



## Advice Note

### Red Squirrels and the law

August 2004

#### Legal protection for the red squirrel

The red squirrel is included in Schedules 5 and 6 of the Wildlife & Countryside Act 1981 (WCA) (The Wildlife & Countryside (Northern Ireland) Order 1985), which means that it is a protected species. This legislation has subsequently been amended, most recently by the Countryside & Rights of Way Act 2000 (CRoW) for England and Wales. (In Scotland the Nature Conservation (Scotland) Act 2004, applies, which has not yet been incorporated into this advice note. Please refer to this legislation for details of red squirrel protection in Scotland). The inclusion of the species in Schedule 5 means that, under Section 9 of the WCA and Article 10 of the W(NI) Order it is an offence to:

- Intentionally kill, injure or take (capture) a red squirrel [S9(1)]
- Intentionally or recklessly damage or destroy any structure or place a red squirrel uses for shelter or protection or disturb a red squirrel while it is occupying such a place [S9(4)]
- Possess a dead or live wild red squirrel, or any part of a red squirrel, unless you can show that the animal was taken legally. [S9(2)]
- Sell, or offer for sale, a wild red squirrel or any part of a wild red squirrel.

Under Section 11 of the Act, it is also illegal to:

- Set in place a trap, snare, electrical device for killing or stunning or any poisonous, poisoned or stupefying substance; use a decoy, gas or smoke, bows or cross-bows, explosives, automatic weapons or mechanically propelled vehicles which are of such a nature and so placed as to be calculated to cause bodily injury to a red squirrel.

Section 18 of the Act makes it clear that attempting to commit an offence is, legally, the same as committing the offence.

There are defences in the Act that, in certain circumstances, permit actions that would otherwise be illegal. These include:

- The act was the incidental result of a lawful operation and could not reasonably have been avoided. This defence applies to killing or injuring squirrels or damaging or destroying their places of shelter or protection.
- The act took place within a dwelling-house. This defence only applies to damaging or destroying places used for shelter or protection. It could be used, for example, if red squirrels enter the roof of a house.
- Injured or disabled animals may be taken and possessed solely for the purpose of looking after them and releasing them once they are no longer disabled; similarly, badly injured animals may legally be killed.

In addition to these defences, there is also a licensing system, which can permit activities that would otherwise be offences for certain purposes. Licences are issued by government departments<sup>i</sup> (GD) or statutory nature conservation organisations<sup>ii</sup> (SNCO), depending on the purpose:

Prevention of serious damage to livestock, crop or growing timber or any other form of property (GD)

Prevention of the spread of disease and for public health and safety (GD)

Science or education (SNCO)

Preservation of zoological collections (SNCO)

Conservation (SNCO)

Note that under the WCA and the W(NI) Order there is no provision for licensing the killing or injuring of squirrels or the destruction of places used for shelter or protection for the purpose of development, forestry etc. Any defence against damage under these circumstances is only eligible if this was the incidental result of a lawful operation and could not reasonably have been avoided.

## Interpretation

Offences must be either intentional or reckless, depending on the section of the WCA, but these terms are difficult to apply.

'Intentionally' is a term widely used in law and there is a body of case law to help with its interpretation, though there is no definitive statement of its meaning. It can be interpreted as follows –

- a) a result is intended when it is the actor's purpose; or
- b) a court may infer that a result is intended, though it is not desired, when
  - (i) the result is a virtually certain consequence of the act; and
  - (ii) the actor knows that it is a virtually certain consequence.

The interpretation of 'reckless' was the subject of a House of Lords judgement in 2003 which concluded that:

"A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to -

- a) a circumstance when he is aware of a risk that it exists or will exist;
- b) a result when he is aware of a risk that it will occur;

and it is, in the circumstances known to him, unreasonable to take the risk."

There is no case law that helps define the meaning of 'places used for shelter or protection', so the words should be given their ordinary English meaning. It would seem entirely reasonable to include squirrel dreys within the meaning of the term as these would meet the narrowest interpretation. Conversely, interpreting the term to mean the whole area of woodland in which squirrels live is probably going beyond the intention of Parliament as the legislation would probably have referred to the protection of habitats. However, this remains to be tested in court.

## Enforcement and penalties

The Police are the primary enforcers of wildlife legislation, though they may seek advice from the SNCO or other bodies such as the RSPCA. In most areas the Police Wildlife Crime Officer would be the primary contact for reporting offences. Offences under the WCA are 'arrestable', giving the Police significant powers of search, detention and entry onto land. Prosecutions for offences under the legislation

in all countries must be brought within 6 months of the date on which sufficient evidence became available to the prosecutor, subject to a time limit of 2 years after the commission of the offence. Penalties for most offences are up to level 5 on the standard scale per offence (£5000 per offence in 2004) and/or a custodial sentence of up to 6 months. Articles used in the commission of an offence, such as vehicles, may be confiscated by the court [WCA S.18(2)].

## Red squirrels and planning

Because the red squirrel is a legally protected species, Government policy is that the planning system should take the presence of the species into account as a material consideration when making planning decisions. This policy is included in PPG9 in England, TAN(W)5 in Wales and *Planning Conservation Guidelines – Nature Conservation and Planning* in N. Ireland. Planning authorities are encouraged to seek advice from the statutory nature conservation organisation and consider the use of planning obligations or agreements to ensure the species and its habitat are protected.

The red squirrel is also listed as one of the Government's priority species, with its own Species Action Plan. Under the CRoW Act (S74), Ministers and government departments are obliged to take reasonable steps to further the conservation of listed species

## Legal status of the grey squirrel

The grey squirrel is included in Schedule 9 of the WCA and the W(NI) Order. This means that it is illegal to release a grey squirrel into the wild, or allow one to escape, even if it was taken into captivity for welfare reasons. Licences to permit the release of grey squirrels for specific purposes can be issued by government departments.

Under the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937, issued under the Destructive Imported Animals Act 1932, it is illegal to keep grey squirrels in captivity. This order is still in force.

## Other legislation affecting squirrels

Although the WCA is the most important Act protecting squirrels, other legislation exists

which may affect squirrel protection or management. This includes:

Wild Mammals (Protection) Act 1996 (England and Wales). This makes it 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. This legislation needs to be taken into account in identifying the method of killing for grey squirrel control.

Although it is not illegal to capture grey squirrels in traps, the Spring Traps Approval Order 1995 together with subsequent variations, govern the types of trap that can be used.

The use of poisons to control grey squirrels may not be illegal under primary legislation, but the type of poison that may be used is defined by the Control of Pesticides Regulations 1986 and subsequent amendments (England and Wales, similar in NI). At present the only product approved for use against grey squirrels for the protection of timber is a specific formulation containing warfarin.

## **Application of the legislation in practice**

### **Captive red squirrels**

It is illegal to capture or possess a red squirrel without a licence. However, the law only applies to wild animals, though the onus is on the possessor to show that the animal was not wild. Red squirrels could legally be held in captivity under the following circumstances:

- Not wild animals. The animals could be captive-bred, either bought from a dealer or bred on site. If captive wild squirrels give birth in captivity the progeny are not considered to be wild animals. Some red squirrels have been imported, quite legally, from Germany.
- In captivity solely for the purpose of tending them and releasing them when no longer disabled. It could be argued that 'solely' would not include having them on public display, especially in a commercial environment.
- Held under a licence issued by a government department or statutory nature conservation organisation. A copy of the licence should be available for inspection.

### **Release of red squirrels**

It is not illegal to release red squirrels into the wild anywhere in the UK, though the UKRSG advises against most releases of red squirrels (see advice note on Red Squirrel Releases).

### **Development and maintenance**

Under the WCA there is no provision for licensing the intentional destruction of places used for by squirrels for shelter or protection, or the disturbance of squirrels occupying such places, for the purposes of development (defined in the widest sense) or maintenance. Such activities must rely on the defence in the legislation that the act was the 'incidental result of a lawful operation and could not reasonably have been avoided'. Thus, to rely on this defence a person must demonstrate to the satisfaction of a court that:

1. The act was incidental to the main purpose of the work.
2. The work was legal (e.g. not in contravention of other legislation, such as the planning legislation).
3. The act could not reasonably have been avoided.

Only a court can decide what is 'reasonable' in any set of circumstances, but, clearly, agreement between the appropriate conservation agencies, planners and developers would be very helpful. In order to minimise the risk of prosecution, developers who wish to maintain, build on or alter areas used by red squirrels are advised to ensure that all reasonable steps are taken to avoid or, if that is not possible, minimise damage to places red squirrels use for shelter or protection. This can best be achieved by undertaking a squirrel survey prior to planning any work and ensuring that appropriate mitigation measures are included in the proposals. Specialist advice may be required.

### **Forestry**

As with development, the intentional or reckless destruction of places red squirrels use for shelter or protection cannot be licensed and must rely on the defence provided in the legislation. In order to minimise the risk of prosecution, forestry managers in areas where red squirrels occur are advised to ensure that all reasonable steps are taken to avoid or, if that is

not possible, minimise damage to places red squirrels use for shelter or protection. For details on how to undertake appropriate precautions and mitigation measures prior to any major forest management works that may potentially disturb red squirrels please seek advice from a specialist (see Contacts on [www.ukredsquirrels.co.uk](http://www.ukredsquirrels.co.uk)) and see advice notes on squirrel monitoring.

Note that the felling of trees may also be controlled by other legislation, most notably that a Forestry Commission felling licence is required to fell growing timber unless an exception applies. See the leaflet [Felling trees – getting permission](#) (2003), available from the Forestry Commission.

Please note the advice given in this document is intended for guidance only. For further details please refer to the exact copies of the relevant legislation, (many of which can be found at [www.hmsso.gov.uk](http://www.hmsso.gov.uk)).

If you have any queries about the information of this advice note please contact:

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<sup>i</sup> England – Department for Environment, Food and Rural Affairs; Scotland – Scottish Executive, Agriculture and Rural Affairs Department; Wales – Welsh Assembly Government; Northern Ireland – Environment & Heritage Service.

<sup>ii</sup> England – English Nature; Scotland – Scottish Natural Heritage; Wales – Countryside Council for Wales; Northern Ireland – Environment & Heritage Service.