

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.

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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 Regulations¹⁵ 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.



WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners 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 in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain 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.



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.

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