude others from the property. It is possible to have more than one occupier in the eyes of the law and each could have liability apportioned if they exercise different degrees of control at the same time.

1.2 Persons entering onto the premises

The duty of care on occupiers can generally be considered (as a starting point) to apply to all persons, whether or not they have permission, entering onto their land or premises, unless (i) the duty of care is excluded by agreement between parties (including by a notice to visitors entering the land – see below for further discussion);[1] or (ii) where the person has willingly accepted the risks associated with going on the property.[2]

1.3 Reasonable care

The duty owed by an occupier to a person on his/her premises is to take reasonable care to avoid acts or omissions which they could reasonably foresee may result in harm or injury. Each case is necessarily determined on its own facts and circumstances, with reasonableness being assessed according to what a reasonable person would have considered to be reasonable in the circumstances. Rewilders who are occupiers will be under this duty to take reasonable care.[3]

1.4 Dangers due to the state of the premises

The danger for which the occupier can be liable, must be one which is due to the state of the premises or to anything done or omitted to be done on them for which the occupier is legally responsible[4] (unless exempted by agreement).[5] Some relevant examples of potential dangers due to the state of the premises may include animals being kept on those premises or trees growing on the land being unstable and falling.

A failure by an occupier to exercise his or her responsibility may result in a claim for breach of the 1960 Act by an injured person. A distinction has to be made between the state of the premises and what a person wishes to do on the premises, e.g., an injury stemming from using an area of land for jumping motorcycles was not due to the state of the premises, but what the person chose to make of them. Specific advice should be taken on whether or not any particular rewilding activities amount to a danger.

1.5 Freely-consented risks

It is a defence for an occupier to argue that the person entering the land or premises, whether or not they have permission to enter, has willingly placed themselves in a position where harm might result, whilst knowing the nature and extent of the risk they were taking.[6] This is known as *volenti non fit injuria* – 'to one who volunteers, no harm is done'.

1.6 Contributory negligence

If an occupier has breached their duty of care and injury or damage has been suffered by a person, it will be a partial defence if the occupier was not totally to blame. If the injured person has contributed towards their injuries or damages by their own actions then they could be found contributorily negligent.[7]

1.7 Notices

Under the 1960 Act, an occupier is entitled to restrict or exclude by agreement their obligations towards persons on their land. Rewilders may therefore look to erect notices on their property in an attempt to limit or exclude liability. Signs being erected may alternatively go to demonstrating the exercising of reasonable precautions by the occupier that will assist in the event of an action being raised as a result of a warned risk. For example, a recent court case considered whether an occupier was liable for injury suffered by a third party who slipped on a slipway going into the sea. The accident occurred on the submerged part of the slipway. Warning signs had been erected and verbal warnings were given to indicate that the submerged walkway was slippery. The occupier was held not liable for the injury caused because it was determined that sufficient notice of the risk of injury had been given.[8] Generally, the more specific a notice can be about a risk, the more likely it is to be of assistance to a rewilder if they face a claim.

If premises are used for business purposes, a notice excluding liability might fall foul of the Unfair Contracts Terms Act 1977 ("UCTA") and be ineffective. For example, if the occupier is charging for entry or running a visitor centre on site, UCTA states that any such disclaimers are void if they try to exclude or restrict liability in respect of death or personal injury.[9] A notice may be valid for other loss or damage, but it would have to be fair and reasonable.

UCTA does not apply where visitors enter non-business premises for recreational purposes. Any notices erected by an occupier here, along with other precautionary measures such as risk assessments, will be taken into consideration when assessing whether they have met their duty of care under the 1960 Act.

EXAMPLE 1: ANIMALS

Occupiers who have animals loose on their land need to consider the risk they pose to visitors etc. and take simple and reasonable steps if they are aware that they may harm visitors. In terms of what "reasonable steps" may include, it might be helpful to read the guidance produced by the Health and Safety Executive regarding the keeping of cattle in areas of land with public access and the practical steps that could be taken to limit the possibility of injury.

To understand how the law applies in practice, it is interesting to look at a case under the 1960 Act dealing with occupier's liability for animals. It concerned a dog that bit an employee of a vet surgery, who accessed the rear of the surgery property, via a neighbours' garden (with the neighbour's consent), to clean some windows of the surgery. The employee was bitten by one of two dogs present in the neighbour's garden. (The bite eventually required amputation of the employee's leg). The neighbours were found liable under the 1960 Act. There was a "foreseeable and not remote risk" that at least one of the dogs would show aggression towards a stranger appearing in the garden. The neighbours must have been aware of the risks and should have taken steps to remove the dogs prior to allowing the employee to enter the garden (or at least not permitted the employee to take access whilst the dogs were loose). These duties were of such a simple character that it led to a breach of the 1960 Act.

Separately, under the *Animals (Scotland) Act 1987*, a person could be liable for injury or damage caused by certain species of animals even without deliberate or negligent conduct. This is covered in the *Rewilding in Scotland: Liability for damage caused by animals* note.

EXAMPLE 2: MAN-MADE STRUCTURES

Whether rewilding concerns the addition or removal of man-made structures, occupiers should always carry out a thorough risk assessment (including who might be affected by the actions and what risks the rewilder could be exposed to) and consider mitigation measures. Expert legal and technical advice should be sought on the specific facts and circumstances. This is because both can have unintended consequences in terms of liability: for example (i) a fence could be removed in part, but leave sharp, exposed post-ends, which could cause injury to visitors walking on the grounds; or (ii) the addition of a ha-ha (a sunken fence) to preserve an area from wandering wildlife could result in injury to those who are unaware of its existence.

A further unintended consequence could be the concealment of one man-made structure by another, for example if a raised bank is built and hides a pond behind, an occupier would have to ensure that visitors are sufficiently warned of its existence by signage, construction of a fence, or otherwise. Occupiers have a duty to take reasonable care to make sure that people entering the land will not suffer bodily injury from structures they have inadequately created or attempted removal of e.g. leaving a fence partially dismantled next to a footpath.

There are of course instances where man-made structures are necessary. For example, fencing around electricity transformers is expected to be retained even if the surrounding area is subject to rewilding.

EXAMPLE 3: PUBLIC RIGHTS OF WAY

Owners of land subject to a public right of way may owe a duty of care to users of public rights of way under the 1960 Act.[10] A judge has decided that the duty under the 1960 Act does not extend to an active duty to maintain a public right of way.[11]

Should a rewilder decide to construct an artificial path then they will need to ensure the path is obvious and part of the landscape and that anything unusual about the path is properly notified in advance.[12] It is also expected that any path is constructed to accepted and normal standards.[13]

A landowner may be liable for any danger created by them on a public right of way – on the basis that would engage their duty of care above.[14]

ARE THERE PRACTICAL STEPS THAT CAN HELP MITIGATE THE RISK TO REWILDERS?

There are a number of steps to take that can show you have complied with your duty of care to visitors and third parties and therefore won't be liable for any harm suffered on your land. For example:

- Carrying out a detailed and specific risk assessment for all aspects of the project;
- Obtaining liability insurance to cover risks;
- Excluding/limiting liability by contract or notice to the extent possible; and
- Meeting required standards including of reasonableness and keeping evidentiary records of having done so.

2. GENERAL DUTY OF CARE

To a large extent, this functionally overlaps with the law of occupiers' liability. The general duty of care is based on the principles of (i) foreseeability (i.e., how predictable was it that damage or other harm could happen); (ii) relationship between the parties (e.g., landowner and visitor); and (iii) the equity of the case (i.e., whether in all the circumstances it is just and reasonable to impose a duty of care on the landowner / occupier in respect of the other). A breach of the general duty of care could be pled as an alternative basis of liability to occupiers' liability. However, in recent cases, the approach to both occupiers' liability and the general duty of care has been similar and we have therefore not covered this general duty of care separately in this note.[15]

3. CRIMINAL LIABILITIES UNDER SECTION 3 HSWA

3.1 Scope of section 3 Health and Safety at Work Act 1974 (the "HSWA")

In circumstances where rewilders carry out rewilding activities as part of a business or enterprise, there may be additional duties in the context of health and safety laws.

Whilst the HSWA is primarily concerned with the legal obligation of an employer towards its employees to safeguard their health and safety at work,[16] section 3 of the HSWA also places an obligation on employers and self-employed persons for third parties (such as visitors) whose health and safety may be impacted by the activities of that business or enterprise. Employers or those that are self-employed are required to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that third parties who may be affected by their activities are not exposed to risks to their health or safety.[17] For section 3 to apply, there must be:

- a duty-holder – either an employer or a self-employed person;
- a risk to the health or safety of a person who is not the employee of the duty holder or the self-employed duty holder themselves; and
- that risk must arise from the conduct of the duty holder's undertaking.[18]

The scope of the duty under section 3 is very broad. The HSWA does not distinguish between visitors and non-visitors and applies generally to third parties. Therefore, employers and self-employed persons must consider the health and safety of any individual regardless of whether they are invited onto the land. In certain high-risk industries, the duty to ensure individuals are not exposed to health and safety risks may present itself more readily. For example, where forestry work is involved, individuals have a responsibility to manage public safety such that landowners and forestry works managers must plan and coordinate safety measures, and operators on forest sites must implement them – proximity areas, harvesting sites and haulage routes should be carefully considered.[19]

Note specifically that in the past, the HSE have prosecuted a farmer (in England) for breaching section 3 HSWA, following the death of a walker who was killed by cattle when on a public footpath situated on that farmer's field.[20] It is important to note that it is not necessary for an incident to have occurred, or for an individual to have been injured, for a breach of HSWA to be established. It only needs to be established that there was a risk of injury or damage to health.

The broad applicability of section 3 is balanced by a policy developed by the Health and Safety Executive (HSE), Britain's national regulator for workplace health and safety. The policy aims at guiding enforcing authorities to exercise their discretion by focusing on 'health and safety priorities', such as where there is a high level of risk involved (e.g., major hazards and construction) or whether enforcement would be in the interests of justice (such as those of the injured or bereaved),[21] and to give less priority in other areas.[22] In certain risk areas (e.g., reservoirs or where an adventure activity is undertaken), the HSE will generally not start to investigate injuries to non-employees, or complaints about risks to non-employees, unless the concerns highlighted in the preceding sentence are present.[23]

3.2 What is an "undertaking" and when will HSWA apply to rewilders?

An 'undertaking' in this context means an enterprise or business. In a rewilding context, rewilders that receive any commercial benefit from their activities (whether it be, for example, from running yoga retreats, wildlife safaris or farming) are likely to fall within the scope of this duty under the HSWA.

3.3 What is required to comply with section 3 HSWA duty?

Employers and self-employed persons must ensure, so far as is "reasonably practicable", that they do not expose third parties to health and safety risks. Such risks may encompass a broad range of issues relevant to land managers (such as rewilders) including injury caused by manmade or natural features of the land, injury caused by animals and other risks to individuals, such as water pollution. It is important to note that a third party does not in fact have to be harmed for an offence to be committed under HSWA – there only has to be a risk of harm for liability to be found.[24]

Appropriate risk assessments must be carried out to identify the risks to the health and safety of third parties as a result of an undertaking[25] and landholders should ensure that these are implemented / reflected in working practice and regularly updated. The risk assessment should include:

- identifying what could cause injury or illness in the business (hazards);
- deciding how likely it is that someone could be harmed and how seriously (the risk); and
- taking action to eliminate the hazard, or if this isn't possible, to control the risk.

Depending on the nature of activity being undertaken, there is guidance published by the HSE to assist individuals in complying with the standards required by the law to keep their land safe for others. Rewilders carrying out business activities should follow such guidance and establish a safety management system based on acknowledged good practice. Two particularly relevant guides for rewilders are the Agriculture Health and Safety Guidance Note[26] and the Cattle and Public Access in Scotland: Advice for Farmers, Landowners and Other Livestock Keepers note.[27]

3.4 How can you discharge liability under the HSWA?

To discharge the duty under section 3, the duty holder must act reasonably and balance the risk to others against the sacrifice (e.g., the money, time or resources) involved in taking the measures needed to avert the risk. If the risk is grossly disproportionate to the sacrifice, such as the risk being insignificant relative to the sacrifice, the duty holder is not required to take any further measures and so discharges the duty.[28] This is a balancing exercise and highly fact dependent.

3.5 What happens when there is a breach of the HSWA?

A breach of the health and safety laws under section 3 can give rise to criminal liability, resulting in a fine not exceeding £20,000 and/or imprisonment for a term not exceeding 12 months (on summary conviction) or an unlimited fine and/or imprisonment for a term not exceeding 2 years (on indictment).[29] If you are intending on undertaking commercial activities on your land, please consult the relevant legal, industry and safety specialists for further advice.

PART B: RESPONSIBILITIES AND DUTIES OWED TO NEIGHBOURING LAND

4. NEIGHBOURING LAND

In addition to the rules under the 1960 Act, occupiers are also bound by the common law of nuisance. Unlike in England, there is no distinct law in Scotland of 'public nuisance', so this section encompasses all instances of nuisance.

The freedom to do as one pleases with their property has to be balanced with the duty to avoid causing loss or inconvenience (known as "nuisance") to neighbours. In cases where there is conflict between the two, whether nuisance is established will be a question of fact and degree.[30]

There is a lack of modern Scottish case law on the position. However, it is generally understood that for nuisance to be established, there needs to be some form of emanation (e.g., noise, smell,[31] etc.) from the occupier's land that results in unreasonable interference with a neighbour's enjoyment of their land. Importantly, the occupier is generally required to be at fault,[32] the nuisance must be continuing and the neighbour must have suffered more than they could reasonably be expected to tolerate.[33]

A court would take many factors into account when determining whether there is a nuisance established in law: this includes the motive of the occupier, the purpose of the occupier's activity and the locality, duration and the intensity of the alleged nuisance.

Management of bodies of water within a rewilder's land (as an example) could involve other legal rules other than 'nuisance', depending on the circumstances (some of which are covered below). Other legal rules that may be engaged include the general duty of care mentioned above.

As a landowner, you need to take care to avoid affecting (for example) the structural stability of neighbouring property (whether built or unbuilt). If that is caused by your land or something within your land, there is a risk of liability.[34]

4.1 Application in practice

In most of the circumstances described below, attempts by neighbours to bring legal action for damages (whether for nuisance, a breach of the general duty of care, or otherwise) will be a last resort. There is likely to have been lots of prior interaction and discussions about the nuisance or other alleged breach being caused and practical ways to resolve it. However, should such discussions fail to lead to a resolution, it is possible that a neighbour may have legal rights as described below and it is worth landowners/ occupiers keeping this in mind.

EXAMPLE 1: FLOODING

Rewilders may cause bodies of water and groundwater levels to revert to their natural state, which may cause localised flooding. This naturally comes with a danger that the flooding will not be restricted to an occupier's own property and will interfere with a neighbour's land.[35]

If an occupier of land interferes with a natural channel of water (e.g. a river or stream), there may be liability where, as a result of that interference, the water does not continue to be adequately carried off, including where there is excess water due to extraordinary rainfall.[36] Similarly if a rewilder's activities cause the water table to rise and the water overflows into neighbouring property, the rewilder may be liable for any damage caused.

If trees (new or old) are growing along a burn, debris may drop into the water and cause a blockage. If this is a regular occurrence then it could be argued that any flooding is a foreseeable risk of the occupier failing to maintain their property. Should that flooding interfere with a neighbour's enjoyment of their property, a claim in nuisance could potentially arise although, as always, it would depend on the facts of the case.

Furthermore, where a river flows through an occupier's property (or they own a loch which forms part of the same water system as a river), the occupier must not pollute the water or transmit water of inferior quality downstream.[37]

EXAMPLE 2: TREE BRANCHES AND ROOTS

A vital part of any natural space is tree and plant life. Under Scots law, branches of trees overhanging the boundary of the land on which they grow will be subject to the law of 'encroachment', which applies e.g. any time a tree breaches the boundary of neighbouring property.

The position is the same in relation to roots where they spread under neighbouring land. If caught early enough, the neighbour may simply cut off the branches and hand them back to the tree owner. Whilst in theory this also applies to roots, extra care should be taken, as damaging the tree as a whole could open the neighbour up to liability.

If the problems continue, the consequences could be serious, particularly if there are buildings on the neighbouring land. For example, roots may grow under neighbouring land and cause subsidence to buildings, resulting in a substantial financial outlay for the tree owner, if they have not taken reasonable steps to maintain the roots and prevent damage from occurring. Note that what will be considered as "reasonable steps" will always be fact specific and there is no clear test for this.

Rewilders should carefully consider whether new growth should be encouraged at the property boundaries or at least what species may cause issues with neighbouring land and consider engaging with neighbours at an early stage.

EXAMPLE 3: LANDSLIDES

Scotland's landscape has a variety of landscape features that can be considered dangerous to people, animals and infrastructure. When disturbance to these volatile natural structures by a landholder causes damage to neighbouring property, the owner of such neighbouring property may be able to claim damages generally to the extent that it was reasonably foreseeable that such damage would be caused to the neighbouring property.[38]

Peatlands are particularly vulnerable to landslides. This is typically a response to intense rainfall events, but equally it could be due to human intervention.
If a landowner has taken any of the actions to rewet peatland or has removed structures to allow a river to take its natural course, they could be liable for any resulting damage. As this is a one off event, it is more likely that any claim against the occupier and/or landowner would be framed as breach of a duty of care, rather than nuisance.[39] In these situations, an examination of the cause of the landslide would be required to determine whether the occupier/landowner is likely to be liable for any damages.

Further, if a landowner has knowledge of a potential risk of landslide and fails to act, they could still be liable for damages even if the landslide occurs because of a natural event such as heavy rainfall.[40]

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of January 2023.

ENDNOTES

1. Occupiers' Liability (Scotland) Act 1960, s2(1). Note that there might be a specific statutory standard of care that are higher than the duty under the 1960 Act. Nothing in the 1960 Act affects that higher standard: s2(2).
2. Occupiers' Liability (Scotland) Act 1960, s2(3).
3. It is well established that there is no duty on an occupier of land to provide protection against obvious (or familiar) and natural dangers: see *Leonard v Loch Lomond and the Trossachs National Park Authority* [2014] Rep LR 46, para [16] onwards and authorities cited therein (albeit mostly pre- 1960 Act authorities).
4. The law does appear to be underpinned by policy rationale that takes those walking up hills to have accepted a degree of risk. From *Leonard*, it appears this risk is taken to be on the walker for obvious hazards at least.
5. Occupiers' Liability (Scotland) Act 1960, s2(1).
6. See Occupiers' Liability (Scotland) Act 1960, s2(1).
7. See, for example, *Lowe v Cairnstar Ltd* 2020 SLT (Sh Ct) 151.
8. *McCann v Dumfries and Galloway Council* [2021] SC EDIN 36.
9. Unfair Contract Terms Act 1977, s16.
10. So long as the owner of the land subject to the right of way is an 'occupier' for the 1960 Act: Johnstone v Sweeney 1985 SLT (Sh Ct) 2. The Sheriff in this case did note that he found the decision a difficult one and it is a first instance decision in Scotland.
11. *Johnstone* (above).
12. Consider the case of *Graham v East of Scotland Water Authority* 2002 SCLR 340.
13. *Leonard* (above).

14. *Johnstone v Sweeney* (above).
15. See, for example, *Mackenzie v The Highland Council* [2022] SC EDIN 8 (where a case on both bases was refused for the same reasons); *Phee v Gordon* 2013 SC 379, para [36], where the Court of Session noted it is appropriate to adopt a similar approach to the calculus of risk as in common law negligence (i.e. general duty of care); *Hill v Lovett* 1992 SLT 994.
16. Section 2, HSWA. The duty of employers to employees under HSWA is outside the scope of this briefing note.
17. Sections 3(1) and 3(2), HSWA. Please note that under section 3(2) self-employed persons have a duty to ensure that they themselves are not exposed to health and safety risks. The HSWA also sets out various other duties such as those owed by employers towards employees, employees towards themselves and to each other, and certain self-employed persons towards themselves and others. These duties are not covered by the scope of this briefing note. Please seek legal advice if needed.
18. Health and Safety Executive: Scope and application of section 3 HSWA.
19. Health and Safety Executive: Managing public safety. For further information, please see: https://www.hse.gov.uk/treework/site-management/public-access.htm
20. Health and Safety Executive: Farmer sentenced after walker killed by cattle.
21. Health and Safety Executive: Priorities for enforcement of Section 3 of the HSWA 1974 - July 2003 (rev April 2015)
22. Health and Safety Executive: Guidance for FOD in responding to (non-construction) public safety incidents where Section 3 of HSWA applies
23. Health and Safety Executive: Further information.
24. Health and Safety Executive: Health and safety at work: criminal and civil law
25. The Management of Health and Safety at Work Regulations 1999, section 3
26. Health and Safety Executive: Agriculture health and safety.
27. Cattle and Public Access in Scotland: Advice for Farmers, Landowners and Other Livestock Keepers
28. Health and Safety Executive: Proving the offence; *Edwards v National Coal Board* [1949] 1 KB 704, CA; *Austin Rover Group Ltd v HM Inspector of Factories* [1990] 1 AC 619, HL.https://www.hse.gov.uk/enforce/enforcementguide/court/rules-prove.htm#fn4
29. Section 33(1)(a) and Schedule 3A, HSWA.
30. *Watt v Jamieson* 1954 SC 56.
31. E.g. consider MacBean v Scottish Water [2020] CSOH 55.
32. *RHM Bakeries v Strathclyde RC* 1985 SC (HL) 17.
33. *Watt v Jamieson* (above).
34. Although an English court decision, consider *House Maker (Padgate) Ltd v Network Rail Infrastructure Limited* [2022] EWHC 1482 (TCC).
35. There is a more urban (albeit English law) example of a recent court decision regarding damage suffered by a neighbour due to a broken drain, leading to flooding, on National Rail's land: *The House Maker (Padgate) Limited v Network Rail Infrastructure* [2022] EWHC 1482 (TCC). This is of interest only in Scotland; any action in similar circumstances in Scotland may need to be framed differently.
36. *Corporation of Greenock v Caledonian Railway Co* 1917 SC (HL) 56
37. *Hunter and Aitkenhead v Aitken* (1880) 7 R 510; *Miller v Stein* (1791) Mor *12823*.
38. *Leakey v National Trust for Places of Historic or Natural Beauty* [1980] QB 485. There is little authority on the applicability of this case in Scots law, however the general need for *culpa* (fault on the part of the defender) to be established means that the degree of fault required is perhaps wider in Scotland in any case.
39. The prospects of success for breach of duty of care may be challenging (although again this is likely to depend on the cause of the landslide and whether human interference with the natural landscape was involved). Other delictual (Scottish equivalent of tort) causes of action may be considered here if there is property damage. There may also be an insurance aspect to any such incident.
40. *Golman v Hargrave* [1967] 1 AC 645. See also, *Sabet*.

PROTECTED AREAS

CORE TOPICS:

- Management of and consents needed for sites of specific scientific interest.
- Protection offered and liabilities under the European regime.

KEY TAKEAWAYS:

- Rewilding in a protected area may be restricted by the area's designated aims of protecting specific species and habitats.
- The SSSI regime limits activities within SSSI sites only and consent/permission must be granted for any activities falling within the site-specific list of "operations requiring consent".
- It is an offence for anyone to intentionally or recklessly damage the protected natural features of any SSSI.
- Any activities which are likely to have a significant negative effect on the protected features of Special Areas of Conservation (SAC) and Special Protection Areas (SPA) will be restricted and may require a Habitats Regulation Assessment.
- It is an offence to intentionally or recklessly damage the natural feature by reason of which the land has been designated as a European site.
- Rewilding within a national park or National Scenic Area may be subject to stricter planning and development controls.

TABLE OF CONTENTS

1. Sites of Special Scientific Interest
1.1 Overview
1.2 Management and consents
2. European protected sites
2.1 Protected sites
2.2 Habitats Regulation Appraisal
2.3 Offences under the Habitats Regulations
3. Other protected sites
4. National parks
5. National Scenic Areas

1. SITES OF SPECIAL SCIENTIFIC INTEREST

1.1 Overview

Sites of Special Scientific Interest (**"SSSIs"**)[1] are areas of land and water that are considered to best represent our natural heritage in terms of their flora, fauna, geology and/or geomorphology. SSSIs are statutory designations made by NatureScot under the Nature Conservation (Scotland) Act 2004. There are over 1,400 in Scotland[2] and SiteLink is a register that lists all SSSI sites in Scotland[3].

When a change in land use or other activities might affect a SSSI, NatureScot will make the decision-maker aware of the site's designation.

SSSIs are statutory designations made by NatureScot under the Nature Conservation (Scotland) Act 2004.

If NatureScot plan to designate a new area they will contact all affected owners and occupiers to discuss their reasoning and how the designation would affect them. This is followed by a formal consultation process.

1.2 Management and Consents

When operating within a SSSI, rewilders should bear in mind that it is an offence for anyone to intentionally or recklessly damage the protected natural features of a SSSI.

To ensure that no offence is committed, owners and occupiers of land within a SSSI must manage land within the SSSI in accordance with the site's management statement which has been created by NatureScot.

In addition, NatureScot's consent will be needed to carry out "operations requiring consent" (unless planning permission has been granted on application or permission has been granted by another regulatory authority[4], with NatureScot having been consulted as part of those processes). The operations requiring consent are different for each SSSI and are designed to ensure that operations undertaken within the SSSI do not harm the protected features of the site. Full information on operations requiring consent and applying for consent can be found on the SSSI consent website[5] and in the site's management pack.

The very nature of rewilding and its ecosystem approach to nature restoration may cause tensions in SSSIs which aim to protect individual features. It is therefore very important for rewilding projects within SSSIs to build a close relationship with NatureScot to understand how the designation may impact activities and find agreed ways forward. Within such cooperation, it may be helpful to understand that as part of their work to protect SSSIs, NatureScot must balance various interests alongside ecological protection, including the specific interests of owners / occupiers and local communities, social and economic development and the needs of agriculture, fisheries and forestry.[6] This balancing act means that (according to NatureScot), a mutually acceptable solution can usually be found and consents are rarely outright refused.

EXAMPLE: IMPACT OF SSSI DESIGNATION ON REWILDING LAND

Landowner A is rewilding a 50-hectare site, part of which is covered by a SSSI designation because it is a good example of dwarf-shrub heath plant communities.

Landowner A notices that, by natural succession and regeneration, native, pioneer tree species such as birch, rowan and willow are colonising the upland heath area of her land and she would like to support this process and allow it to continue.

She would also like to introduce cattle and horses to graze the land and encourage the creation of a mosaic of habitats.

Part of the land in Rewilding Project A is covered by an SSSI. Landowner A therefore needs to ensure that her management of the land is in accordance with the management statement and that through her action she does not either intentionally or recklessly damage the dwarf-shrub heath plant communities for which the site is designated. Causing such damage could amount to an offence.

She should discuss the natural succession and regeneration of native trees on the upland heath with NatureScot and work together to understand if there are ways to support these processes within the SSSI designated land.

If the use of natural grazing herbivores is not envisaged in the management statement, it may be an operation requiring consent, in which case NatureScot will need to be consulted and their consent granted before the animals are introduced to the land.

2. EUROPEAN PROTECTED SITES

2.1 Protected sites

The Habitats Regulations 1994 (as amended)[7] are the applicable law in Scotland that protect sites that are internationally important for threatened habitats and species requiring strict protection. Sites can either be a Special Area of Conservation (**"SAC"**) or Special Protection Area (**"SPA"**). Prior to Brexit, these areas were part of the European-wide Natura 2000 network and are now referred to as "European Sites".

The boundaries of all SACs and SPAs and details of the habitats and/or species for which a site is protected are identified on NatureScot's SiteLink portal.

Each SAC is designated to protect one or more habitats and /or species listed in the Annexes of the Habitats Directive. Similarly, SPAs are selected to protect one or more of the bird species listed in Annex I of the Birds Directive.

Scotland's SACs also contain a number of priority habitats which benefit from even stricter protection. Details of these priority habitats are available on the NatureScot website.

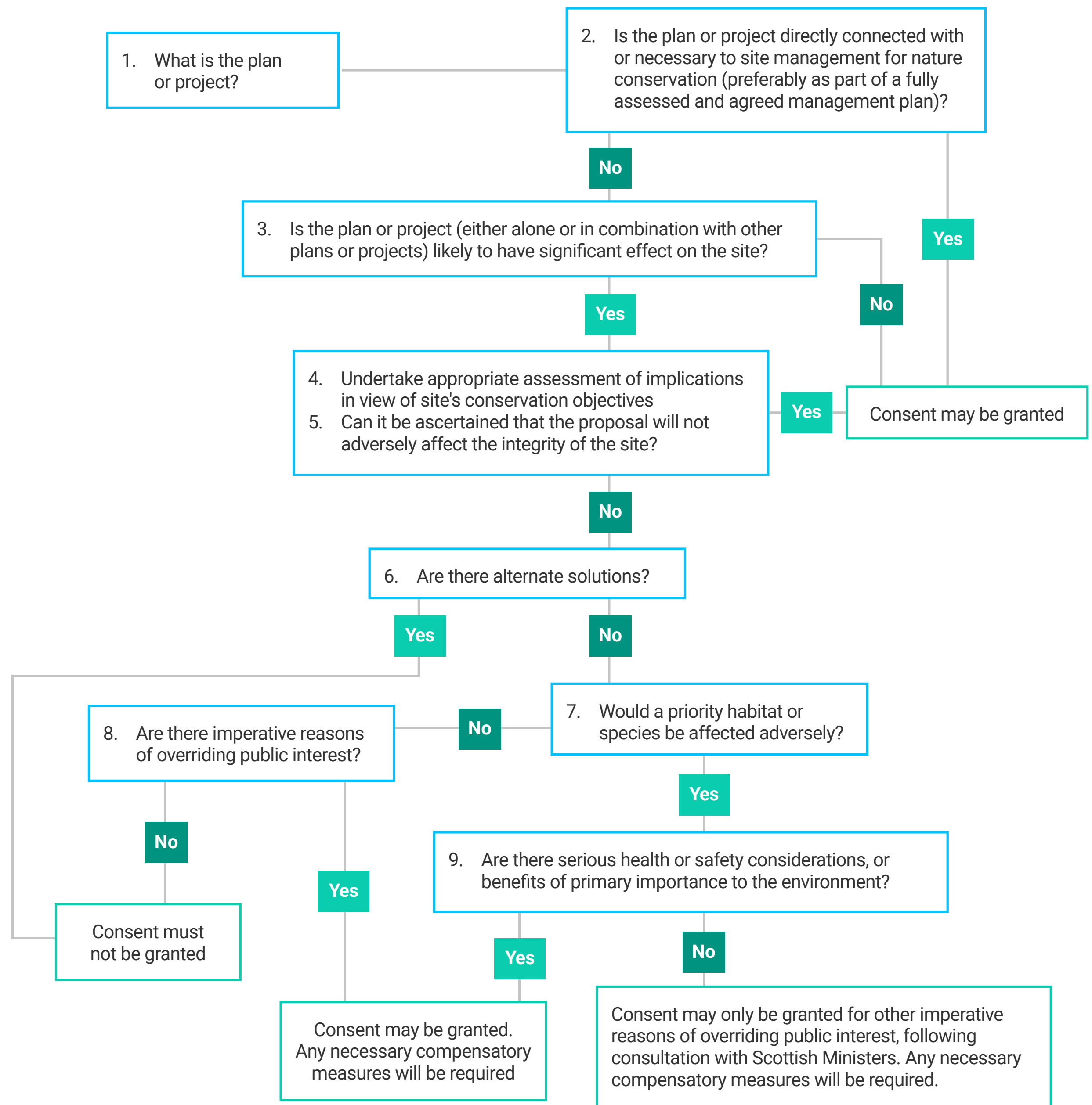
If rewilding land exists within a European Site or near a European Site, rewilding interventions may be restricted by the underlying principle that the protected features and the integrity of these sites must not be significantly negatively impacted by any plans or projects (either individually or cumulatively), either within or outside the protected areas themselves.[8] The impact of any traditional "development" such as the erection of buildings or fences, the creation of footpaths, or felling of trees will need to be considered in this context. More broadly, the impact of any change to how a European site is managed will have to be considered if it could negatively impact the protected features of a European Site. This could apply to a number of activities such as changing grazing management or the reintroduction of new species or the removal or building of dams or other water control in order to alter the flow of a watercourse.

2.2 Habitats Regulation Appraisal

There is a process called the "Habitats Regulations Appraisal" ("**HRA**") by which relevant authorities assess plans and projects with the potential to affect European sites.

An HRA is required when a plan or project requiring permissions or consents is likely to have a significant effect on a European site.

An HRA comprises both the process for determining whether an 'appropriate assessment' of the environmental risk is required, and the appropriate assessment itself. NatureScot provide the following useful flowchart as part of their guidance on considering plans and projects that could affect European Sites:



Plan-making authorities must consult NatureScot as part of any appropriate assessment process and the basic rule is that consent may only be given if the appropriate assessment concludes that the plan would not adversely affect the integrity of any European site. In circumstances where adverse impacts are not ruled out, consent can still be granted if there are overriding reasons of public interest in allowing the plan or project to go ahead. Typically, this test will be very hard to satisfy and consent will only be granted for damaging central infrastructure projects rather than anything that a private landowner may wish to do. The test for such exceptions is even stricter where priority habitats are involved and consent may only be granted if (i) there are serious health and safety considerations; (ii) there are other wider important benefits to the environment; or (iii) there are imperative reasons of overriding public interest and following consultation with the Scottish Ministers.

Where such exceptional consents are granted (for both priority and non-priority habitats), compensatory measures will be required.

Please refer to NatureScot's 'Habitats regulations appraisal of plans: guidance for plan-making bodies in Scotland'[9] and 'The handling of mitigation in Habitats Regulations Appraisal – the People Over Wind CJEU judgement[10]' for more detailed guidance.

2.3 Offences under the Habitats Regulations

In addition to the requirements for consents, the Regulations create an offence of intentionally or recklessly damaging the natural feature by reason of which the land has been designated as a European site. There are important exceptions to this offence where the damage is caused as part of a lawful operation and certain other criteria are satisfied.[11]

Rewilders working in European Sites should be mindful of this offence which carries with it the possibility of a fine.

EXAMPLE: IMPACT OF SPA DESIGNATION ON REWILDING ACTIVITIES

Landowner B is rewilding a 300-hectare upland area in the Highlands which includes a SPA which is designated to protect a unique wetland habitat.

Landowner B learns that a neighbouring landowner is planning significantly to increase the amount of drainage on his land and Landowner B thinks that this could negatively impact the protected wetland habitat.

Although the proposed increased drainage is not taking place in the SPA itself, as this could affect the SPA, it is still caught by the protections offered by the Habitats Regulations and will need to be subject to a Habitats Regulation Assessment if it is likely to have a significant effect on the integrity of a SPA.

This means that an appropriate assessment will need to be conducted to understand the likely impact of the increased drainage on the SPA. If a significant negative effect cannot be ruled out, NatureScot will not grant consent if there is an alternative solution. If an alternative solution is not available, NatureScot will only grant consent in the exceptional circumstance of there being an overriding and imperative public interest which is a very stringent test to satisfy.

3. OTHER PROTECTED SITES

Ramsar sites: A number of Scotland's wetlands are designated as Ramsar sites under the Convention on Wetlands of International Importance 1971 (the "**Ramsar Convention**"). All Ramsar sites in Scotland are designated as SSSIs and many of them also benefit from protection as European protected sites.[12]

National Nature Reserves ("**NNRs**"): Sites designated as NNRs are recognised as being of national importance for one / a range of natural features and subject to management to continue or enhance those features in the long term; are publicly accessible to showcase these natural features; and are seen as likely to inspire people to value and enjoy Scotland's natural environment.[13] The majority of NNRs will also be designated as SSSIs and/or European protected sites and will also be subject to a management agreement which can be enforced by NatureScot.

Local designations: Local authorities are able to designate areas of locally important nature as Local Nature Conservation Sites[14] (a non-statutory designation) or Local Nature Reserves[15] (a statutory designation under the National Parks and Access to the Countryside Act 1949 (as amended)).

4. NATIONAL PARKS

Designation as a national park is a landscape designation which focuses more on planning and development controls rather than aiming specifically to protect wildlife and nature.

There are two national parks in Scotland; Loch Lomond and the Trossachs and the Cairngorms[16].

The aims of the national parks are to:

- Conserve and enhance the natural and cultural heritage of the area;
- Promote sustainable use of the natural resources of the area;
- Promote understanding and enjoyment (including enjoyment in the form of recreation) of the special qualities of the area by the public; and
- Promote sustainable economic and social development of the area's communities.

Should conflict arise between any of these objectives in a particular circumstance, the National Parks (Scotland) Act 2000 requires that conservation of the natural and cultural heritage should take precedence.

The management strategy for each park is set out in the national park plan and the activities of rewilders will need to comply with these plans.

Both the Loch Lomond and the Trossachs[17] and the Cairngorms[18] National Park Authorities must prepare a development plan. Loch Lomond and the Trossachs has responsibility for development management in the park area[19]. Planning applications affecting land in the Cairngorms must be made to the relevant local authority although the Cairngorms National Park Authority must also be consulted[20].

For rewilding projects in national parks, the stricter planning regime will be applicable and could restrict certain development projects.

5. NATIONAL SCENIC AREAS

National Scenic Areas ("**NSA**") are broadly the equivalent to the Areas of Outstanding Natural Beauty found in England, Wales and Northern Ireland. Scotland's 40 National Scenic Areas cover 13% of the land[21] including spectacular mountain ranges (like the Skye Cuillins, Ben Nevis and Glencoe); dramatic island landscapes (in the Hebrides and Northern Isles); and picturesque, richly diverse scenery (such as the NSA in Perthshire, the Scottish Borders, and Dumfries and Galloway).

Scotland's planning system safeguards the special qualities of NSA, with NatureScot acting in an advisory capacity, by ensuring protection from inappropriate development.

Scotland is in the process of finalising its Fourth National Planning Framework at present ("**NPF4**"). A revised draft of NPF4 was laid before the Scottish Parliament on 8 November 2022. The revised draft NPF4 notes that developments in National Scenic Areas will only be supported where:

- The objectives of designation and the overall integrity of the areas will not be compromised; or
- Any significant adverse effects on the qualities for which the area has been designated are clearly outweighed by social, environmental or economic benefits of national importance.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

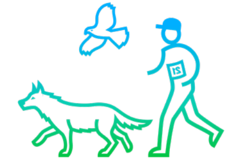
The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of January 2023.

ENDNOTES

1. Nature Conservation (Scotland) Act 2004.
2. Sites of Special Scientific Interest (SSSIs) | NatureScot
3. SiteLink (nature.scot) for searching the register by using the interactive map or by entering the site name or local authority. Alternatively to look at the register boundary map, citation or ORC list Register of Sites of Special Scientific Interest - Registers of Scotland (ros.gov.uk)
4. Scottish Ministers, local authorities, Crofters Commission, District Salmon Fisheries Boards, Forest and Land Scotland, and Scottish Environment Protection Agency are "regulatory bodies" pursuant to the Nature Conservation (Scotland) Act 2004
5. Sites of Special Scientific Interest (SSSIs) - Consents | NatureScot
6. Natural Heritage (Scotland) Act 1991, section 2.
7. Conservation (Natural Habitats, &c.) Regulations 1994/2716 as amended and The Habitats Regulations: implementing species protection | NatureScot
8. See NatureScot: Habitats Regulations Appraisal which specifies that "Any plan or project that could affect a European site – no matter how far away it is – should be subject to HRA"
9. Habitats Regulations Appraisal of Plans - plan-making bodies in Scotland - Jan 2015.pdf (nature.scot)
10. Guidance Note - The handling of mitigation in Habitats Regulations Appraisal – the People Over Wind CJEU judgement | NatureScot
11. Habitats Regulations, section 18.
12. NatureScot: Ramsar Sites

13. National Nature Reserve Selection Criteria and Standards
14. NatureScot: Local Conservation Sites
15. NatureScot: Local Nature Reserves
16. Created under through the National Parks (Scotland) Act 2000
17. https://www.lochlomond-trossachs.org/planning/planning-guidance/
18. https://cairngorms.co.uk/planning-development/
19. Resources for making planning applications https://www.lochlomond-trossachs.org/planning/planning-applications/
20. Making an application - Cairngorms National Park Authority
21. National Scenic Areas | NatureScot

PUBLIC ACCESS



CORE TOPICS:

- Public rights to access land that may affect rewilding projects.
- Restricting public access to land and practical difficulties in doing so.

KEY TAKEAWAYS:

- The Scottish "Right to Roam" provides extensive public access to land and inland waterways across Scotland for recreation, education and some commercial activities.
- Each local authority area contains a network of core paths allowing public access to land and which must not be blocked or obstructed.
- Land can also be subject to servitudes which are usually recorded in title deeds.
- The law allows landholders to take action against people who cause damage to land or unreasonably interfere with it.

TABLE OF CONTENTS

1. Introduction

2. Public rights to access land

2.1 Land Reform (Scotland) Act 2003

2.2 Core paths

2.3 Rights of way

2.4 Servitudes

2.5 Permission

3. Landholder responsibilities regarding public access rights

3.1 Restricting access

3.2 Keeping animals and livestock

4. Restriction of access rights

5. Trespass and irresponsible users

6. Fences and hedges

1. INTRODUCTION

In Scotland, most of the land suitable for rewilding purposes is accessible to the public for recreational, educational, and certain commercial purposes under the Land Reform (Scotland) Act 2003 (the "**Land Reform Act**"), also known as the "Right to Roam" legislation. Land used for rewilding may also be subject to other public rights of way. Landowners planning to rewild land need to be aware of their responsibilities to protect public access and how this might affect their ability to close paths or introduce animals onto sites.

2. PUBLIC RIGHTS TO ACCESS LAND

The public is allowed to access most land suitable for rewilding in Scotland unless there are particular restrictions or the area has specific characteristics (e.g. a railway). It is therefore difficult for a landowner, particularly of a large estate, to entirely prevent access to their land. In addition to these broad access rights, there are often public rights of way, core paths, and general access rights, particularly in rural land, all of which can be used by the public and must be considered when rewilding.

2.1 Land Reform (Scotland) Act 2003

In Scotland the "Right to Roam" refers to the rights of responsible access introduced by the Land Reform Act. This is the basis for public access to most land and inland water across Scotland. It includes the right to cross land or to be on land for certain purposes. It is not limited to paths. People accessing land can cross in any direction, provided they act responsibly. The permitted purposes include recreation, education and commercial activities where they could be carried on non-commercially (e.g., a mountain guide)[1].

The permitted purposes include a vast array of activities, from walking, cycling, horse riding, kayaking and swimming to paragliding, wild camping, and foraging amongst others. They are set out in the guidance document called the "Scottish Outdoor Access Code" (the "**Code**"). The Code provides guidance to individuals and landowners when using or managing land.

Certain conduct is excluded from access rights.[2] This means that if a person is carrying out excluded conduct on the land, they cannot rely on the access rights under the Land Reform Act. Examples of excluded conduct when on or crossing land are:

- hunting, shooting or fishing[3];
- taking away anything in or on the land for commercial purposes or profit[4]; or
- travelling in a motorised vehicle (unless it is one constructed or adapted for a person with a disability and is being used by them)[5].

All land is included by default unless it is subject to a specific exemption. Some examples of exemptions are[6]:

- land containing buildings, plant, or machinery;
- where another law prevents access to the area;
- school grounds;
- land around a residential property[7]; or
- land where crops are growing[8].

Some landowners have raised actions asking the court to determine whether some of their land is "excluded land" under the Land Reform Act.[9]

Additionally, where areas are of natural or cultural heritage[10], public bodies have powers to put up notices warning individuals about the impact access and activities may have on natural or cultural heritage[11]. For example, advising against climbing on certain rock-faces during bird nesting season. Another reason to restrict access could be for the protection of rare species of plants or an ancient monument.

Other powers include giving specific public bodies (e.g., NatureScot) power to make byelaws 'for the protection of a site of special scientific interest'. When considering this type of site, landowners should consider the regularity of access, and what effect this might have on wildlife at any particular time. The public must take special care where sites are in one of these protected categories. Where such sites are privately owned, NatureScot works with site owners and managers to ensure the natural features of the sites are protected[12].

As land used for rewilding generally encompasses large rural areas, it is likely that access rights under the Land Reform Act will be allowed to be exercised over it. See section 3 (*Landholder Responsibilities regarding Public Access Rights*) below for a discussion of how this may impact management of rewilding land.

2.2 Core Paths

Each local authority area also includes a system of core paths.[13] Every local authority is responsible for preparing a map of core paths for use by the public that allows them access to the local area. These are published on the local authority website for each area and cover every local authority in Scotland. They can be found in many rural areas and there is a comprehensive map available on the NatureScot website. Core paths are largely based on historic rights of way but can also be created by notification (e.g., via adoption of a Core Paths Plan)[14] or agreement with the landowners. These paths allow for horseback, pedal and/or foot access. Local authorities have the power to change and close routes and are responsible for maintaining them. There are powers within the Land Reform Act relating to the amendment of core path plans and agreeing delineation of paths.

Core paths cannot be blocked by landowners, nor can landowners discourage the public from using them. Local authorities have the power to "do anything which they

consider appropriate" for the purpose of keeping a core path free from obstruction or encroachment.[15] There are other obligations on landowners, where core paths cross their land, including restrictions on disturbing the surface of a core path.[16]

2.3 Rights of way

Public rights of way connect two public places and allow for access between them. Their importance is now generally less significant than it was before the introduction of the Land Reform Act. However, they can still provide access over land in Scotland where land would otherwise be excluded under the Land Reform Act. ScotWays provides a search service for rights of way which allows landowners to find out where these cross their land.[17] These cross many rural areas, including historic hill tracks and heritage paths. Some of these have been updated and signposted in recent years, however many more are recorded by local knowledge.

There are also some public rights of way which permit vehicle access. Under the Land Reform Act, the "right to roam" generally does not apply to motor vehicles (except those used for accessibility purposes). Rights of way are therefore very important where access needs to be taken via motor vehicles.

There is no individual process for landowners to close rights of way. It may be possible in some cases to argue that a particular right of way has ceased to exist by a lack of use over time,[18] although it is likely to be difficult to prove legally.

2.4 Servitudes

In Scotland, particular individuals might have a right of access over land. These are known as servitudes (broadly equivalent to 'easements' in England). They can be created in several ways, the main one being inclusion in the title deeds of the property. Another is through usage over the passage of time where there is no other basis on which the person can reach the land. To discover where there are servitudes, landowners should look at their title deeds and find out from the local community if there is any regular access taken through their property as not every servitude will necessarily be in the title deeds.

One of the main types of servitudes (however created) is a right of access. This is different to a public right of way because it only benefits the owner of the title giving rise to it (as well as their agents). The law of servitudes is complex but the key point to note is that a party, most likely neighbours, might have a servitude right of access over rewilding land.

Servitudes are likely to exist where land has been split into different parcels of ownership, and where there are other buildings and inhabitants nearby. This could include historic agricultural land and large estates which have been subdivided.

A servitude can be extinguished (i.e., removed) through (i) an express discharge by the servitude holder; (ii) through an implied discharge where they act in a way incompatible with the servitude; (iii) where the servitude is not exercised for 20 years; or (iv) where the landowner applies to the Lands Tribunal for the servitude to be discharged.

2.5 Permission

Landowners can also invite members of the public onto their land. If they do so, those members of the public will be able to access the land for any of the purposes for which they are invited (even where the land would otherwise be excluded under the Land Reform Act). Expressly permitting access at certain times will not grant individuals a servitude right of access over that land. This is because such a right must be exercised not on a personal permission basis, but rather as if the person has a right (when, in fact, they do not have any right).

A rewilder who wanted to encourage access to their land by setting up paths to enable more people to enjoy it (especially those who might otherwise not be confident to do so) should generally not need any special permission (beyond any applicable planning or environmental permissions) in order to do so, though specific advice should be sought in the circumstances.[19] This assumes that the rewilder would not be preventing or deterring access to the land surrounding the path (if that land would otherwise be accessible under the Land Reform Act) but rather is an optional alternative route for those who are less confident.

3. LANDHOLDER RESPONSIBILITIES REGARDING PUBLIC ACCESS RIGHTS

3.1 Restricting access

Where there is a right of access to land, the landowner is responsible for ensuring there is no obstruction or deterrent to access[20].

Where access is granted under the Land Reform Act, the landowner can only exclude the public where the land falls into one of the exemptions in the Land Reform Act,[21] some of which are set out above.

Although erecting fences and gates is sometimes allowed, these should not interfere with the substance of access, i.e., where reasonably practicable, a gate should allow access for pedestrians, cyclists, horse riders, wheelchairs, and buggies, given that access rights can be exercised by these means. Generally, gates must not be locked nor create unnecessary obstructions to the public exercising their rights of access. Any measures introduced should prioritise safety and good, responsible access for all. There is detailed guidance as to how best to construct and maintain gates and paths on the Paths for All webpage.

Landowners must avoid putting up misleading or dissuasive signs such as "Keep out" or "Private" on land which the public are entitled to access. Signs saying "no access" should not be used, nor should misleading signs warning about dangerous animals or chemicals where no such risk exists.[22]If landowners prevent or deter access rights under the Land Reform Act, landowners can be issued with a statutory notice from their local authority.[23]

However, landowners can still manage access to their land. For example, landowners are allowed to put up accurate informational signs and gates (where these still allow access, unless it is exempted land). The Code provides further guidance on balancing a landowner's interest and the requirement to facilitate access.

3.2 Keeping animals and livestock

One way in which a landowner may be considered to be preventing or deterring any person from exercising their access rights "is positioning or leaving at large any animal"[24]. Landholders engaged in rewilding should consider how this might affect them.

Where animals are particularly dangerous (e.g., bulls or perhaps bison), these must be kept away from areas to which the public generally take access. For example, if there is a principal hill track through one field, and no regular access taken through a second field, potentially dangerous livestock should, where possible, be kept in the latter field. Landowners should be particularly conscious of increased risks to the public, such as during school holidays where people new to rural areas may be more likely to pass through land. Landowners should erect suitable gates and fences to protect the public from such animals. However, a balance needs to be struck between safety and disproportionate prevention of access. Individuals are still entitled to take access through land where animals are present, however, they should take alternative routes where available, and take access responsibly if they do need to pass through a field containing dangerous animals.[25]

The Health and Safety Executive set out further detailed guidance for farmers, landowners, and individuals on how to effectively balance access rights and keep cattle safely, which provides general considerations for how other livestock or reintroduced animals could be managed[26].

By way of example, introducing large animals in areas where the public regularly take access in an isolated manner (e.g., positioning them deliberately in a field close to the path) may be considered to deter access and therefore be incompatible with the rewilders' obligations under the Land Reform Act.[27]

It will depend on the facts and circumstances in each case, e.g., whether as part of an overall rewilding strategy across an estate or done in isolation. To mitigate the risks here, rewilders should engage with their local authority to make clear the purpose of introducing animals on their property. This is to check the local authority's position on rewilding as measured against their duty to "uphold access rights".[28] Whilst the assessment of 'purpose' of a landowner's act that might deter access is objective, if the animal(s) on the property are endangered species and there is publicity about rewilding, it may be difficult for a court to conclude that the objective purpose of introducing such animals was to prevent exercise of access rights.

However, the way in which rewilders go about introducing these animals will be a relevant consideration for the local authority. Where large areas have been fenced off with no consideration for the current use of the site, it is less likely that the local authority will consider the "purpose" or "main purpose" of the introduction to be something other than preventing access. Where infrastructure such as deer fencing is introduced, landowners should be careful to ensure they provide appropriate alternative access for the public.[29] Another reason for engaging with the local authority is that they have powers to exempt particular land from access rights under the Land Reform Act.[30] The power does not entitle the local authority to exempt the land permanently, but temporary exemptions can be renewed.

Landowners should ensure that they have effective signage and take other appropriate steps to mitigate or prevent incidents between animals and the public. This includes signs requiring the public to shut gates properly and warning in advance of the location of any animals or electric fences, for example.[31] For further information about potential liabilities associated with the keeping of animals as part of rewilding projects, please see notes entitled *Rewilding in Scotland: Liability to Visitors and Neighbours* and *Rewilding in Scotland: Liability for Damage Caused by Animals*.

Separately, it may be relevant for rewilders to understand that individuals taking access under the Land Reform Act must ensure dogs are kept on a tight leash or under close control. If a dog or other animal is "not under proper control" then individuals do not enjoy the rights of access under the Land Reform Act.[32] This can also lead to the individual being charged with "worrying livestock" if animals under their control cause alarm or harm. Individuals should first be warned and can be asked to leave if they fail to comply with the principles of responsible access set out by the Land Reform Act.[33] The police should be called if you think a criminal offence may have been committed.[34] However, the relevant legislation only applies to cattle, sheep, goats, swine, horses or poultry, and currently not to other species that might be introduced by rewilders.[35]

4. RESTRICTION OF ACCESS RIGHTS

Local authorities in Scotland have a legal duty to "uphold access rights" for the public.[36] The landowner could also face legal action from any interested person (e.g., local people who have taken access to an area) if they seek to restrict access. In such a case, the court would be asked to decide on the existence and extent of access rights.[37] Where paths are closed temporarily or wider access is temporarily denied for the purpose of carrying out repairs or moving livestock, these are unlikely to result in legal action. Any such restrictions should be as short-term as possible and alternative access should be facilitated where practicable.

Cases allowing a more permanent exclusion of land have largely turned on the privacy of the landowners residing on the site, and the type of land excluded has been determined on a case-by-case basis.[38] Other cases have concerned appeals against a local authority's notice under the Land Reform Act. These cases turn on the landowner's purpose or main purpose (in the view of the local authority) in preventing or deterring access.[39]

5. TRESPASS AND IRRESPONSIBLE USERS

Where individuals taking access to land do not do so in accordance with the principles of responsible access set out in the Scottish Outdoor Access Code and the Land Reform Act, they can be asked to change their behaviour, and if they refuse to do so, they can be asked to leave.[40]

Where access is taken for purposes other than those set out in the Land Reform Act or otherwise allowed as set out above, then this would constitute trespass at least as a civil wrong (rather than a criminal offence). However, there are practical difficulties to enforcing the civil wrong of trespass. There needs to be non-trivial damage for a trespass to be actionable in civil courts. The Scottish Outdoor Access Code sets out examples of conduct that would constitute an unreasonable interference and therefore potentially be an actionable trespass. The legal issue will be whether such trespass resulted in damage. There will be other practical issues. The examples given in the Code as to unreasonable interference (i.e., conduct that would not be responsible) are: breaking a fence, trampling crops or posing a significant disturbance to land operations (like parking a car in front of a wild animal).[41] These actions would therefore be outside the scope of the Land Reform Act and not be protected access rights.

There is also a criminal offence of trespass (as distinct from a civil wrong) in Scotland under the Trespass (Scotland) Act 1865 (the "**1865 Act**"). However, given the terms of the 1865 Act and the wide-ranging nature of the statutory right to roam under the Land Reform Act, its scope is relatively narrow.[42] In its modern form, this only applies to (in summary) individuals lodging in property or lighting a fire on or near a road or enclosed or cultivated land that is outside the scope of the Land Reform Act.[43] There are a few further criminal offences which may be applicable where individuals prevent others from carrying out a lawful activity on land.[44]

As a landowner, it is also possible to seek "interdict" (injunction) through the civil courts. This allows for a court decision prohibiting individuals from carrying out certain actions or activities on the land. However, this is an expensive procedure and unlikely to be very useful where the parties only take access once or are not known to the landowner.

6. FENCES AND HEDGES

Generally, there is no statutory or common law obligation on owners to erect or maintain fencing along the boundaries of their land, however, title deeds or lease documentation may contain obligations to maintain fencing or hedging.

For example, a heritable proprietor or tenant may find that their title deeds or lease requires them to maintain some or all of the fencing or hedging separating their land from that of their neighbours. Where the title deeds to land imposes such an obligation, the obligation is likely to be binding on future purchasers. In some cases a fence or hedge may be owned in common by neighbours whose land it separates and the parties may be obliged to maintain it jointly.

If the land is occupied by a tenant under a tenancy agreement regulated by the Agricultural Holdings (Scotland) Act 1991 ("**AHSA**") and any permanent fences (including hedges, stone dykes, gate posts and gates) are 'fixed equipment'[45], the AHSA regulates the respective liabilities of the landlord and tenant to maintain and repair the same.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

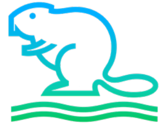
The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of October 2022.

ENDNOTES

1. Land Reform (Scotland) Act 2003, s1(3)
2. Land Reform (Scotland) Act 2003, s9.
3. Land Reform (Scotland) Act 2003, s9(c).
4. Land Reform (Scotland) Act 2003, s9(e).
5. Land Reform (Scotland) Act 2003, s9(f).
6. See more generally Land Reform (Scotland) Act 2003, s6.
7. Land Reform (Scotland) Act 2003, s6(1)(b)(iv), Scottish Outdoor Access Code, 3.14. This is defined in the Land Reform Act as sufficient adjacent land to provide a reasonable measure of privacy to the inhabitants and to ensure that their enjoyment of that house or place is not unreasonably disturbed. This will turn on the facts and circumstances of the individual property. ScotWays provides an in-depth analysis of the case law in this area.
8. Land Reform (Scotland) Act 2003, s6(1)(i). This does not include the headrigs, endrigs or other margins of the fields in which crops are growing: Land Reform (Scotland) Act 2003, s7(10)(b); Scottish Outdoor Access Code, para 2.2
9. Land Reform (Scotland) Act 2003, s6 sets out excluded land.
10. Both terms are defined in the Land Reform (Scotland) Act 2003, s32.
11. Land Reform (Scotland) Act 2003, s29; Scottish Outdoor Access Code, para 6.7.
12. Sites of Special Scientific Interest (SSSIs) | NatureScot
13. See Land Reform (Scotland) Act 2003, s17 onwards for the statutory basis of "Core Paths".

14. There was a recent challenge to the adoption of an amended Core Paths Plan by the Loch Lomond and Trossachs National Park Authority by way of Judicial Review: see *Gartmore House, Petitioner* [2022] CSOH 24.
15. Land Reform (Scotland) Act 2003, s19.
16. Land Reform (Scotland) Act 2003, s23.
17. Solicitor Enquiry Searches | ScotWays
18. Prescription and Limitation (Scotland) Act 1973, s8.
19. By 'special permissions', we mean any permissions under the Land Reform Act. Particular advice should be taken because e.g. there may be a concern that the paths are trying to deter access being taken from land surrounding the paths. In this case, consideration of s11 of the Land Reform Act should be given.
20. For examples of what this might be in practice, see Land Reform (Scotland) Act 2003, s14(1). The purpose or main purpose of this is to be considered objectively, not subjectively.
21. See Land Reform (Scotland) Act 2003, s6.
22. Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority [2018] CSIH 222
23. Land Reform (Scotland) Act 2003, s14(2). These can be appealed against by the landowner and there is reported case law of some such appeals.
24. Land Reform (Scotland) Act 2003, s14(1)(c).
25. Scottish Outdoor Access Code, 3.30
26. https://www.hse.gov.uk/pubns/ais17s.htm
27. See e.g. Land Reform (Scotland) Act 2003, s3(1).
28. Land Reform (Scotland) Act 2003, s13.
29. An example might be stiles – but these would need to be maintained. Consideration should also be given to accessibility issues (e.g. an alternative access that would allow wheelchairs to take access).
30. Land Reform (Scotland) Act 2003, s11.
31. Land Reform (Scotland) Act 2003, s15
32. This is the effect of Land Reform (Scotland) Act 2003, s2(1) and (2)(a) read with s9(d). See also Scottish Outdoor Access Code, 3.53, Land Reform (Scotland) Act 2003, s9(d) which requires that dogs must be "kept under control".
33. Scottish Outdoor Access Code, 6.13
34. Scottish Outdoor Access Code, 6.14
35. See the Dogs (Protection of Livestock) Act 1953, s3 (for definitions of "livestock" and "agricultural land", which are key elements of the scope of that Act). The 1953 Act was recently amended by the Dogs (Protection of Livestock) (Amendment) (Scotland) Act 2021.
36. Land Reform (Scotland) Act 2003, s13.
37. Land Reform (Scotland) Act 2003, s28.
38. Gloag v Perth & Kinross Council and The Rambler's Association 2007 SCLR 530; Snowie v Stirling Council and Ramblers Association: Lindsay and Barbara Ross v Stirling Council 2008 SLT (Sh Ct) 61; Creelman v Argyll & Bute Council [2009] B12/08
39. Forbes v Fife Council [2009], B375/077
40. Scottish Outdoor Access Code, 6.13
41. Scottish Outdoor Access Code, 3.3
42. Trespass (Scotland) Act 1865 is restricted in scope and does not extend to anything done by a person in the exercise of the access rights created by the Land Reform (Scotland) Act 2003: see 1865 Act, s3(2).
43. See endnote 42.
44. See those listed at Scottish Outdoor Access Code Annex 1, although each provision should be checked to ensure it remains in force.
45. Agricultural Holdings (Scotland) Act 1991, s5

REINTRODUCTIONS



CORE TOPICS:

- Licences and assessments required prior to the reintroduction of animals.
- Obligations on landowners regarding reintroductions.

KEY TAKEAWAYS:

- It is a criminal offence to release, or allow the escape from captivity of, any animal out of its native range without a licence.
- Certain species of animals are protected species meaning that licences will be required to capture them from any existing wild populations for release as part of a reintroduction project.
- Reintroduction projects will need to comply with animal welfare laws during the capture, transportation and keeping of any animals prior to release.
- The impact of any reintroduction on any protected areas will need to be considered and additional assessments and licences may be required.
- Reintroductions should comply with the IUCN Guidelines and the Scottish Code for Conservation Translocations which often require detailed social consultations and ecological surveys.

TABLE OF CONTENTS

1 Introduction
- 1.1 Summary
- 1.2 The meaning of *native range* in Scotland
- 1.3 Regulatory bodies and the Scottish Code for Conservation Translocations

2 Licences required for reintroductions in Scotland
- 2.1 Is a licence required under the 1981 Act for the release of an animal outwith its native range?
- 2.2 Are any other licences or assessments required?
- 2.3 International dynamic

3 Additional legal obligations relevant to reintroductions
- 3.1 Capturing and trapping
- 3.2 Monitoring obligations
- 3.3 Animal welfare obligations
- 3.4 Health and disease control
- 3.5 ‘Right to Roam’ (Scotland only)
- 3.6 Large enclosures as “zoos”
- 3.7 Other

4 Conflict with landowners and others

1. INTRODUCTION

1.1 Summary

This note explains the legal position in Scotland in relation to the introduction of species outwith their native range and any licences which are or may be required to do that.

Whilst some native species can be re-introduced without the need for a licence, the introduction of non-native or former-native species can involve extensive consultations with the relevant public and community bodies and in many cases special conditions will be imposed during the reintroduction process.

The legal aspects of reintroductions can appear complex, but there are three prevailing themes throughout:

- the protection of species;
- the protection of places (such as designated sites); and
- the legal presumption against introducing a species to a location outwith its "native range".

Rewilders must always be mindful of the ecological and social impacts of any proposed activity. For that reason, engagement with the local community (including landowners) and conducting detailed ecological surveys form an integral part of understanding feasibility and outcome. The length and depth of these processes ought not to be underestimated. However, since these are primarily policy issues which are highly fact specific, rather than legal issues, they are not addressed in this note. Instead, throughout this note we refer to guidance issued by NatureScot which outlines what may be appropriate in terms of surveys and other local engagement.

KEY QUESTIONS WHEN PLANNING A REINTRODUCTION PROGRAMME:

Considering the following questions will help rewilding projects navigate what licences may be required for reintroductions:

- The type of animal or species being reintroduced, and whether it is being reintroduced to a place outwith its native range. If it is, then a "non-native species licence" will be required.
- How and from where the specimens to be reintroduced will be obtained. Any plan to capture specimens from the wild may require a licence where the species is a European protected species or is protected under the WCA 1981. There are also relevant restrictions regarding the methods of trapping and holding of any animals which will need to be complied with.
- The place to which the animal or species is being introduced. If the reintroduction is happening within a protected area or could impact a nearby protected area, specific consents and assessments may be required (e.g., Habitats Regulations Appraisal).
- Any licences required to allow for the ongoing management and monitoring of the reintroduced animals.

In all cases NatureScot should be consulted prior to reintroduction to ensure that the appropriate licences and authorisations are in place.

1.2 The meaning of *native range* in Scotland

The Wildlife and Countryside Act 1981 (as amended) (the "**1981 Act**") sets out the rules for the reintroduction of a species which pivot around the meaning of the "*native range*" of an animal or plant. It is defined in the 1981 Act as: "*the locality to which the animal or plant of that type is indigenous and does not refer to any locality to which that type of animal or plant has been imported (whether intentionally or otherwise) by a person*."

It can be complicated ascertaining the native range of some plants and animals.

A species is considered by NatureScot to be outwith its native range if it has been imported to a location by human action. Even species imported centuries ago are still considered to be outwith their native range regardless of how long ago a non-native species was established in the wilds of Scotland (e.g. rabbits and brown hares).

NatureScot also considers species that were once native in a location, but where either the population has died out or the species no longer has the potential to re-colonise that location naturally, to be outwith their native range. These are termed "*former natives*". According to NatureScot, once a former native has been reintroduced back into a locality, this area does not become part of its native range because the reintroduction involves being moved by humans.

In some instances, a species may be native to specific localities of Scotland but not others – for instance, a species may not be native to some islands. Genetic differences between populations must also be taken into account. Where different subspecies are recognised, a licence could be required to translocate these variants outwith their native range.

NatureScot has produced an extensive Guidance Note on this matter and the Non-native species: code of practice provides further advice. Their website also provides further guidance as to the definition of native range.

Moreover, all species considered to be non-native to Great Britain are outwith their native range in Scotland. The GB Non-Native Species Information Portal provides information for over 3,000 non-native species in Great Britain (but we would note that this is a non-exhaustive list and less than half of these species are established in the wild in Scotland).

1.3 Regulatory bodies and the Scottish Code for Conservation Translocations

NatureScot

Various aspects of this note deal with the work of NatureScot, the successor of Scottish Natural Heritage. NatureScot advises the Scottish Government and also controls various aspects of nature conservation in Scotland. It is the main licensing body in Scotland for matters relating to conservation, nature and wild species.

Other Relevant Bodies

NatureScot is the licensing authority for all non-native species. For some actions, permissions from other bodies such as the Scottish Environment Protection Agency (SEPA) or Marine Scotland may be required. NatureScot also works closely with other bodies such as Forestry and Land Scotland to assess any forestry related proposals.

The Scottish Code for Conservation Translocations

NatureScot publish the Scottish Code for Conservation Translocations (the "**Code**")[1] along with the Best Practice Guidelines for Translocations in Scotland[2]. These provide the framework for planning and assessing conservation translocations in Scotland. 'Translocation' is an umbrella term which includes reintroduction (as well as other deliberate movement and release of species into the wild) and, therefore, it is prudent to consult these documents even if the reintroduction under consideration is not necessarily for traditional conservation purposes.

The Code outlines some of the preliminary steps to consider when obtaining necessary permissions:

- obtain permissions from landowners before collecting or releasing organisms in the wild;
- consult with NatureScot before undertaking translocations which involve protected species or designated sites, or which involve moving species outwith their native range; obtain all necessary legal permissions and licences. Licensing requirements are set out in more detail below;
- where the translocation involves moving organisms to/from other countries, obtain all necessary import/export permissions and licences, and consult with the relevant statutory bodies in all involved countries to establish national legislative requirements; and
- adhere to any relevant animal welfare, health and safety, biosecurity, quarantine and sanitation legislation.

2. LICENCES REQUIRED FOR REINTRODUCTIONS IN SCOTLAND

2.1 Is a licence required under the 1981 Act for the release of an animal outwith its native range?

The legal test under 1981 Act

SECTION 14 – INTRODUCTION OF NEW SPECIES ETC. (APPLICABLE IN SCOTLAND):

1. ***Subject to the provisions of this Part, any person who***
   a. *releases, or allows to escape from captivity, any animal -*
      I. *to a place outwith its native range; or*
      II. *of a type the Scottish Ministers, by order, specify; or*
   b. *otherwise causes any animal outwith the control of any person to be at a place outwith its native range,*
   is guilty of an offence.
2. ***Subject to the provisions of this Part, any person who plants, or otherwise causes to grow, any plant in the wild at a place outwith its native range is guilty of an offence.***

The 'non-native species licence'

The above provision creates a legal presumption against introducing a species to a location outwith its native range. A 'non-native species licence' is required to sanction the actions referred to in Section 14 that would otherwise be offences under the 1981 Act.

Whether or not a proposed reintroduction or translocation of a species will be outwith its native range is a question of fact depending on the species and the proposed release location.

An offence is not committed where a non-native species licence has been granted by the appropriate authority[3]. The licencing authority has a great deal of flexibility as to the terms and conditions of non-native species licences. The key features of licences are that they:

- can be general or specific;
- can be granted either to persons of a class or a particular person;
- can be subject to compliance with any specified conditions;
- are modifiable or capable of being revoked at any time by the appropriate authority;

- can be valid only for the period stated in the licence; and
- can be subject to discretionary charges by the appropriate authority if that authority determines that such reasonable sums are appropriate[4].

Guidance on licence applications

Applications must be lodged with NatureScot. The guidance provided on NatureScot's website is clear in relation to rewilding and reintroductions – when planning any activities which might involve the release of a non-native species, seek further advice from NatureScot and contact the relevant local office.

Before a non-native species licence can be issued, the following considerations need to be satisfied:

- what alternative options have been considered for the conservation management of the species and why have these been discounted?
- does the translocated species pose any threats to the release site and wider environment?
- what actions will be taken to reduce the risk of the translocated species causing negative impacts, how will any risks be monitored and how will remedial action be implemented if any risk is realised?

For some actions, permissions may also be required from other agencies, such as SEPA and Marine Scotland. For example, in Scotland it is an offence for any person to intentionally introduce any live fish or spawn of any fish into inland waters, or possess them with the intention of introducing them[5]. As such, any conservation translocation of a freshwater fish species to a Scottish site will require the prior "consent in writing of the appropriate authority"[6] Therefore, translocation of a species of fish may need a number of different licences.

The practical examples at the end of this note will help you understand how the licensing provisions apply in practice.

EXAMPLE 1: WCA NON-NATIVE RELEASE LICENCES

A rewilder wants to release the following species:

black grouse: a native bird that until 10 years ago, was known in the area, but is now gone and is unlikely to recolonise naturally (an example of animal being introduced to an area outwith its native range despite still naturally occurring in other parts of Scotland i.e., a former native species);

round-leaved sundew (*drosera rotundifolia*): a native carnivorous plant which may still be in the area but is difficult to find (an example of a plant that is within its native range i.e., a native species);

beaver (an example of an animal that is a protected species);

freshwater pearl mussels; and

wildcat.

As explained above, it is a criminal offence to release any species of animal or cause to grow any plant outwith its native range. Rewilders intending to carry out planned reintroductions of non-native or former-native species must therefore obtain the appropriate consent or licence from NatureScot.

Best practice is for the rewilder to consult with NatureScot in order to ascertain whether consents, such as a non-native species licence, are required before taking any action towards a release. The Scottish Code for Conservation Translocations should also be consulted along with the Best Practice Guidelines for Translocations in Scotland.

It is assumed that the rewilder will already have satisfied themselves that they comply with any applicable pre-licence conditions and that there are no cross-border complications. In general terms we note the following matters may be of significance: (i) there is an identifiable conservation goal; (ii) there has been consideration as to whether the planned location is a specially protected place of significance or 'European protected site' and if appraisals or additional consents are required; (iii) the rewilder has assessed the potential impacts of release on local flora, fauna and existing human activity (i.e., what we might informally term a threat assessment); (iv) the rewilder has assessed whether pre-requisite or post-release management practices are necessary to reduce the risk of the translocated species causing negative impacts to the local ecosystem; and (v) the planned release is the most appropriate form of action in the given instance and alternative options were discounted.

BLACK GROUSE

Releasing black grouse in areas where they are not currently present but used to be found 10 years ago would likely be classified as a reintroduction of a former native species (noting that the designation depends in part on whether the species no longer has the potential to re-colonise the relevant location naturally). Therefore, a licence is likely required for reintroduction of black grouse to their native range or a locality to which the animal was formerly indigenous.

NatureScot work closely with other bodies such as Forestry and Land Scotland and they will advise if the proposal has any forestry related aspect if they consider that the rewilder may need to obtain additional permissions/licences from other bodies. Moreover, all wild birds are given protection under the 1981 Act and the black grouse will be considered a protected species. Therefore, if the rewilding project involves activity such as the handling, capture and/or release, the licence conditions must take account of the protected status of the species and provide consent to appropriate activities.

Best practice dictates that NatureScot should be consulted prior to taking any direct action to reintroduce the species to limit the risks of committing an offence.

ROUND-LEAVED SUNDEW

According to the Scottish Wildlife Trust, round-leaved sundew is common across Scotland and is categorised as a species of 'least concern'. For this reason, it would appear the plant grows widely and most areas of Scotland would likely be classified as within its native range and therefore not require a licence under the WCA.

As a matter of practicality, prior to taking any action to plant the species in the planned area, it would be sensible to determine whether the round-leaved sundew is present in the relevant location. Thereafter, the rewilders should consult with NatureScot and otherwise seek agreement to the effect that the species is native, not protected and the planned site has no special environmental protection status in law or policy.

Best practice dictates that NatureScot should be consulted prior to taking any direct action to reintroduce the species to limit the risks of committing an offence.

BEAVER

In Scotland the beaver is recognised as a European Protected Species. NatureScot figures estimate the median number of beavers in Scotland is 954 beavers across 254 beaver territories, mainly in the Forth and Tay catchments. Since native populations of beavers went extinct in Scotland by the 16th century and those that are now present have been reintroduced, the species is classed as 'former native' in many suitable localities meaning rewilders will require a licence for reintroduction.

Notably, the Scottish Government recently changed its position to be actively supportive of translocation of beavers outwith their current range in Scotland and the new Beaver Strategy was published in September 2022.

NatureScot must be consulted about any project involving beavers. The policy on beavers is moving towards a more liberal hand in dispersing populations across Scotland. However, beavers are designated as a European Protected Species and a former-native species, and so on this basis, a licence would be required to allow the reintroduction of beavers as well as for many activities necessarily involved in a reintroduction project such as the handling, capturing and holding of these animals.

FRESHWATER PEARL MUSSELS

We understand that freshwater mussels are endangered and only native to *some* parts of Scotland; there are a few populations in Southern Scotland and some more abundant populations in the Highlands. In order to ascertain whether a non-native species licence is required, NatureScot should be consulted.

Freshwater pearl mussels are protected under Section 9 of the WCA 1981 which means that it is an offence to capture, take, kill or otherwise disturb these invertebrates. If a rewilder wishes to take specimens of freshwater pearl mussels from the wild to be used in reintroduction projects, they will need to obtain consent and a licence from NatureScot. NatureScot can licence certain activities that would otherwise constitute an offence against freshwater mussels. A licence can be applied for to survey for freshwater mussels, however these are only granted to experienced and suitably trained individuals.

WILDCATS

Wildcats are an indigenous species to Scotland. However, they are not widespread and very few individuals are thought to be left in the wild - it has been estimated that there are only 115 to 314 individuals which suggests their native range is marginal. For most rewilding projects this means wildcats will be considered as a former native species but NatureScot should be consulted to confirm in this instance whether the species is to be considered non-native.

Wildcats are a designated European Protected Species.

Assuming NatureScot confirms that the wildcat is only formerly native to the release area, a licence would be required to allow the reintroduction of wildcats under the WCA. A separate licence would be required for many activities necessarily involved in a reintroduction project such as the handling, capturing and holding of these animals given their status as a European Protected Species.

2.2 Are any other licences or assessments required?

Protected Areas

If a rewilder plans to reintroduce a species within an area that has a protected status (such as a European Site or a Site of Special Scientific Interest ("**SSSI**")) or if a reintroduction could impact such a site, further licences could be required to ensure that the reintroduction will not negatively impact the protected sites.

To find out if an area is protected visit SiteLink.

The degree of protection afforded to protected areas will depend on their classification and the reason for their designation. A rewilder should be aware of the most important classifications highlighted below.

European Sites

In Scotland, the areas with the highest level of protection are termed "**European Sites**" (formerly known as "Natura 2000" sites), which include Special Areas of Conservation (SACs) and Special Protection Areas (SPAs). European sites are protected under the Habitats Regulations.[7]

The objective of the Habitats Regulations is to ensure that any plan or project that may damage a European Site is assessed and can only go ahead if certain strict conditions are met. All competent authorities (which includes any Minister, local authority, SEPA, NatureScot and Forestry & Land Scotland) must consider whether any plan or proposal will have a 'likely significant effect' on a relevant site. If so, they must carry out an 'appropriate assessment'. The assessment is known as a Habitats Regulations Appraisal[8]. If any proposal to reintroduce animals (including both native or non-native species) may impact the status of a European Site, it will be necessary to consider whether a Habitats Regulations Appraisal is required. The assessment must show, beyond reasonable scientific doubt, that the plan or project will not adversely affect the integrity of the site. The competent authority must consult with NatureScot who will then determine whether there is enough evidence to support that conclusion. More information on this matter can be found on NatureScot's website.

SSSIs

Separately, areas considered by NatureScot to be of special interest for their flora or fauna, geology or geomorphology, are designated as SSSIs. Together they form a network of the best examples of species, habitats and rock and landform features throughout Scotland. The scheme is now contained in the Nature Conservation (Scotland) Act 2004 (the "**2004 Act**").

It is an offence for anyone to "intentionally or recklessly damage any natural feature" of SSSIs (see Section 19). The owners and occupiers of land designated as a SSSI must apply to NatureScot for consent to carry out certain operations that could conceivably negatively affect the natural features of SSSIs – such operations are included in a list maintained by NatureScot which is sent to all interested parties. Therefore, NatureScot should be consulted in relation to any proposal for species introduction within or near to SSSIs[9].

In many cases, a site may be both a SSSI and a European Site, in which case the protections offered by both regimes will apply.

Ramsar Sites

"Ramsar Sites" (designated wetlands under a treaty established in 1971 by UNESCO) can be European sites and/or SSSIs and are therefore protected under the relevant statutory regimes.[10]

Protected Species

There are a sizeable number and variety of species which are protected by law in Scotland including beavers, red squirrels, mountain hares, wildcats and all wild birds. For quick reference, NatureScot has published a table detailing all of Scotland's protected species including a note of the legislative instruments conferring protection. In addition, NatureScot provides on their website an A-Z guide for a specific protected species which highlights how to apply for each type of licence.

Under the 1981 Act, there is an obligation not to kill, capture or otherwise disturb the place a protected species occupies (including their eggs or their nesting sites in case of wild birds). If any person intentionally or recklessly kills, injures, or takes, any wild animal included in Schedule 5 of the 1981 Act, they shall be guilty of an offence under Section 9 of the 1981 Act unless they posses a bespoke 'protected species licence'[11] sanctioning such activity.

Similarly, if any person intentionally or recklessly picks, uproots, destroys or exposes for sale any wild plant, included in Schedule 8 of the 1981 Act they shall be guilty of an offence under Section 13 of the 198 Act, unless such act is shown to be one of the listed lawful exceptions or the person is in possession of a relevant consent sanctioning such activity.

Separately, certain species of animals and plants in Scotland are designated '**European Protected Species**'. These species are listed in Schedules 2 and 4 of the Habitats Regulations[12] and includes bats, otters and dolphins. Regulation 39 of the Habitats Regulations makes it an offence, amongst other things, to:

- deliberately or recklessly capture, injure or kill any such animal;
- deliberately to disturb or harass any such animal;
- deliberately to take or destroy the eggs of such an animal; or
- damage or destroy a breeding site or resting place of such an animal.

Regulation 43 extends similar protection to wild plants of European Protected Species as it is an offence deliberately to pick, collect, cut, uproot or destroy a wild plant of this designation.

Whenever a European Protected Species is present, a licence will be required to permit any activity that may affect such animals and plants (see Regulation 44) and will only be granted by NatureScot subject to satisfying the three-pronged test noted below.

Badgers are notably absent from both the Habitats Regulations and Schedule 5 of the 1981 Act (as amended). However, both badgers and their setts are legally protected under the Protection of Badgers Act 1992 (as amended). It is an offence to wilfully or recklessly interfere or disturb with a badger sett, and a person must not take, injure or kill a badger without a licence to do so.

In addition, the Nature Conservation (Scotland) Act 2004 (as amended) gave rise to the Scottish Biodiversity List, which identifies species considered by Scottish Ministers to be of principal importance for the conservation of biodiversity. Wildlife reintroduction projects should seek to avoid or mitigate against any significant negative impact on species on this list as a matter of 'best practice'[13].

Licensing implications for protected species

The protected species regime has two broad implications for wildlife reintroductions in Scotland: first, the planned capture and release of protected animals for use in reintroduction projects will require a species licence from NatureScot.

In particular:

- Section 1 of the 1981 Act provides that a licence is required to take any wild bird or egg of a wild bird (except those specified in Schedule 2 outside the relevant closed season);[14]
- Section 9 of the 1981 Act prohibits the 'taking' of those wild animals specified in Schedule 5; and
- With reference to a European Protected Species, a licence will be required to take, possess or capture such animals (see Regulations 41 and 44 of the Habitats Regulations).

Therefore, if a rewilder plans to reintroduce a protected species, careful thought will need to be given to where the specimens will come from. Any plan to capture the animals from existing populations (either in Scotland or elsewhere) will likely require a licence.

Separately, NatureScot will consider and assess whether the planned reintroduction of any species could negatively impact populations of existing protected species in the locality of any release.

It is advisable to obtain specialist advice from a consultant ecologist if a proposed activity is at risk of committing any of the offences set out above and to develop the supporting body of information required to satisfy the tests/conditions precedent in the licencing regime. For further practical consideration of how the regulations on protected species operate in practice, refer to NatureScot guidance and see Scenario 2 of Schedule 2.

Dangerous wild animals

The Dangerous Wild Animals Act 1976 (the "DWAA") applies to Scotland. The "dangerous wild animals" to which it applies are listed in the Schedule which includes a number of UK native species such as wolves, lynx, wild boar and elk.

It is not permitted to keep any dangerous wild animal except under the authority of a 'dangerous wild animal licence' granted by a local authority in accordance with Section 1 of the DWAA[15].

The DWAA lists the conditions for the granting of such licences, such as that it must not be contrary to the public interest on the grounds of safety, nuisance or otherwise, and all reasonable precautions will be taken to prevent and control the spread of infectious diseases (Subsections (2)-(5) of Section 1). It is also necessary to ensure that the dangerous wild animal will be held in a secure enclosure, the implications of which will vary by species and the facts of each reintroduction site. Therefore, where a dangerous wild animal licence is granted, there will be various conditions[16] included in the licence bespoke to the local area.

The Scottish government has published a helpful guide which provides guidance on an individual species basis for the keeping of dangerous wild animals.

2.3 International dynamic

Licence requirements and conditions depend in equal parts upon the particular species being moved, the methods involved, and the place which it is being moved to/from. In some instances multiple countries can be connected to rewilding projects. Where that is the case, NatureScot will require evidence that the necessary licences and permissions have been obtained in the other countries before issuing any Scottish licences or consents.

Animal and plant import law is a large subject in itself and is beyond the scope of this note, save for the following general comments:

Translocations between Scotland and other parts of the UK

Scots law is different to that in the rest of the UK. If translocations involve other parts of the UK, the relevant statutory agencies therefore need to be consulted to obtain advice on their licensing requirements.

Translocations between Scotland and non-UK countries

All EU Member States are bound by the Habitats Directive and Birds Directive. There will be differences in how these Directives have been transposed into domestic legislation. Following Brexit, Scotland has ensured the directives 'stay operable'. The Scottish Government have published information on how this has worked logistically. The process with the relevant statutory bodies in the countries concerned should be consulted. The same general advice applies to countries outwith the EU.

International movement of endangered species

As well as complying with all local regulation and consulting with their relevant statutory bodies, it should be borne in mind that the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) places constraints on the international movement of CITES-listed species. The species covered by CITES are listed in three Appendices[17] according to the degree of protection they receive, and permits are required to allow the legal import or export of those species. Any such projects should also take advice

on the application of the Control of Trade in Endangered Species (Enforcement) Regulations 1997.

3. ADDITIONAL LEGAL OBLIGATIONS RELEVANT TO REINTRODUCTIONS

Rewilders must consider whether licences may be required to permit the range of operations necessary for the ongoing management of the species following the reintroduction phase. In many instances, it is a legal requirement for NatureScot to sanction the activity otherwise a rewilder risks committing an offence. This includes the following matters:

3.1 Capturing and trapping

In addition to licences being required to capture and reintroduce species under the provisions of the 1981 Act and Habitats Regulations referred to above, if a rewilder needs to re-trap or capture the animals or their offspring after release for e.g., tagging or monitoring purposes, further licences may be required for those activities. Such licences will be applied for and issued under the same provisions of the 1981 Act and the Habitats Regulations described above.

Separately, legal restrictions on the methods which can be used to capture specified animals from the wild are set out in Section 11 of the 1981 Act. For example, it is an offence to use poisonous substances, self-locking snares, nets, devices for illuminating a target, sounds as a decoy and the use of a mechanically propelled vehicle in immediate pursuit of the animals included in Schedule 6 under the Act (the badger is one such example).

Therefore, when planning reintroduction projects, there will be important considerations on whether the permissions are in place for these reintroduced animals to be legally caught and/or held and the means of doing so, for the purposes of ongoing monitoring etc.

3.2 Monitoring obligations

The precise extent of ongoing obligations for rewilders will vary depending on the factual circumstances in every project. However, it should be noted that the Code reflects an expectation that some form of monitoring will be undertaken: "*As a minimum, all translocation programmes undertaken in Scotland should include some demographic monitoring. The level of detail, and the need (and level of detail) for other forms of monitoring will vary and should be proportional to the scale of the translocation and the associated risks. The greater the distances involved, the more sentient the organism, the greater the biological and socio-economic risks, the greater the need for extensive and detailed monitoring*[18]."

At the outset of the project, it would be sensible to seek input from NatureScot about the appropriate level of monitoring. By way of example, it may be important for a project to mark individual animals that have been reintroduced or have a GPS collar fitted for tracking purposes. Further, if the animals in question are a protected species it may be necessary for NatureScot to authorise the proposed methods of monitoring and include consent within the scope of licence conditions.

3.3 Animal welfare obligations

NatureScot views animal welfare as a priority in any wildlife management practices which arise in connection with planned reintroductions.[19]

The provisions of the Animal Health and Welfare (Scotland) Act 2006 (as amended) (the "**AHWA**") are applicable to any vertebrate species other than human beings. Under the AHWA, it is an offence for a person to cause "*unnecessary suffering*" to any "*protected animal*".

Animals of a kind "*commonly domesticated*" in the British Islands are "*protected animals*". Wild animals are also "*protected animals*" under the AHWA whenever they are under human control, be it on a temporary or permanent basis, and possibly even when they are no longer under human control but are not yet living "*in a wild state*" (for example, animals that have escaped captivity)[20]. Therefore, wild animals kept for the purposes of reintroduction projects may be protected under the AHWA, for example, whilst temporarily held in an enclosure (including large areas of fenced land), pen or cage trap; during transportation; temporarily held in a net (including a mist net) or snare; or whilst held in the hand.

Unnecessary suffering can occur where a person owns or has otherwise assumed responsibility for a protected animal, and their act or omission, causes unnecessary suffering (see Section 19 AHWA). Whether or not suffering is sanctionable is determined on consideration of a number of factors including, but not limited to, if the purpose was to benefit the animal and whether it was proportionate. A relevant consideration is whether the person knew, or ought reasonably to have known, that the act would have caused the suffering or be likely to do so. Abandonment can also be construed as an offence if, without reasonable excuse, the person neglects an animal for which the person is responsible in circumstances likely to cause it unnecessary suffering (see Section 29).

The AHWA also imposes an obligation on the person responsible for an animal to take reasonable steps to ensure that the "*needs of an animal*" for which they are responsible are met to the extent required by good practice. An animal's needs shall be taken to include:

- a suitable environment;
- a suitable diet;
- to be able to exhibit normal behaviour patterns;
- to be housed with or apart from other animals; and
- protection from pain, suffering, injury and disease.[21]

The provisions under AHWA would appear to be especially relevant when animals are in transit for the purposes of reintroductions.

3.4 Health and disease control

There are legal obligations relating to animal health and disease control which rewilding projects may need to comply with depending on the circumstances of an animal's release. These obligations are outside the scope of this note.

3.5 'Right to Roam' (Scotland only)

Most of the land suitable for rewilding in Scotland is accessible to the public for recreational, educational, and commercial purposes under the "Right to Roam" legislation[22]. In essence, it is useful to assume that people may simply appear at any time on any land (so long as they are acting responsibly). Rewilders ought to take this principle into consideration where land has been identified as suitable habitat for species to be (re)introduced in large enclosures, especially where a project is within a range known to be popular for recreational activity. For instance, there could be an immediate conflict if plans are afoot to reintroduce wolves into a large enclosure to the extent it would inhibit or prohibit public access to that area of land. Consultation at an early stage on this type of issue will need to be carefully thought through in order to ensure specific rights of way and the general right to roam are respected or appropriate permissions to exclude access are obtained. For further details we refer to the separate *Rewilding in Scotland: Public Access* note.

3.6 Large enclosures as "zoos"

Rewilders should also be wary of the implications of holding species captive in large enclosures, especially if both prey and predator species will be present (e.g., wolves and red deer). Large enclosures which facilitate public exhibition of wild animals may be subject to the zoo licensing regime[23] and the applicable standards and regulations thereto may give rise to unforeseen limitations on the project, such as, restrictions on permitting live prey in the enclosure. Consultation at an early stage on this type of issue will need to be carefully thought through in order to ensure the fundamental objectives of the project can be achieved.

3.7 Other

Where any licence has been obtained it is of paramount importance to ensure compliance with all conditions as well as to stay abreast of any other legal obligations that arise from time to time.

Beyond the general scope of this note there may be additional specific protections applicable to certain animals under the following legislation: (i) The Offshore Marine Regulations 2007; (ii) The Birds Directive and Wildlife and Countryside Act 1981; (iii) The Protection of Badgers Act 1992; and (iv) The Deer (Scotland) Act 1996.

4. CONFLICT WITH LANDOWNERS AND OTHERS

Where reintroductions may affect people, it is important to consult with landowners, land users and any other interested groups or individuals. The reintroduction of certain species could affect people's wellbeing, livelihoods and recreational activities.

The Code states that permissions should be obtained from landowners before collecting or releasing organisms in the wild.[24] Conflicts are more likely to arise in certain situations; such as where there is disruption to rural economies, restriction on land use, risk of transmissible diseases or risk of direct harm to humans or other animals.

Where reintroductions or translocations lead to conflicts between the conservation goals and the livelihoods or leisure of other stakeholder groups, the Code states that they should not proceed unless acceptable solutions can be developed. An acceptable solution may be, for example, management actions/mitigations (such as containment or control), long-term compensation agreements to offset losses, or a viable exit strategy for reversing the translocation or reintroduction if unacceptable impacts occur. To reduce the risk of conflicts arising, all reintroduction projects should include stakeholder engagement as early as possible. This will help to address any concerns early on, through dialogue, to identify suitable options and mitigations.

In respect of the liability of rewilders and/or other third parties involved in all such projects, neither the Code nor the 1981 Act specifically address the issue of reintroduced species causing damage to persons, property or the environment. However, liability can arise out of other established legal principles (e.g., delict/tort and the common law) (see the *Rewilding in Scotland: Liability for Damage Caused by Animals* and *Rewilding in Scotland: Liability to Visitors and Neighbours* notes).

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of October 2022.

ENDNOTES

1. https://www.nature.scot/doc/scottish-code-conservation-translocations
2. https://www.nature.scot/sites/default/files/2019-02/Scottish%20Code%20for%20Conservation%20Translocations%20-%20Summary.pdf
3. Section 16(4)
4. Section 16(5) of 1981 Act
5. Section 33A of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003
6. Section 33A of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003
7. European Sites were originally given legal protection under the "Habitats Directive" (Council Directive 92/43/EEC of 21 May 1992). Despite the advent of Brexit their designation persists through domestic legislation in Scotland known as the "Habitats Regulations" (The Conservation (Natural Habitats, etc.) Regulations 1994 (as amended). Various amendments have been made to the Regulations between 2004-2019 which apply only to Scotland; thus the Scottish regime does not precisely mirror the rules in force in England and Wales pursuant to the Conservation of Habitats and Species Regulations 2017.
8. Required under the European Union Council Directive 92/43/ECC on the conservation of natural habitats and of wild fauna and flora which is translated into specific legal obligations in Scotland by the Conservation (Natural Habitats, &c.) Regulations 1994
9. Nature Conservation (Scotland) Act 2004 (as amended)
10. Paragraph 211 of the Scottish Planning Policy, 2014; Scottish Government Guidance Note, 2019
11. A species licence is a generalised term included within the Code (refer to page 26) used in respect of a licence which required actions involving identified species given specific legislative protection.
12. Since this is a piece of domestic legislation the European Protected Species list has survived Brexit. The corresponding key legislation in England and Wales is the Conservation of Habitats and Species Regulations 2017 which enables the jurisdictions to differ in how they seek to implement species protection on land and inshore waters.
13. Page 26, the Code.
14. The definition of 'wild bird' under the Wildlife and Countryside Act 1981 generally does not include game birds (namely pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan) except for certain provisions of the WCA 1981 relating to licencing and the prohibition on the use of certain traps.
15. See Section 1 of the 1976 Act
16. Sub-section 6 of the 1976 Act
17. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Appendices I, II and III valid from 14 February 2021: https://cites.org/sites/default/files/eng/app/2021/E-Appendices-2021-02-14.pdf
18. Page 44 of the Code, Chapter 9: Monitoring, management, communication
19. Position paper on Wildlife Welfare: https://www.webarchive.org.uk/wayback/archive/20211020105617mp_/https://www.nature.scot/sites/default/files/2020-06/SNH%20Position%20Statement%20Wildlife%20Welfare%20-%202014.pdf
20. See Section 17 of AHWA.
21. See Section 24 of AHWA.
22. The Land Reform (Scotland) Act 2003
23. See Section 1(1) and (2) of the Zoo Licensing Act 1981. The enclosure must allow members of the public access to view the animals for at least seven days per year to be considered a zoo within the meaning of this legislation.
24. Page 8 of the Code, "Stay legal: obtain necessary permissions and adhere to relevant legislation" and Page 30, "Responsible access"

SUBSIDIES

CORE TOPICS:

- Subsidies currently available in Scotland that may be available for rewilding and upcoming changes.

KEY TAKEAWAYS:

- As well as the Basic Payment Scheme, the Scottish Rural Development Programme may provide financial support for various rewilding activities.
- New support mechanisms will be put in place under the proposed Agriculture Bill which is anticipated in 2024.
- The Scottish Government's vision document and relevant consultations suggest that the key outcomes for support will include climate change adaptation and mitigation, and nature protection and restoration.

TABLE OF CONTENTS

1. Development of agricultural subsidies: Before Brexit

2. Development of agricultural subsidies: After Brexit

3. Current state of affairs

3.1. Direct payments – the Basic Payment Scheme

3.2. Scottish Rural Development Programme

3.3. Central Scotland Green Network contribution

4. Future changes

1. DEVELOPMENT OF AGRICULTURAL SUBSIDIES: BEFORE BREXIT

The Common Agricultural Policy (**"CAP"**) is a European programme of funding and support for farmers and crofters, as well as rural businesses and communities.

Europe allocates funding to each member state in two ways:

- The European Agricultural Guarantee Fund – Pillar One or the former Direct Payments (payments that farmers, crofters and landowners may be entitled to, based on the size and type of their farm and the livestock they keep); and
- The European Agricultural Fund for Rural Development – Pillar Two or the former Scottish Rural Development Programme (a range of grants and support for rural communities, rural businesses, farmers, crofters and other land managers).

2. DEVELOPMENT OF AGRICULTURAL SUBSIDIES: AFTER BREXIT

The European Union (Withdrawal) Act 2018 wrote CAP into domestic law.

In August 2020, the Scottish Parliament passed the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (the "**Retained EU Law Act**"), which gave ministers the power to alter the inherited CAP regime.

In August 2021, the Scottish Government and Scottish Green Party shared a draft policy programme[1] setting an aim for Scotland to be a global leader in sustainable and regenerative agriculture. The programme proposes that an Agriculture Bill be passed and sets out that the Bill will deliver:

- A new support framework that will include delivering climate mitigation and adaptation, nature restoration and high-quality food production;
- Integration of enhanced conditionality against public benefits, with targeted outcomes for biodiversity gain and low emissions production; and
- Increased equality of opportunity, improving business resilience, efficiency and profitability.

The Bill is to replace the current CAP framework for agriculture and land use support. The Scottish Government have committed to consulting with stakeholders before introducing this Bill[2]. A consultation on agricultural transition in Scotland took place from 25 August 2021 to 17 November 2021[3]. The Agriculture Reform Implementation Oversight Board published the responses to this consultation[4] and set-out their full rationale and proposals for a future Agriculture Bill by way of consultation in August 2022[5].

The Scottish Government must lay a new Scottish agricultural policy before the Scottish Parliament no later than 31 December 2024[6].

3. CURRENT STATE OF AFFAIRS

The Retained EU Law Act provides the current legislative framework in Scotland[7]. Below is a brief outline of the current subsidies that may be applicable to rewilding projects in Scotland.

3.1 Direct payments – the Basic Payment Scheme

The Direct Payments to Farmers (Legislative Continuity) Act 2020 wrote CAP direct payment schemes into domestic law for the 2020 claim year and the Retained EU Law Act provides that the Scottish version of the CAP scheme will continue to apply (subject to modification by the government) until the government implements a new scheme. In March 2022, the government published their vision for a new scheme, see Section 3, below.

The payments available under the existing scheme in Scotland include:

The Basic Payment Scheme

The Basic Payment Scheme acts as a safety net for farmers and crofters by supplementing their main business income. To qualify for this support, you must actively farm eligible land.

Eligible land under the scheme is any agricultural area of the holding used as arable land, permanent crops or permanent pasture, with a minimum area requirement of 3 hectares[8]. The land must comply with the Good Environmental & Ecological Condition requirement.

An active farmer is a farmer who produces, rears or grows agricultural products, including through harvesting, milking, breeding animals, and keeping animals for farming purposes.

Whether or not land that forms part of a rewilding landscape constitutes "eligible land" and the rewilding activities constitute "active farming" will be a matter of fact and rewilders should take specific advice on where the boundary lies if they wish to be eligible for the Basic Payment Scheme.

The Basic Payment Scheme is area-based and has been regionalised to reflect the variation in the traditional quality of land across Scotland. For land to be eligible for claiming under the Basic Payment Scheme, the claimant must undertake the minimum activity for the payment region your land is in. There are three payment regions:

- Region 1: includes better quality agricultural land that has been used for arable cropping, temporary grass and permanent grass;
- Region 2: includes rough grazing with a Less Favoured Areas (**"LFA"**) grazing category of B, C, D or non-LFA; and
- Region 3: includes rough grazing with an LFA grazing category A.

In addition, payment regions 2 and 3 have been designated "land naturally kept in a state suitable for grazing". This means that there is a presumption that there has been no meaningful activity by the claimant to maintain the agricultural potential of the land.

Consequently, the claimant must undertake a specified activity in order to turn such land into eligible hectares.

Therefore, the extent to which a rewilding project, which for example involves extensive grazing by large herbivores, might satisfy the scheme may depend on the region in which it is carried out. It appears that, depending on e.g., stocking density and it being considered to be active farming, the extensive grazing of large herbivores on rough grazing land in regions 2 and 3 might qualify under the Basic Payment Scheme. It appears unlikely that it would qualify as such in region 1.

Separately, rewilders may be interested to know that the requirement for minimum agricultural activity can also be met in payment regions 2 and 3 by undertaking an annual Environmental Assessment which consists of three elements (i) a map and description of the farm environment; (ii) a breeding bird, mammal and butterfly survey; and (iii) monitoring of habitats including plant health survey.

However, the eligibility of any activity under the Basic Payment Scheme will always be fact dependent so please read Basic Payment Scheme full guidance[9] for eligibility information.

Greening payment 'for agricultural practices beneficial for the climate and environment'

A Greening payment 'for agricultural practices beneficial for the climate and environment' is a top-up of the Basic Payment Scheme available in Scotland. In order to claim a Greening payment, you must therefore first be eligible to receive a Basic Payment.

The Greening requirement applies at a business level. This is the land under one Business Reference Number (i.e., all the land your business claimed on your Single Application Form). Greening is paid in accordance with the number of eligible hectares in the region concerned in each year of application.

To make sure you receive the Greening payment with your Basic Payment, you must comply with Greening requirements. Please read the guidance to see which Greening requirements apply to you. Greening activities may be applicable to rewilders who qualify for the Basic Payment and must include one or more of the following:

- protecting permanent grassland designated as environmentally sensitive grassland; and
- farming 5% of your arable area in a manner that promotes biodiversity – known as an Ecological Focus Area.

For further information please read the Greening Guidance (2022)[10].

Young Farmer payment

Should any rewilders eligible for the Basic Payment Scheme be under the age of 40, they may be able to claim a Young Farmer top up payment. It is expected that this payment will continue to 2024 with the Scottish Government due to make an announcement on plans for after then imminently[11]. For further information please read Rural Payments and Inspections Division (**"RPID"**) guidance[12].

Voluntary Coupled Support

Voluntary Coupled Support includes the "Scottish Suckler Beef Support Scheme" and the "Scottish Upland Sheep Support Scheme". These schemes provide a payment linked to farm production to maintain livestock numbers. For further information please read Scottish Suckler Beef Support Scheme (Mainland and Islands) full guidance[13] and the Scottish Upland Sheep Support Scheme full guidance[14].

3.2 Scottish Rural Development Programme

Pillar 2 of the CAP is the financial support provided through the Scottish Rural Development Programme.

The principle of 'public money for public goods' underpins Pillar 2. The concept of public goods is a way of describing the environmental and social goods and services provided by agriculture and forestry that society benefits from, but which farmers are not rewarded for through market prices. Maintaining or encouraging the provision of public goods therefore needs supporting, through financial incentives or other mechanisms.

Below we have highlighted schemes that may be relevant to some rewilders that are still applicable during the transition period (which is expected to run until 2024).

The Agri-Environment-Climate Scheme ("AECS")

The AECS was part of the Scottish Rural Development Programme 2014-20 and has also been included in the Scottish Rural Development Programme 2021-2024[15].

The AECS aims to:

- Deliver the Scottish Biodiversity Strategy[16] (forming part of the Scottish Government's Green Recovery[17]) by supporting appropriate management for vulnerable and iconic species and habitats, strengthening ecological networks, controlling invasive non-native species and enhancing the condition of protected nature sites;
- Contribute to Scotland's climate change targets by reducing greenhouse gas emissions from agriculture and securing carbon stores in peatlands and other soils;
- Meet obligations to improve water quality under the Scotland River Basin Management Plan by reducing diffuse pollution;
- Control flooding through natural flood risk management;
- Support organic farming;

- Preserve the historic environment; and
- Improve public access.

The AECS awards about £30-40 million annually to land managers[18]. The following activities have been awarded funding by AECS:

- Arable farmland and birds;
- Designated sites;
- Key vulnerable species;
- Pollinators;
- Water management;
- Grassland management, habitat mosaics and carbon rich soils;
- Carbon rich soils;
- Moorland management;
- Hedgerows; and
- Organic farming.

The AECS is delivered jointly by the RPID and NatureScot.

Note that AECS does not appear to provide payment for capital expenditure such as fencing. Funding may be available through the Small Farms Grant Scheme and New Entrants Capital Grant Scheme. Please see below.

Applying to the AECS

The AECS is open to farmers, groups of farmers and other land managers with land in Scotland and who are registered with RPID[19] and have a Business Reference Number.

To be eligible applicants must be able to demonstrate that they have the legal right to carry out the projects to be funded for the length of the contract and any associated monitoring period.

To maximise environmental outcomes and ensure value for money, support under the AECS is geographically targeted. This means that applicants will need to check which options are available in their area before applying[20]. If applicants have several holdings, they will need to enter each of these separately.

For further detail on how to apply please refer to the Scottish Government's 'Rural Development: Agri-Environment Climate Scheme' full guidance[21] and the checklist of requirements for applications[22].

Forestry Grant Scheme

The Forestry Grant Scheme offers financial support for the creation of new woodland and the sustainable management of existing woodland as outlined below.

It appears that rewilding projects working towards e.g., native woodland creation and restoration or agroforestry may be able to benefit from one of these grant schemes, but it will depend on the specific nature of each project. A detailed analysis of the relevant guidance should be undertaken with the proposed project in mind.

Each type of grant within the Forestry Grant Scheme will cover different capital costs, based on a number of capital items as explained in more detail in the Scottish Government guidance.[23] You must claim your capital items on the Forestry Grant Scheme Manual Standard Costs Capital Item Claim Form once you have satisfactorily completed the work to the desired specification.

Capital items must meet, as a minimum, the specifications detailed in the individual capital item's guidance. You must include a map of the location of the capital items with your claim.

Please consult the Forestry Grant Scheme Capital Items list to determine whether your proposed item is covered by the Scheme.

Grant options for owners of existing woodland[24]

I. Woodland Improvement

This contains five grant options:

- Planning;
- Habitats and species;
- Restructuring regeneration;
- Low Impact Silvicultural Systems; and
- Woodlands in and around towns.

Note that the capital costs of deer fencing may be covered by grants for woodland improvement focusing on habitats and species where without such protection, a project will be prevented from meeting its grant objectives.[25]

II. Sustainable Management of Forests

This contains nine grant options:

- Low Impact Silvicultural Systems;
- Native Woodland;
- Livestock Exclusion;
- Woodland Grazing;
- Public Access Rural Woods;
- Public Access – Woods In and Around Towns;
- Grey Squirrel Control;
- Predator Control for Capercaillie and Black Grouse; and
- Species Conservation – Reducing Deer Impact.

III. Forest Infrastructure

This grant has two aims:

- to provide support for new access infrastructure that will bring small scale (up to 50 hectares), undermanaged or inaccessible existing woodlands back into active management; and
- to provide support for new access infrastructure to new woodlands as part of the Sheep and Trees initiative.

Capital grants are available for the following types of infrastructure under this scheme:

- Construction of forest road (up to 500m) with on-site material;
- Construction of lay-bys turning areas and loading bays; and
- Bell-mouth junction[26].

IV. Harvest and Processing

V. Tree Health

Grant options for woodland creation[27]

The following grants depend on specific requirements for composition and stocking densities. Grants are available for the creation of the following woodland:

- Conifer (predominantly Sitka spruce);
- Diverse conifer (species other than Sitka);
- Broadleaves (productive species at high stocking);
- Native Scots pine;
- Native upland birch;
- Native broadleaves;
- Native low density;
- Small or Farm woodland (mixed woodlands less than 10ha); and
- Northern & Western Isles.

Rates vary depending on species planted.

Note that capital costs associated with deer fencing may be covered under this scheme where without such protection, a project will be prevented from meeting its grant objectives.[28]

Please note that additional payments are available for a number of operations ancillary to the establishment of new woodland such as for improving fencing.

I. Agroforestry

Agroforestry is an integrated approach to land management where trees and agriculture co-exist to provide multiple benefits.

This option is new to the Forestry Grant Scheme and provides grant support to help create small scale woodlands on sheep grazing pasture.

The trees can:

- provide shelter for livestock
- provide timber
- increase biodiversity
- enhance the landscape

The rate of capital grants available for agroforestry depends on the number of trees planted per hectare. This also has a bearing on the annual maintenance rate (payable for up to five years).

II. Sheep and Trees

This is available to upland livestock farmers where sheep are, and will continue to be, a major component of the farm business. The new woodland must be between 10 hectares and 50 hectares of productive conifer woodland using the 'Conifer' or 'Diverse Conifer' options.

3.3 Central Scotland Green Network contribution

The Central Scotland Green Network (**"CSGN"**) is a development within the National Planning Framework. It aims to restore and transform the landscape, whilst making a significant contribution to Scotland's sustainable economic development. If successfully applying for a woodland creation grant within the CSGN area, an applicant could also receive an additional grant called CSGN contribution.

Small Woodland Loan Scheme

It is also worth noting that there is the Small Woodland Loan Scheme. This is a loan to allow the work required to create new, small woodlands (no greater than 50 hectares) before obtaining financial support from the Forestry Grant Scheme. For further information please refer to the Scottish Forestry guidance[29].

To make an application visit the RPID's website[30], and refer to their guidance on making an application[31].

Please refer to guidance from the Scottish Forestry Commission for further information[32].

Less Favoured Area Support Scheme

The Less Favoured Area Support Scheme (**"LFASS"**) provides essential income support to farming businesses in remote and constrained areas. To constitute an eligible "farming business", you must be (i) a farmer or a crofter aged 16 years or above; (ii) who holds at least 3 hectares of eligible land (the RPID will confirm if the land is eligible); (iii) which is actively farmed (this requires the applicant to own stock); and (iv) be an active farmer (i.e. a natural or legal person (or a group of natural or legal persons)) whose holding (production units) are situated within Scotland and that person carries out an agricultural activity that can include the production, rearing or growing of agricultural products, including harvesting,

milking, breeding animals and keeping animals for farming purposes (as defined in the Direct payment scheme[33]) in remote and constrained rural areas (i.e. the area classed as LFA in Scotland). There are maps showing the Scottish LFA boundary available from the RPID. It is anticipated that the LFASS will remain until 2024[34].

To make an application visit the RPID's website[35], and refer to 'Rural Development: Less Favoured Area Support Scheme' full guidance when making an application[36].

To the extent that rewilders are working on land classified as LFA and are keeping animals for the production of agricultural products, it appears that they could qualify for this support scheme. Eligibility, however, will depend on the facts and scope of each specific rewilding project.

Small Farms Grant Scheme

This scheme provides capital grants for small farms (between 3 and 30 hectares) to make improvements to their holdings and help to sustain their businesses. Grants are provided for activities including the provision or improvement of equipment for handling and treating livestock; and planting of shelter belts and the provision of fences, hedges, walls, gates or stock grids.[37]

If rewilders on small projects are undertaking agricultural activity and are active farmers (discussed above), they may be eligible for such a grant for relevant activities.

To make an application visit the RPID's website[38], and refer to 'Small Farms Grant Scheme' and 'New Entrants' full guidance when making an application[39].

4. FUTURE CHANGES

In March 2022 the Scottish Government published their vision for agriculture that included an aim to transform farming and food production support to help Scotland become a global leader in sustainable and regenerative agriculture[40].

Of particular interest to rewilders, the Scottish Government's vision refers to their intention to support land managers and "*design those mechanisms to support outcomes that restore nature, benefit our natural capital and promote the natural economy*".

To help deliver on this aim the Scottish Government have invested in a National Test Programme, which will support and encourage farmers, crofters and land managers to learn about how their work impacts on climate and nature[41]. This may be a valuable learning resource for rewilders.

This vision also noted that the AECS is set to be revised through the Scottish Agriculture Bill which is to be brought forward in 2023[42], following the consultation[43] which closed in November 2022.

The consultation[44] provides insight into what can be expected from the Agriculture Act and is worth reading for further information. In summary, four tiers of payments are proposed, Tiers 2 and 3 of which specifically include nature restoration and enhancement, making them potentially applicable for rewilding activities.

The proposed key outcomes for support will be:

- Climate change adaptation and mitigation;
- Nature protection and restoration;
- High quality food production; and
- Wider rural development.

It is suggested that the Agriculture Bill will include powers and other mechanisms to allow payments to farmers, crofters and land managers to specifically support national targets around these outcomes. It seems likely that certain rewilding activities may be capable of helping to support these outcomes and therefore benefit from support payments.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of October 2022.

ENDNOTES

1. Our natural environment – Scottish Government and Scottish Green Party: draft shared policy programme – gov.scot (www.gov.scot)
2. It is worth noting the proposals in the 'Sustainable and integrated farming and crofting activity in the hills and uplands of Scotland: blueprint – report' from the Hill, Upland and Crofting Climate Change Group (Sustainable and integrated farming and crofting activity in the hills and uplands of Scotland: blueprint – report – gov.scot (www.gov.scot))
3. Agricultural transition in Scotland – Scottish Government – Citizen Space (consult.gov.scot)
4. Agricultural transition in Scotland: Feedback updated 26 August 2022
5. Delivering our vision for Scottish agriculture – proposals for a new Agriculture Bill: consultation
6. Section 22(3) of the Agriculture (Retained EU Law and Data) (Scotland) Act 2020
7. Agriculture (Retained EU Law and Data) (Scotland) Act 2020 – Explanatory Notes (legislation.gov.uk)
8. Basic Payment Scheme Guidance (www.gov.scot)
9. Basic Payment Scheme full guidance (ruralpayments.org)

10. Greening guidance (2022) (ruralpayments.org) and Greening guidance (2023) (ruralpayments.org)
11. New entrants to farming – Agricultural careers – gov.scot (www.gov.scot)
12. Basic Payment Scheme (ruralpayments.org) and New Entrants resources for farmers from Farm Advisory Service (fas.scot)
13. Scottish Suckler Beef Support Scheme (Mainland and Islands) full guidance (ruralpayments.org)
14. Scottish Upland Sheep Support Scheme full guidance (ruralpayments.org)
15. Scottish Rural Development Programme – domestic: programme 2021 – gov.scot (www.gov.scot) and rspb–scotland–aces-paper.pdf
16. 2020 Challenge for Scotland's Biodiversity – gov.scot (www.gov.scot)
17. Securing a green recovery on a path to net zero: climate change plan 2018–2032 - update – gov.scot (www.gov.scot)
18. https://www.nature.scot/doc/scotlands-agri-environment-and-climate-scheme-summary
19. Eligibility (ruralpayments.org)
20. targeting.ruralpayments.org
21. Rural Development: Agri-Environment Climate Scheme full guidance (ruralpayments.org)
22. Checklist of requirements for applications (ruralpayments.org)
23. Scottish Government: Rural Payments and Services: Forestry Grant Scheme capital items
24. https://forestry.gov.scot/publications/107-the-forestry-grant-scheme-a-guide-to-grant-options-for-existing-woodland-owners/viewdocument/107
25. Scottish Government: Rural Payments and Services: Forestry Grant Scheme capital items
26. 107 (forestry.gov.scot)
27. https://forestry.gov.scot/publications/108-the-forestry-grant-scheme-a-guide-to-grant-options-for-woodland-creation/viewdocument/108
28. Scottish government: Rural Payments and Services: Forestry Grant Scheme capital items
29. Scottish Forestry – Small Woodland Loan Scheme
30. Forestry Grant Scheme (ruralpayments.org)
31. Forestry Grant Scheme full guidance (ruralpayments.org)
32. Guidance on existing woodland areas - https://forestry.gov.scot/publications/107-the-forestry-grant-scheme-a-guide-to-grant-options-for-existing-woodland-owners/viewdocument/107 and guidance on the creation of woodlands https://forestry.gov.scot/publications/108-the-forestry-grant-scheme-a-guide-to-grant-options-for-woodland-creation/viewdocument/108
33. Main features (ruralpayments.org)
34. Scotland's less favoured area scheme funding reinstated – FarmingUK News
35. Less Favoured Area Support Scheme (LFASS) (ruralpayments.org)
36. Rural Development: Less Favoured Area Support Scheme full guidance (ruralpayments.org)
37. Rural Development: Small Farms Grant Scheme and New Entrants Capital Grant Scheme full guidance, Appendix A.
38. Small Farms Grant Scheme (ruralpayments.org)
39. Rural Development: Small Farms Grant Scheme and New Entrants Capital Grant Scheme full guidance (ruralpayments.org)
40. Sustainable and regenerative farming - next steps: statement - gov.scot (www.gov.scot)
41. Sustainable and regenerative farming - next steps: statement - gov.scot (www.gov.scot)
42. Environment strategy for Scotland: progress report - gov.scot (www.gov.scot)
43. Delivering our Vision for Scottish Agriculture: Proposals for a new Agriculture Bill
44. Delivering our Vision for Scottish Agriculture: Proposals for a new Agriculture Bill

TAX

CORE TOPICS:

- Impact of rewilding on various tax regimes

KEY TAKEAWAYS:

- Rewilding may have a positive or negative effect on how property and income are taxed.
- Certain inheritance tax reliefs depend on land being considered farmland.
- Other inheritance tax reliefs depend on land being used for profit.
- Given the long-term nature of forestry, special rules apply to woodland which differ from farm and other types of land.

TABLE OF CONTENTS

1. Introduction
2. Summary
3. Inheritance tax: Agricultural Property Relief
4. Inheritance tax: Business Property Relief
5. Income and corporation tax
6. Conservation burdens
7. Taxation of grants and subsidies
8. Taxation of woodland

1. INTRODUCTION

This note provides a high-level overview of some of the tax considerations that may be relevant for rewilding activities on land in Scotland[1] and is more relevant to land previously used for farming or crofting. It consists of a summary in Q&A format, followed by a more detailed briefing in which we explore some case studies and refer to legislation and case law.

2. SUMMARY

Is rewilding "farming" and does it matter?

For tax purposes, it can be beneficial for land to be considered "farmland" given the favourable inheritance tax treatment (where Agricultural Property Relief or Business Property Relief applies) and certain capital gains tax reliefs that are available (in the form of Business Asset Disposal Relief and rollover relief). Typically, case law and legislation have focused on "farming" as including some form of tillage of soil and use of land by livestock held for its produce or for food (e.g., cows, sheep, goats, and pigs). While "farming" has historically included more diverse activities such as bread-making, homespun cloth and home-brewed ale, whether rewilding will qualify for various farming tax reliefs will depend on the fact and degree of the activity. It is therefore advisable to seek tailored legal and accounting advice before embarking on a rewilding project.

Will I lose inheritance tax relief if I rewild my land?

Agricultural Property Relief is only available in respect of the agricultural value of agricultural property which has been used for agricultural purposes throughout the required period (and where certain ownership conditions are met). Where an entitlement to Agricultural Property Relief exists, a rewilding project will have to be considered carefully as it could result in the loss of such relief (e.g., where land previously used to grow crops is left to allow natural tree growth and so is no longer considered to be used for agricultural purposes, this may result in it no longer being eligible for Agricultural Property Relief). On the other hand, where no previous entitlement to Agricultural Property Relief exists, rewilding could attract such relief (e.g., where land previously only used to generate income by selling rights to shoot game is rewilded by introducing low intensity grazing by cattle and pigs that are also sold for meat production).

Business Property Relief may be available where Agricultural Property Relief does not apply. For example, where rewilding involves a trading business carried on for the purposes of gain such as conducting eco-tourism, corporate and education retreats alongside rewilding.

What if I only rewild some of my land, will that still impact inheritance tax?

Often tax reliefs operate on parts of land and per farm buildings so that a combination of reliefs can be used. It may be that rewilding is undertaken on a small portion of land in respect of which Agricultural Property Relief is lost because traditional farming or crofting is replaced by eco-tourism, but Business Property Relief is available in connection with the eco-tourism business. Or it could be that Agricultural Property Relief is given up to a certain value of an asset, with Business Property Relief available on the rest. It is important to note that Business Property Relief is not available where the business consists of "*making or holding investments*". So pure holiday lettings will not benefit from this relief. However, where the business consists of a mix of trading and investment activities, full relief from inheritance tax may be available provided that overall, the business is predominantly a trading business.

Is rewilding a "trade" for tax purposes?

This will again be a question of fact, considering whether there are any 'badges' of trade present, i.e., whether the activity of rewilding displays the characteristics that case law has considered over time to be indicative of a trading business. For example: Is there an activity undertaken with a view to generating profit? What is the number of transactions and how has the sale been carried out? Income taxed as farm trading income, rather than as investment income (e.g., from holiday cottage rentals) can be advantageous because it benefits from various capital gains tax reliefs and averaging relief, and will support a claim for Business Property Relief for inheritance tax purposes.

How is woodland taxed?

As a general principle, the commercial use of woodland is outside the scope of income tax and corporation tax, provided the woodlands are managed on a 'commercial basis' and with a view to the realisation of profits. This will need to be supported by evidence, e.g., maintaining a woodland management plan and keeping accounts and records showing historic details of any profits and losses made. The exemption from income and corporation tax does not cover income/profits received from the sale of Christmas trees or short rotation coppice such as willow and poplar, or receipts from felled timber (where the land is predominantly occupied for farming). Similarly, rental income from letting woodlands (e.g., for picnics or camp sites) is taxable.

Like other forms of land, woodland is subject to inheritance tax. However, various reliefs from inheritance tax may be available, including Woodlands Relief, Business Property Relief and Heritage Relief (see Sections 3 (*Inheritance Tax: Agricultural Property Relief*), 4 (*Inheritance Tax: Business Property Relief*), and 8 (*Taxation of Woodland*) respectively below).

Does rewilding impact the tax treatment of my woodland?

The aim of rewilding is to push woodlands in a more natural, wilder direction without being focused on any particular end points (for example, which percentage of canopy cover should be native broadleaves). Rather, nature is left to unfold in its own way. Where a rewilding project stops any 'commercial' activity, the associated exemptions from income, corporation, and capital gains tax will also likely fall away. To the extent the woodland is used for other purposes (e.g., for commercial shooting or fishing where there is a river or lake or it is rented out), income or corporation tax may be chargeable on the profits.

However, certain inheritance tax reliefs are likely to be available where woodland is rewilded. For example, small areas of woodland such as shelter belts which are "ancillary"

to the farming business can qualify for Agricultural Property Relief, and Heritage Relief may be available for woodlands considered to be of outstanding scenic, historic or scientific interest (see Section 8 *Taxation of Woodland* below).

What should I consider?

Those considering rewilding will need to analyse their current tax position (from both an income/capital perspective and for estate planning purposes) and seek to understand the potential impact of rewilding on that status. The various relationships between the tax reliefs available is complex, and accounting will be key for evidential purposes. Detailed advice should be taken prior to undertaking rewilding to ensure the tax implications are understood.

These issues are considered in more detail below, including some practical examples in the inset boxes in Sections 3 (*Inheritance Tax: Agricultural Property Relief*), 4 (*Inheritance Tax: Business Property Relief*) and 5 (*Income and Corporation Tax*) below.

3. INHERITANCE TAX: AGRICULTURAL PROPERTY RELIEF

Inheritance tax ("**IHT**") is a charge levied on the estate (the property, money and possessions) of an individual on their death. IHT can also apply to any gift or sale (at less than market value) of property that belonged to the deceased, which the deceased gave or sold within seven years of their death. The present tax rate is at 40% of the value of the deceased's estate, typically above a nil rate band of £325,000 (depending on certain circumstances).

Agricultural Property Relief ("**APR**") is a key form of IHT relief in the context of farming or crofting[2]. For the purposes of calculating IHT, APR reduces the "*agricultural value*" of transfers of "*agricultural property*" which has been occupied or owned by the transferor (i.e., the deceased person) for the required period for "*purposes of agriculture*"[3].

So long as the agricultural value of the relevant property is not exceeded by its open market value, APR will generally allow agricultural property to be passed on free of IHT if 100% relief is given (in certain circumstances, broadly where the property is subject to a tenancy that commenced before 1 September 1995, only 50% relief will be given). Some company shares are eligible for APR if their value (i) gave the deceased control of the company at the time of death; and (ii) comes from agricultural property that forms part of the company's assets.[4]

Even when it comes to traditional farming or crofting, the availability of APR is not straightforward and HMRC will readily challenge claims to rely on it. Working out if it would apply in the context of rewilding farmland or a croft is even more complex, given certain rewilding activities (such as reintroducing plants without any associated "tillage" of the soil) are unlikely to qualify as "agriculture" for tax purposes, whereas others (such as removing internal fencing and introducing low-intensity grazing animals) likely would.

So, what is "agricultural property"?

Under the Inheritance Tax Act 1984 (the "**IHTA 1984**"), "*agricultural property*" is broadly defined as "*agricultural land or pasture*" which includes[5]:

- woodland and any building used in connection with the intensive rearing of livestock or fish[6] provided that the woodland or building is occupied with (but ancillary to) the "*agricultural*" land or pasture; and
- cottages, farmhouses or any other farm buildings (and the land occupied with them) of a "*character appropriate*" to agricultural land or pasture.

First you have to establish that the property being transferred (or inherited) contains agricultural land or pasture that is occupied for agricultural purposes. Only once that is done can you then consider whether any farmhouses, farm cottages or buildings qualify for APR[7]. While "agriculture" is not defined in the IHTA 1984 (though s.115(4) provides that the breeding and rearing of horses on a stud farm and the grazing of horses in connection with those activities is taken to be agriculture and any buildings used in connection with those activities to be farm buildings), guidance on what does and does not constitute "*agricultural*" land and pasture can be taken from other legislation (see the Agricultural Holdings (Scotland) Act 1991, relevant case law and HMRC's manual. It is generally accepted that "agriculture" for these purposes includes:

horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes[8].

To benefit from APR, agricultural property either needs to have been occupied for agricultural purposes by the transferor (i.e., the deceased) for the two years preceding the date of the transfer (i.e., the gift or inheritance)[9]; or owned by the transferor but occupied by any person for continuous agricultural purposes throughout the preceding seven years[10]. In certain circumstances, the seven-year ownership rule may be relaxed (where there has been a replacement of agricultural property, an acquisition on death, or where there have been successive transfers).

So, what is "agricultural value"?

Relief is only given based on the "*agricultural value*" of agricultural property. Section 115(3) IHTA 1984 provides that the value of the agricultural property is the value that it would have if it were subject to a perpetual covenant (a sort of permanent agreement) prohibiting its use otherwise than as agricultural property. In some cases, the agricultural value of the property may be less than the open market value. This might be because of development value or mineral value, or because the farm is in a desirable part of the country and suitable for commuters such that wealthy non-farmers would be prepared to pay a premium for it.

This fictitious, perpetual covenant provides some indication of how value may be impacted by conservation burdens[11], to the extent the property subject to the conservation covenant may benefit from APR. For example, a property might only be given APR on 70% of its open market value,

on the basis that a "lifestyle" purchaser would be deterred from buying the property because it could only be used for agricultural purposes.[12] This could become less of a concern where the agricultural property is subject to a conservation burden, because a burden might in practice reduce the open market value of a property (e.g., where it prevents a purchaser from developing the land and using it in ways that would breach the burden). This may bring the agricultural value of the property more in line with its open market value, such that APR is available on a higher percentage of the open market value.

So, when is a farmhouse of a "character appropriate" to agricultural land or pasture?

As noted above, farmhouses may benefit from APR provided they meet the required conditions of having been "*occupied for the purposes of agriculture*" and are of a "*character appropriate*" to agricultural land or pasture. There is no statutory definition of a "farmhouse", but case law provides that this is the place from which the farming operations are conducted by the farmer.[13] When considering whether the farmhouse is of a "*character appropriate*", a key factor is that the agricultural land or pasture to which the farmhouse relates is the dominant feature, and the farmhouse must be occupied "*with*" that land. There is currently some doubt as to whether this requires both (i) common ownership of the farmhouse and the agricultural land and (ii) common occupation, or whether just one or the other is sufficient. If common occupation is a requirement, then land let out to a third party (e.g., to a neighbouring farmer or conservation group for rewilding) would not count. To the extent rewilding activities impact the classification of the land to which the farmhouse relates (e.g., such that it is no longer considered to be ancillary to "*agricultural land*"), this could also impact whether the farmhouse is considered to be both occupied for the purposes of agriculture and of a character appropriate to agricultural land or pasture.

APR may be available to tenanted land (including land under a crofting tenancy), provided that the tenant occupied the land for the purposes of agriculture and the ownership period criteria has been met. However, allowing a tenant to "rewild" the land may impact IHT planning, depending on whether the rewilding activity would be categorised as "agricultural".

However, business property relief from IHT may be available on certain assets where the tenant and landowner enter into a business or partnership together (e.g., for eco-tourism purposes), provided the partnership is predominantly a "trading" business (i.e., not a property investment business) (see further below).

Whether rewilding land is considered agricultural property which has been used for agricultural purposes will be fact specific.

EXAMPLE 1: FARMER A

Farmer A is a farmer-landowner seeking to rewild a large part of his property currently used for grazing and crop growing, which is near a local river prone to flooding, as part of a habitat restoration project relating to historic woodlands in the area. Farmer A lives in the farmhouse on his land, which has three broiler houses used for the intensive rearing of chickens, and farm buildings for the cattle he keeps in order to sell the calves.

Farmer A materially reduces his herd of cattle and stops using most of his land previously designated for grazing and crop growing in order to allow natural tree growth, supported where necessary by native tree planting. The impact of his rewilding activity on the APR available when Farmer A passes away may be material. Farm buildings only qualify for APR where they are ancillary to the larger agricultural operation carried out on the land.

The nature of the rewilding undertaken by Farmer A is likely to mean that a substantial part of the property will no longer be classed as "agricultural land". The result may be that the broiler houses do not qualify for APR as they are no longer *ancillary* to land being farmed for agricultural purposes (e.g., if the land on which the cattle now graze is small and the broiler houses dominate the part of the land they occupy)[14].

Similarly, the farmhouse may cease to qualify for APR.

APR would likely be available on the land on which the cattle continue to graze[15], and any farm buildings on that land (to the extent they have continued to be "character appropriate"). The non-agricultural woodland might not be considered "ancillary" to the minor portion of agricultural land for the small herd of cattle, even if part of it forms a shelter belt for the agricultural land from flooding risks related to the local river.

However, the woodland may qualify for woodland relief (providing certain conditions are met, e.g., Farmer A has been beneficially entitled to the woodland for at least five years prior to death). Prior to undertaking the rewilding project, Farmer A might wish to consider the impact on APR as well as the availability of Business Property Relief (see further below).

EXAMPLE 2: FARMER B

Farmer B is a farmer-landowner seeking to rewild farming land by promoting natural regeneration and habitat restoration whilst maintaining its active use as grazing land. She might do so by eliminating her use of high-density, high-intensity grazing by sheep in favour of using fewer, large, low-intensity grazing cattle.

She might additionally fence the perimeter of her farming property while removing all interior fencing to allow low intensity grazing to occur over a larger land area, thereby encouraging the natural regeneration of previously heavily grazed land. Such rewilding activity will complement the use of her farming property as grazing land, as the changes merely make that grazing more sustainable, and such use is likely to fall under the IHTA 1984 definition of agricultural property, with the farmer in occupation of the land for a clear agricultural purpose so that on her death, an inheritor is likely to be able to benefit from APR.

Land which was not previously being used for "*agricultural purposes*" and so did not benefit from APR might start to qualify for APR as a result of rewilding activities. For example, an estate which has been predominantly used for game shooting and fishing, with cottages rented out for leisure holidays. It is unlikely the land on this estate would have qualified for APR, including the cottages on it. However, the landowner decides to undertake a rewilding project including wildflower seeding in selected areas to restore a diversity of habitats to the landscape and introducing low numbers of grazing animals, including cattle, to mimic natural grazing which the landowner combines with meat production from the cattle and pigs. It may be that these activities make the land eligible for APR on the basis of it now being "*agricultural land*". While agriculture is accepted as including the use of land as grazing land, it seems that this would still require some form of agricultural activity to be linked to the grazing – i.e., food production from cattle. While cattle are more obviously considered as farming livestock, arguably this should also apply to animals such as deer, pigs and wild boar to the extent they are also kept primarily for food production, given the statutory definition of "livestock" includes "*any creature kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land*"[16].

4. INHERITANCE TAX: BUSINESS PROPERTY RELIEF

In circumstances where APR does not apply, or where it is not sufficient to relieve the IHT burden on the full open market value of farmland property, an alternative form of IHT relief which may apply is Business Property Relief ("**BPR**"). Unlike APR, BPR is applicable in respect of the full value of any asset which qualifies as "*relevant business property*" and will reduce the full value of such an asset by 100% or 50% for the purposes of calculating IHT[17]. The amount of relief applicable will depend on the category of relevant business property into which the asset falls.

Typically, a farmer operating their farming business as a sole trader will be able to claim 100% BPR on assets / property relating to that farming business (or at least the remaining value following any applicable APR relief). Where the business is carried on by a partnership in which the transferor was a partner or by a company that the transferor controlled, 50% relief applies to land, buildings, machinery, or plant owned by the transferor and used "*wholly or mainly*" for the purpose of that business. The property must have been owned by the transferor for more than two years (subject to certain relaxations to these rules for transfers between spouses on death, quick succession, and replacement property).

The business must be carried on for gain[18] and be a trading business. It must not be wholly or mainly an investment[19] or a dealing business and so cannot be a business dealing in land or buildings or making or holding investments (e.g., BPR may not be available in respect of furnished holiday lets or residential let properties held as investment property within an agricultural estate). BPR will usually be available for farming business property such as the business banking accounts, farm machinery/plant, farmland, woodland (see Section 8 (*Taxation of Woodland*) below), farm buildings and stock as these are clearly used in the trade of farming. Certain assets within a qualifying business may be deemed to be an "excepted asset"[20] if they are not used in the business and not required for future business use.

The questions in this context are therefore whether "rewilding" can be categorised as "farming" trade and thereby qualify for BPR, or if not, whether it can still qualify as a "trade" not prohibited from benefitting from BPR. The answers depend on the factual circumstances. See Section 5 (*Income and Corporation Tax*) below for discussion on whether rewilding activities can be considered farming trade for income tax purposes. If so, they are likely to be eligible for BPR for IHT purposes.

EXAMPLE 3: FARMER A

Farmer A's rewilding land is unlikely to qualify for BPR as it is likely to be viewed by HMRC as no longer used "wholly or mainly" for the purposes of the farming business as the use of the land is not connected with his farming "trade", being the cattle and chickens.

In addition, Farmer A is not undertaking any activities in respect of the rewilding land with a view to profit (he has not sought to generate an income from the rewilding land in respect of eco-tourism, for example) and so the rewilding land is unlikely to be viewed by HMRC as having been used for a business at all.

However, Farmer A may be able to claim BPR for his three broiler houses in which he rears the chickens, as well as the farm buildings for cattle, to the extent that APR was not available. However, Farmer A is unlikely to be able to claim BPR in respect of the farmhouse as his home because it's unlikely to be viewed as having been used wholly or mainly for the purposes of the business (although BPR may be available for any specific rooms used as an office to run the farm).

As mentioned above, for property to qualify for BPR the underlying business must not be wholly or mainly an investment or dealing business. This point was considered in *HMRC v Brander*[21] (known as the Balfour case), where the application of BPR was assessed in the context of a farming business which consisted of a mix of both trading and investment activities, and which is a helpful reference for rewilding activities, in particular where traditional farming income is supplemented by income from eco-tourism in connection with rewilding land.

In that case Lord Balfour owned the estate in a partnership with his nephew and the estate comprised a mixture of trading and investment activities: two in-hand farms, three let farms, 26 let cottages, two let commercial units and various woodlands, parks and sporting rights.

The Executors claimed that the estate was managed as one composite business, but HMRC disagreed, contending that (among other things), as the estate included a large number of rental properties, the partnership was not undertaking a business activity and was instead "*making or holding investments*". However, the Upper Tax Tribunal determined that the estate was run as one whole composite business, with Lord Balfour's involvement across the estate as a whole being an important factor in supporting that conclusion with the result that BPR was available in full against the value of the estate.

The case was helpful in clarifying that where a landowner has diversified their sources of income, various factors are considered when determining if BPR is available across an estate as a whole and not just the property involved in trading activities. Consideration needs to be given to the turnover, profit, time spent on elements within the business and the capital value of the elements and how the accounts are drawn up. This is now known as the "Balfour Principle" and when successfully applied, would mean a whole business benefits from BPR and not only the property involved in the trading activities.[22]

A key element of this and other cases is the landowner's active performance of some activity on the land, in particular where land is let under a grazing agreement. Following the decision in *McCall and Keenan v HMRC*[23], where grazing agreements are in place, it is important to show that the profit from the land is not simply the rent from letting the land to a third party, but that the owner is still actively farming the land (e.g., by being permitted to graze their own animals alongside the licensee's animals, or by growing grass as a crop which the licensee's animals are permitted to graze on).

EXAMPLE 4: FARMER B

Farmer B carries out rewilding activities to reduce the impact of historic heavy-grazing and encourage natural regeneration. She may also do this as part of a general push to diversify her use of her farming property.

To compensate for lower farming profits or even initial losses following the elimination of her large sheep herd as part of rewilding efforts, she may decide to engage in various investment activities to generate non-agricultural profits, e.g., letting out an agricultural cottage as a rental property.

She also lets out a portion of her land on a grazing licence to a conservation group, with her only responsibility being the maintenance of the boundary of the let land.

Farmer B will need to ensure that a balance is maintained between farming activity and other more diverse means of creating profit from farmland, to prevent inadvertently tipping the balance from farming trade profits to a focus on investment income generated from renting property. Unless Farmer B undertakes some activity on the land leased to the conservation group, it will likely be excluded from BPR on the basis of generating investment income from the rent. In such circumstances, the availability of APR could be at risk if the diversification results in the land no longer being occupied for "*agricultural purposes*". Finally, BPR may not be available if her business is viewed as investment activity rather than trading.

5. INCOME AND CORPORATION TAX

For the purposes of both income tax and corporation tax, farming is treated as a trade[24] whether or not the land is managed on a commercial basis and with a view to making a profit (although, if a trade is not carried out with a view to being commercially profitable, this may restrict the availability of loss relief – see further below). Farming is defined in both the Income Tax Act 2007 ("**ITA 07**") and the Corporation Tax Act 2010 ("**CTA 10**") as being "*the occupation of land wholly or mainly for the purposes of husbandry but excluding any market gardening*"[25]. Although for the purposes of defining farming for tax purposes no restriction is put on where the land is situated, the automatic treatment of farming as a trade is restricted to land farmed within the United Kingdom.

There are certain advantages of income being categorised as farming trade income (e.g., in respect of reliefs from capital gains tax (which are outside the scope of this note) and BPR for IHT purposes as explained above). There is therefore a tax advantage where land in the process of rewilding can be categorised as an asset occupied and used for the purposes of the farming business.

In connection with rewilding, it is important for farmers to prove the "badges" (i.e., the features) of trade and ensure business plans support this. According to case law, badges of trade include, for example: whether there is a profit seeking motive; the nature of the asset (i.e., is the asset of such a type or amount that it can only be turned to advantage by a sale); and the number of transactions (because evidence of repeated transactions will often support "trade"). It may be that rewilding complements farming in constituting part of a "trade", for example, where rewilding encourages grazing of moors, managing and expanding wetland and retaining winter stubble and is accompanied by an on-farm butchery, and an outdoor rare breed pig and beef business.

As set out above, to be a farmer, a person must satisfy two tests: the person must be in occupation of land (other than market garden land) and the purpose of the occupation must be mainly for husbandry. Case law provides that "farming" for Income Tax purposes generally means "*the carrying*

on of activities appropriate to land recognisable as farmland"[26], so that it will generally need to consist of the kinds of agricultural activities that we have discussed above, certainly including "*the raising of [livestock], the cultivation of land and the growing of crops*".[27] The ITA 07 does not include a complete definition of husbandry but provides that it includes hop growing, breeding and rearing horses, and grazing horses in connection with those activities and the cultivation of short rotation coppice, which is defined as "*a perennial crop of tree species planted at high density, the stems of which are harvested above ground level at intervals of less than 10 years*".[28]

The ordinary language definition of "husbandry", i.e., the cultivation of crops and breeding of animals, has been extended by the courts, which may be helpful when considering the treatment of rewilding for income tax purposes. In *CIR v Cavan Central Co-operative Agricultural and Dairy Society Ltd*[29] diverse activities such as bread-making, homespun cloth and home-brewed ale were considered examples of husbandry, if carried out by a "husbandman" (i.e., the farmer who tills the soil). The court thought that the origin of husbandry suggested a liberal interpretation that would include some activity on the land whose manifest object was the benefit of mankind and the support of life. When planning a rewilding project then, you might like to consider selling traditional farming produce such as milk, meat and wool for human consumption and use, as part of the project. Where rewilding plants and grasses are consumed by the animals used for human consumption, this will also be helpful, and may support an argument that income from land let to a third party to operate a rewilding project through a grazing agreement does not fall within the investment exception explained above.

EXAMPLE 5: FARMER C

Farmer C has two plots of farmland. They let one plot to a rewilding organisation on a short-term basis, so that it can operate rewilding activities on this land.

The rewilding organisation undertakes non-agricultural rewilding activities such as peat and wetland restoration, which are unlikely to constitute farming (or any kind of trade at all) for income tax purposes. Any rental payments which Farmer C receives from this rewilding tenancy will likely be chargeable as property income instead of farming income. However, if Farmer C continues to directly work on the other plot of land wholly or mainly for crop farming, they will both be in occupation of that plot of land and their income in respect of that trade will likely be chargeable as farming income.

As can be seen with BPR, for certain tax relief purposes, it is important that a farmer's income generated from the land is specifically recognised as "trading" income and not as "property" income. Income generated from rewilding activities (e.g., in connection with nature tourism) will not necessarily count as farming trade income. This may impact on certain reliefs bespoke to farming trade, such as the one-trade rule which generally allows all farming activities by a particular person in the UK to be treated as one trade, allowing profits and losses from multiple farms to be aggregated for tax purposes.

In addition, farmers' profit averaging relief allows a farmer to choose to average farming income profits over either two consecutive tax years[30] or five consecutive tax years[31]. Averaging is not just available to farmers. Other qualifying trades include the intensive rearing (in the UK) of livestock or fish on a commercial basis for the production of food for human consumption.[32] Averaging can also be applied to trades of market gardening[33]. Averaging only applies to profits chargeable to income tax, so companies liable to corporation tax cannot use these provisions[34].

Trade loss relief against general income is usually not available where a farmer incurred losses before capital allowances in each of the five preceding tax years[35] (often referred to as the "hobby farming" restriction). However, relief is not denied where the farmer can show that during the period when loss was sustained, the trade was being carried on, on a commercial basis and with a view to the realisation of profit. So, for example, initial farming trade losses due to rewilding efforts will not necessarily act as a barrier to the availability of trade loss relief to a farmer minded to rewild, nor will they definitively cause rewilding or sustainable farming activity to be considered "hobby farming".[36]

Equally, the "hobby farming" restriction does not apply where the loss-making farm is part of, and ancillary to, a larger trading undertaking.[37] For example, a farmer previously used her substantial high-intensity grazing herd of sheep for meat and accounted for them as trading stock. She decides to undertake a major rewilding project by: reducing the size of the sheep herd and using them instead for wool; offering craft classes in spinning, weaving and rug-making using the wool; and building a thriving eco-tourism business including camping and luxury glamping. It may be that if the business of keeping the sheep for their wool is loss-making, trade loss relief is still available on the basis that keeping the sheep for wool is ancillary to the eco-tourism business. The farmer may also account for the retained sheep on the "herd basis", enabling the farmer to treat the herd in most circumstances as a capital asset in accordance with the herd basis rules, such that the cost of maintaining the herd can be charged against tax and any profit on disposal of the herd will be tax-free.[38]

6. CONSERVATION BURDENS

Conservation burdens are a specific type of real burden granted by a landowner over their land in favour of a "conservation body" (e.g., a conservation or rewilding charity as approved by Scottish Ministers) or the Scottish Ministers for the purpose of preserving, amongst other things, the special characteristics of land derived from the flora, fauna or general appearance of the land. They set out

obligations in respect of the land which will be legally binding both on the landowner and on any subsequent owner of the land. Other than as mentioned above, this note does not cover tax considerations relating to the grant by a donor of conservation burdens.

See briefing note titled *Rewilding in Scotland: Conservation Burdens and Legal Protections* for more detailed information on conservation covenants.

7. TAXATION OF GRANTS AND SUBSIDIES

The purpose for which a grant or subsidy is paid will usually determine whether it is a trading receipt or a capital receipt. For example, in the case of *Clyde Higgs v Wrightson (inspector of taxes)*[39] receipt of a ploughing grant was held to be a trading receipt, whereas in *Watson v Samson Brothers*[40], payments for rehabilitation of flood-damaged land were held to be capital receipts. Payments under the basic payment scheme[41], for example, will be assessed as income.

8. TAXATION OF WOODLAND

What is 'commercial woodland' for income and corporation tax purposes?

The 'commercial occupation' of woodlands in the United Kingdom is not a trade or part of a trade for any income tax purpose and is exempt from income tax[42] and the same is true of corporation tax[43]. Profits or losses from the commercial occupation of woodlands in the United Kingdom are therefore ignored for both income tax and corporation tax purposes[44]. Woodlands are treated as 'commercial' if they are: (a) managed on a commercial basis; and (b) with a view to the realisation of profits. It is not necessary to show profits immediately, given the long-term nature of forestry can make that difficult, but it is important to be able to demonstrate to HMRC the commerciality of the occupation of the woodland in other ways, for example through a woodland management plan, accounts and records. Where the woodland is part of a farm, separate accounts and records should be kept demonstrating the commerciality of the woodland independent from other estate or farm activities (to avoid the activities on the woodland being taxable as farming trade or other income).

There is no clear definition of what constitutes 'commercial occupation' for this purpose and so how HMRC will view an activity depends on the facts and it is easier to identify what is not covered, than what is covered. The exemption of commercial woodland from income tax and corporation tax does not cover: (a) the sale of short rotation coppice such as willow and poplar; (b) receipts from felled timber where the land is predominantly occupied for farming; and (c) specialist Christmas tree farms, which are nurseries within the statutory definition of market gardening[45] and treated as a trade. Although where Christmas trees are a crop on an ordinary farm, the income from their sale may be included in the farm profits[46].

What about capital gains tax?

Broadly, the sale of timber or standing timber from commercial woodlands is exempt from income tax, corporation tax and capital gains tax[47]. The sale of the land, however, is not exempt from capital gains tax. Where the woodland is sold as a whole, an apportionment is made between the value of the standing trees, timber and underwood and the value of the land (note that this apportionment is not applicable to agricultural or amenity[48] woodland).

Rollover Relief[49] may be available to woodlands where these are managed by the occupier on a commercial basis and with a view to the realisation of profits. Such relief enables any capital gains tax due on a disposal of the woodland to be deferred when new assets are acquired costing the same as, or more than, the amount realised on disposal of the woodland. Any tax is then postponed until disposal of the new asset. Holdover Relief[50] may also be available in respect of woodlands and applies to gifts. Such relief defers any capital gains tax payable so that none is due when the woodland is gifted to another person, although the recipient will then be liable to meet the cost of any capital gains tax due, when they sell or dispose of the woodland.

What Inheritance Tax Reliefs are available for woodland?

As discussed in Section 3 (*Inheritance Tax: Agricultural Property Relief*), the IHTA 1984 provides for woodland to be eligible for APR where it is "ancillary" to the agricultural land subject to the relief. Ancillary uses include tree nurseries, shelter belts or, for example, short rotation coppice carried out for woodchips, firewood, and fencing.

Commercial woodland can also qualify for BPR, provided the conditions discussed in Section 4 (*Inheritance Tax: Business Property Relief*) above are met (as regards being a business carried on for gain and being owned and occupied for at least two years prior to the transfer). Woods managed as a business could include, for example, those used for commercial shooting, fishing, residential letting or commercial timber harvesting. As discussed in Section 5 (*Income and Corporation Tax*), the badges of trade will be useful in demonstrating there is a trading business in respect of the woodland. It is also helpful to be able to demonstrate profitability, and given it is not always possible to make a profit in years where, for example, regeneration and planting take place, regular budget reviews and business/management plans are invaluable (for example using the Forestry Commission's Woodland Management Plan template).

Woodland Relief

Woodlands relief[51] provides deferral relief so that a charge does not arise until the trees or underwood growing on the land is sold in the future (provided the woodlands are not occupied or ancillary to agricultural land). This form of relief is therefore less valuable than APR and BPR as the tax is deferred and not exempt, in addition to which the relief only applies to the trees and not the land.

Heritage Relief

If the woodland is in an area of "*outstanding scenic, historic or scientific interest*", then it may qualify for conditional exemption from IHT[52] (available to both ancient woodland and new plantations). On a transfer of value, it may be exempted on the condition that the new owner agrees to certain 'undertakings' to maintain the woodland and grant access to the public.

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of November 2022.

ENDNOTES

1. The tax laws referred to in this note apply to Scotland.
2. The Agricultural Property Relief provisions in IHTA 1984 will apply to property held under the Crofting Acts.
3. The Inheritance Tax Act 1984, Part V, Chapter II, s.116 - 117
4. The Inheritance Tax Act 1984, Part V, Chapter II, s.269
5. The Inheritance Tax Act 1984, Part V, Chapter II, s.115(2)
6. Given its ordinary meaning, "intensive rearing of livestock" involves keeping livestock at high stocking densities on a large scale designed to maximise production while minimising costs.
7. *Starke* v *IRC* [1995] STC 689
8. The Agricultural Holdings (Scotland) Act 1991, Part IX, s.85(1). In *Assessor for Tayside Region* v *Reedways Ltd* (1982, unreported), emphasis was placed on the importance of "*tilling, sowing or cultivation*" of the soil for land; as the reeds were a natural growth, and all the taxpayer did was cut the reeds down for thatching, this meant the reed beds could not be agricultural due to the absence of any tillage of the soil. In *Hemens (Valuation Officer) v Whitsbury Farm and Stud Ltd* [1988] A.C. 601, buildings used for the purposes of a stud farm for racehorses were not "*agricultural buildings*" (which were exempt from rating under the Rating Act 1971 s.1(3)) as animals were not considered "livestock" unless they were kept for the production of food, wool or for use in farming the land. *Assessor for Lothian Region v Rolawn Ltd* [1989] RVR 146 found that the growing and selling of high-quality turf was an agricultural purpose and the lands were entitled to be derated (note that the land used to grow the turf in this case was cultivated in the same way as that used for many edible crops and most of the machinery involved was also commonly used for agricultural purposes).
9. The Inheritance Tax Act 1984, Part V, Chapter II, s.117(a).
10. As above, s.117(b).
11. See briefing note *Rewilding in Scotland: Conservation Burdens and Legal Protection* for discussion on conservation burdens.
12. See Lloyds TSB Banking v IRC [2005] W.T.L.R. 1535.
13. CIR v John Whiteford and Son [1962] TR 157, Rosser v IRC [2003] WTLR 1057.
14. See Richard Williams (personal representative of Mary Philomena Williams (deceased)) v HMRC [2005] (SpC500) where a claim for APR failed in respect of three broiler houses used for the intensive rearing of chickens because the broiler houses dominated that part of the land they occupied, and there was no evidence of wider agricultural activities on the remainder of the land.
15. Note that the test is whether the land is "*agricultural land*" and there is no obvious answer as to how many cattle or other livestock would need to be grazing on the land for it to qualify as such.
16. Section 85(1), the Agricultural Holdings (Scotland) Act 1991.
17. The Inheritance Tax Act 1984, Part V, Chapter I, s.103 - 114
18. The Inheritance Tax Act 1984, Part V, Chapter I, s.103(3)
19. As above, s.105(3).
20. The Inheritance Tax Act 1984, Part V, Chapter I, s.112
21. [2010] UKUT 300 (TCC)

22. See also *Vigne (HMRC v The Personal Representative of Maureen Vigne (Deceased)* [2018] UKUT 0357), *Graham (The Personal Representatives of Grace Joyce Graham (deceased) v HMRC* [2018] UKFTT 306 (TC))
23. [2009] NICA 12
24. Income Tax (Trading and Other Income) Act 2005, s.9, the Income Tax Act 2007, s.996(1), Corporation Tax Act 2009, s.36, and Corporation Tax Act 2010 s.1125
25. The Income Tax Act 2007, Part 16, Chapter I, s.996(1), Corporation Tax Act 2010, Part 24, Chapter I, s1125
26. Lowe (Inspector of Taxes) v J. W. Ashmore Ltd [1970] 3 W.L.R. 998 [553]
27. As above
28. The Income Tax Act 2007, s.996
29. (1917) 12 TC 1
30. The Income Tax (Trading and Other Income) Act 2005, Part 2, Chapter 16, s.222(1).
31. As above, s.222A(1).
32. Income Tax (Trading and Other Income) Act 2005, s221(2)(b)
33. Income Tax (Trading and Other Income) Act 2005, s221(2)(a)
34. Income Tax (Trading and Other Income) Act 2005, s221(1))
35. The Income Tax Act 2007, s.67.
36. See BIM85615 – Farming losses: test of commerciality
37. The Income Tax Act 2007, s.67(3)(a)
38. Income Tax (Trading and Other Income) Act 2005, Chapter 8 of Part 2. Note that although the herd basis rules are expressed in terms of farmers, they apply to any person who keeps or has kept a production herd for the purposes of a trade, whether or not the trade is farming (section 111(3))
39. [1944] 1 All ER 488
40. [1959] 38 TC 346
41. See *Rewilding in Scotland: Subsidies* for more information on the Basic Payment Scheme
42. Income Tax (Trading and Other Income) Act 2005, Section 11, Part 2
43. Corporation Tax Act 2009, section 37, Part 3
44. Corporation Tax Act 2009, Sections 208 and 980 and Income Tax (Trading and Other Income) Act 2005, section 687 and 768
45. Income and Taxes Act 2007, section 996(5), Jaggers v Ellis [1997] 71 TC 164
46. BIM55205
47. BIM55205, Income Tax (Trading and Other Income) Act 2005, Section 25, Corporation Tax Act 2009, Section 46 and the Taxation of Chargeable Gains Act 1992, Section 250
48. There is no set definition of amenity woodland but broadly speaking it means woodland not used for commercial timber but for other purposes e.g., leisure and recreational activities.
49. Taxation of Chargeable Gains Act 1992, section 152
50. Taxation of Chargeable Gains Act 1992, section 165
51. Inheritance Tax Act 1984, section 125
52. Inheritance Tax Act 1984, section 31

In partnership with

PHOTOGRAPHY CREDITS

Cover Quentin / Wildscreen
Page 4 Starsphinx / Shutterstock
Page 5 Ben Porter

June 2024 © Rewilding Britain
Rewilding Britain is a charitable incorporated organisation registered in England & Wales (no. 1159373), and Scotland (no. SCO45685).
Registered office: The Courtyard, Shoreham Road, Upper Beeding, Steyning, West Sussex BN44 3TN