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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Forestry and Land Management (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 30 May, 20 June and 27 June 2017, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Forestry and Land Management (Scotland) Billⁱ ("the Bill") at Stage 1. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandumⁱⁱ ("DPM") on the delegated powers provisions in the Bill. The DPM sets out the reasoning for taking the delegated powers.

ⁱ Forestry and Land Management (Scotland) Bill [as introduced] is available [here](#)

ⁱⁱ Forestry and Land Management (Scotland) Bill Delegated Powers Memorandum is available [here](#)

Overview of the Bill

3. This Government Bill was introduced by the Cabinet Secretary for the Rural Economy and Connectivity, Fergus Ewing MSP, on 10 May 2017. The lead Committee is the Rural Economy and Connectivity Committee.
4. The overall policy aim of the Bill is to complete the devolution of forestry in Scotland, by transferring the powers and duties of the Forestry Commission (“FC”), so far as they relate to Scotland, to the Scottish Ministers, and to provide a modern statutory framework for forestry in Scotland. This modern statutory framework will replace the application in Scotland of the Forestry Act 1967, which currently governs forestry in England, Wales and Scotland.
5. The Policy Memorandum explains that, although forestry is not reserved and forestry strategy and policy in Scotland is set by the Scottish Ministers, the management of forestry in Scotland, including management of the National Forest Estate, has remained the responsibility of the FC, a cross-border public authority.
6. Currently, the activities of the FC in Scotland are delivered through Forestry Commission Scotland (“FCS”) – as to policy, advice, regulation and grants – and Forest Enterprise Scotland (“FES”) – an Executive Agency of the Forestry Commission which manages the National Forest Estate for Scotland. It is intended, following the completion of the devolution of forestry in Scotland, that the functions currently carried out by FCS will be undertaken by a dedicated Forestry Division within the Scottish Government and that the functions currently carried out by FES will be taken on by a new Scottish Executive Agency, Forestry and Land Scotland, which will take on the existing network of local FC offices.
7. As set out in the Policy Memorandum, the Bill is the first of three principal activities required to complete the devolution of forestry to the Scottish Ministers. Once the Bill has completed its Parliamentary passage, two further steps will be required.
8. Firstly, UK secondary legislation will be required under the Scotland Act 1998, to wind up the FC as a cross-border public authority and to provide certain powers to the Scottish Ministers in currently reserved areas; to enable UK-wide arrangements with the UK and Welsh Governments in the area of forestry; and to make arrangements for transferring some of the FC’s property and staff to the Scottish Ministers.
9. Secondly, the new administrative and organisational arrangements will be put in place to enable the delivery of the policy and management functions currently delivered by the FC in Scotland.
10. The Bill itself does the following:
 - Confers on the Scottish Ministers forestry functions, including a duty to promote sustainable forest management; and a duty to prepare, publish and have regard to a forestry strategy.
 - Transfers tree health and silvicultural (woodland cultivation) functions, in so far as they apply to Scotland, from the Forestry Commissioners to the Scottish Ministers.

- Confers on the Scottish Ministers functions in relation to management of land, including forestry land, and provides for those functions to be delegated to community bodies where the Scottish Ministers consider it appropriate; enables the Scottish Ministers to enter into arrangements with other persons to manage land on their behalf, and/or provide advice and assistance on management of land; and provides powers for the Scottish Ministers to acquire and dispose of land, including land on the National Forest Estate.
- Introduces a regulatory regime for felling trees and restocking land. Unless an exemption applies, or the Scottish Ministers require felling to be carried out via a direction or a notice, felling must be carried out in accordance with permission granted by the Scottish Ministers.
- Provides powers for the Scottish Ministers in connection with the regulatory regime for felling and restocking including powers of entry, a step-in power (which allows the Scottish Ministers to rectify a failure to comply with the regulatory regime where they have given a person notice to rectify the failing and the person has not done so) and an ability to recover expenses associated with use of the step-in power.
- Provides general powers for the Scottish Ministers when carrying out their functions under the Bill, including the ability to conduct research and inquiries, provide education and training and collect and publish data and statistics relating to their forestry and land management functions; to provide financial assistance; and to impose charges for the purposes of carrying out functions under the Bill.

Delegated Powers Provisions

11. At its meeting on 30 May 2017, the Committee considered the eleven sections of the Bill which confer delegated powers on Scottish Ministers. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:
 - Section 8 – Transfer of Plant Health Act 1967 functions
 - Section 25 – Applications for felling permission
 - Section 31 – Felling directions
 - Section 31 – Felling directions (associated regulations)
 - Section 33 – Restocking directions
 - Section 33 – Restocking directions (associated regulations)
 - Section 60 – Appeals against decisions by Scottish Ministers
 - Section 66 – Ancillary provision
 - Section 74 – Commencement
12. The Committee agreed to write to the Scottish Government to raise questions on four sections of the Bill. This correspondence is reproduced at Annex A.
13. Following consideration of the Scottish Government's response to the questions, the Committee is content in relation to the issues raised on two sections of the Bill which are as follows:
 - Section 27 – Decisions on applications
 - Section 29 – Compensation for refusal of felling permission
14. The Committee is not content with the Scottish Government's response to questions raised on the two remaining sections of the Bill which are as follows:
 - Section 24 – Unauthorised felling: exemptions
 - Section 64 – Charging
15. The Committee's conclusions and recommendations in relation to these sections are set out in the next section of this report.

Recommendations

16. The Committee's conclusions and recommendations on the delegated powers in sections 24 and 64 are detailed below.

Section 24 – Unauthorised felling: exemptions

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: regulations**
- **Parliamentary procedure: affirmative**

Provisions

17. Part 4 of the Bill (sections 21 to 60) introduces a comprehensive forestry regulatory regime which gives the Scottish Ministers wide-ranging powers to regulate felling activity, together with a range of offence provisions to ensure that the requirements of legal felling are complied with.
18. Section 23 of the Bill provides that a person commits an offence if that person fells a tree, unless (a) the felling is exempt under section 24, or (b) the felling is carried out in accordance with a permission or direction given by the Scottish Ministers under the Bill. A person who commits an offence of unauthorised felling is liable on summary conviction to a fine (a separate offence is committed in respect of each tree felled).
19. Section 24 gives a power to the Scottish Ministers to make regulations setting out exemptions to the offence of unauthorised felling. Regulations under section 24 may, in particular, provide that the offence provision does not apply to: particular categories of person; particular places or activities; particular circumstances; and trees of particular descriptions. Regulations under this section may modify any enactment (including the Act flowing from this Bill).
20. As noted in the DPM, since the offence of unauthorised felling applies to all trees in Scotland, unless there is an exemption (or unless a felling permission or felling direction is in place), the exemptions under section 24 effectively determine which situations will be caught by the forestry regulatory regime in the Bill.

Comment

21. The Bill as introduced contains no provision for exemptions to the offence of unauthorised felling in section 23. Exemptions to the offence will instead be set out in regulations under section 24. This is in contrast to the current legislation governing forestry in Scotland (the Forestry Act 1967 (“the 1967 Act”)) which will be repealed and replaced by the Bill. The 1967 Act sets out various exemptions to the requirement to obtain a felling licence on the face of that Act, and confers a power to add or to amend those exemptions by regulations.
22. The DPM explains that it is considered that the approach of setting out the exemptions in regulations offers greater flexibility and opportunity for engagement with, and input from, interested parties on the approach to the exemptions, creating

a more agile regime. The Government considers that this would have been difficult without those interested parties having sight and understanding of the Bill first.

23. It is the Committee's view that the power conferred on the Scottish Ministers in section 24 is fundamental to the application of the forestry regulatory regime introduced by the Bill, in that it allows Ministers to create exemptions to illegal felling and, by extension, to determine in what circumstance that regime will apply. This in turn will establish when the act of felling may amount to an offence under the Bill.
24. The Committee considered that the Scottish Government had not given sufficient justification, beyond the need to involve forestry stakeholders in the development of the exemptions, for not including any *initial* exemptions from illegal felling on the face of the Bill.
25. The Committee also noted that the power conferred on the Scottish Ministers in section 24 is wide. While the power provides a non-exhaustive list setting out what the exemptions *may* cover, no information has been provided by the Scottish Government as to whether it intends to replicate the list of exemptions currently set out in the 1967 Act.
26. Accordingly, the Committee sought an explanation of the approach taken by the Scottish Government (see Annex A). The response explained that the approach will allow the Government the opportunity to enter into open and detailed discussions on exemptions with interested parties, who will be fully informed of the details of the proposed legislation now that the Bill has begun its Parliamentary scrutiny. This will allow the current exemptions in the 1967 Act to be reviewed and the Government to make any required changes to those exemptions in the new regulations. The Scottish Government consider that those discussions would have been difficult to have prior to the introduction of the Bill.
27. It is the Committee's view that if Parliament is to have the opportunity to scrutinise effectively the proposals for the new forestry regulatory regime introduced by the Bill, a significant aspect of that policy, such as the situations in which felling a tree will, or will not be an offence under the Bill should be made available during the Parliament's consideration of the primary legislation.
28. Therefore, while the Committee accepts that a power to vary the relevant exemptions by regulations subject to the affirmative procedure is appropriate in principle, the Committee considers that the initial exemptions should appear in primary legislation.
29. The introduction of amendments at Stage 2, to set out initial exemptions on the face of the Bill, would not preclude the Government from pursuing discussions with stakeholders while the Bill is completing Stage 1 (which includes the period during which Parliament is in summer recess) and would then allow those proposals to be scrutinised by the Parliament during the course of Stage 2.

Recommendation

30. **Accordingly, the Committee recommends that the Scottish Government bring forward amendments to the Bill at Stage 2 which make detailed provision for exemptions from the offence of unauthorised felling.**

31. **The Committee also expresses its disappointment that the legislation has been introduced in the absence of full consultation on and development of the Scottish Government's policy regarding exemptions from the offence of illegal felling.**

Section 64 – Charging

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: administrative action**
- **Parliamentary procedure: none**

Provisions

32. Section 64 gives a power to the Scottish Ministers, for the purposes of or in connection with the carrying out of their functions under the Bill, to impose charges of such amounts as they consider appropriate.

Comment

33. Although this provision is not framed as a power to make subordinate legislation, scrutiny of this power falls within the DPLR Committee's remit, which, under rule 6.11.1(d) of the Parliament's Standing Orders, extends to considering whether any proposed delegated powers in Bills should be expressed as a power to make subordinate legislation. This power is not discussed in the Government's DPM, which is the usual approach for powers that are not exercisable by subordinate legislation nor by directions, guidance etc.
34. The Committee noted that the power in section 64 is framed as an executive power, exercisable by the Scottish Ministers with no oversight or control by the Parliament; and also that the proposed power is a wide one, allowing the Scottish Ministers to impose any type or level of charges so long as they are "for the purposes of or in connection with the carrying out of their functions under the Bill". The Committee further noted that no indication is given on the face of the Bill as to the types or level of charges which could be imposed under this section, nor as to the specific activities of the Scottish Ministers in connection with which charges could be imposed.
35. The Committee considered that, without further information on the face of the Bill as to what charges imposed under section 64 might cover, it would be difficult for Parliament to properly scrutinise the policy behind the power to impose charges, and to fully understand the potential impact on those on whom charges under this section may be imposed.
36. The Committee further considered that a power for the Scottish Ministers to set and to amend charges levied in connection with the carrying out of their functions under the Bill by subordinate legislation (rather than by executive action) would provide an opportunity for Parliament fully to scrutinise the detail of any charging regime imposed under section 64.

37. Accordingly, the Committee sought an explanation of the approach taken and the circumstances in which the power might be exercised (See Annex A). In particular, the Committee asked the Scottish Government to explain why a power to impose charges by way of executive action is considered to be appropriate, as opposed to a power to set and amend charges by way of subordinate legislation.
38. The Scottish Government's response explained that the Bill operates to transfer the management of the National Forest Estate ("NFE") to the Scottish Ministers. The NFE is currently managed predominantly on a commercial basis by Forest Enterprise Scotland, an executive agency of the Forestry Commissioners which has public corporation status.
39. The response points to the Financial Memorandum for the Bill, which sets out the scale of commercial activity on the NFE and the range of activities which generate income. These range from renewable energy developments and sales of timber and venison, to recreation permissions, and amounted to £83m in 2015-16. The Scottish Government explains that the policy intention is that the NFE should continue to be able to be managed commercially and Ministers should have appropriate powers to determine, via executive action, the scale and nature of the charges.
40. The Scottish Government also explained that the Bill enables the Scottish Ministers to reach agreements with other persons (who may be public bodies, private companies or individuals) to manage land on their behalf, with the option of a commercial rate being charged by the Scottish Ministers where this is considered appropriate. The Bill also confers powers on the Scottish Ministers to provide information and research to support and develop the forestry sector. Scottish Government policy is that the Scottish Ministers should be able to recover costs for, and potentially charge at a commercial rate for, these services.
41. The Scottish Government response also stated that requiring charges to be set and amended by way of subordinate legislation would constrain Ministers' commercial activities and put involvement in new opportunities (for which charges might not yet have been agreed by the Parliament) at risk. Further, the Scottish Government points to examples of low-level charges which it would not be considered proportionate to set by way of subordinate legislation. The Government also notes that the exercise of this power would be taken forward in compliance with the fees and charges section of the Scottish Public Finance Manual.
42. However, the Committee does not consider that the Scottish Government's response provides adequate explanation for the approach taken. As noted above, the power as drafted affords the Parliament no opportunity to scrutinise proposed charges and no opportunity for oversight or control of any charging regime which might be imposed.
43. In addition, the power is drafted very widely, allowing Ministers to impose charges of such amount *as they consider appropriate*, but setting no upper limit as to the level of charges which may be imposed nor explaining how such charges might be calculated and applied. The range of activities in respect of which charges may be imposed is correspondingly very wide, allowing charging for the purposes of or in connection with *any* of the Scottish Ministers functions under the Bill.
44. It is the Committee's view that a more proportionate approach would be to confer a power on the Scottish Ministers to impose charges for the purposes of or in

connection with the carrying out of their functions under the Bill, by reference to a charging scheme set out in regulations. This would not necessarily require the Scottish Government to set out the detail of all charges which might be imposed in full, but would allow the Parliament a degree of oversight and control as to the functions in respect of which the Scottish Government intends to impose charges, the way in which those charges are calculated and applied and the maximum level of charges which could be imposed. A charging scheme set out in regulations would also aid transparency for those on whom charges may be imposed.

Recommendation

- 45. Accordingly, the Committee recommends that the Scottish Government bring forward an amendment to section 64 of the Bill at Stage 2, to confer a power on the Scottish Ministers to impose charges for the purposes of or in connection with the carrying out of their functions under the Bill, by reference to a charging scheme to be set out in regulations.**

Annex A

Correspondence with the Scottish Government

Thank you for your letter of 30 May setting out the questions raised by the Delegated Powers and Law Reform Committee during their consideration of the delegated powers contained the Forestry and Land Management (Scotland) Bill. I have addressed each point in turn below.

Section 24 - unauthorised felling: exemptions

1. Please explain why it is considered that the power in section 24 strikes an appropriate balance between primary and secondary legislation. Why is it considered appropriate in section 24 to take a power to create exemptions from the offence of unauthorised felling under section 23, rather than making provision for such exemptions on the face of the Bill? Does the Scottish Government consider that setting out initial exemptions on the face of the Bill, together with a power to amend those exemptions by regulations, could strike a more appropriate balance?

The Scottish Government is grateful for the opportunity to describe in more detail the rationale for proposing that the exemptions under section 24 be set out in Regulations. It is true that setting out initial exemptions on the face of the Bill, together with a power to amend those exemptions by regulations, would provide the same intended flexibility in the long term.

It would however remove the opportunity to enter into open and detailed discussions on exemptions with interested parties, with all those involved fully informed of the detail of the proposed primary legislation now that the Bill has begun its Parliamentary scrutiny, in order to draft them. Those discussions are intended to review the current exemptions, determine whether changes are required and, if necessary, make those changes as the new Regulations are developed – with critical input from FC staff, the forestry sector and NGOs with an interest. These discussions would have been difficult to have prior to the publication of the Bill but the Scottish Government feels that the opportunity should be taken to review the exemptions, in particular given that the exemptions have not been amended for some time.

Section 27: decisions on applications

2. It is not immediately clear (despite the non-exhaustive list provided in that section) whether the exercise of this power would be limited to matters of purely administrative detail, or whether the power could be used to make provision in relation to the way in which such decisions should be taken by the Scottish Ministers. If the latter, this would appear to go beyond purely administrative provision, and could have a significant effect on those applying for permission. Please provide further clarification as to how it is intended that this power should be exercised.

The Scottish Government has proposed a framework in this Bill that ties decision making to sustainable forest management (SFM). In relation to decisions on applications, section 27(2) *requires* Ministers to have regard to SFM in making decisions – we therefore require the powers in Section 27(8) not to set the principles on which decisions are made but to set out, in order to provide clarity to applicants, how the process of decision taking will

work. This could cover a broad range of detail such as how site visits to assess an application would be conducted, what communication the applicant can expect from the regulator and the period of time that must elapse before an application can be made again after permission is refused. Those details are, of course, crucial to potential applicants but the Scottish Government considers negative procedure strikes the correct balance between the need for flexibility in the system and the need to make proper use of Parliamentary time while ensuring suitable scrutiny.

Section 29: compensation for refusal of felling permission

3. Section 29(2) provides that regulations made under that section may include (amongst other things) provision about persons who are entitled to compensation. To the extent that this could extend to provision setting out in what circumstances persons may, or may not, be entitled to compensation, thereby affecting the scope of the compensation provision made by section 29(1), this would appear to go beyond purely administrative provision, and could have a significant effect on those persons who suffer loss as a result of a refusal by the Scottish Ministers to grant felling permission.

Please therefore provide further clarification as to how it is intended that this power should be exercised. Please explain, in particular, the policy intention underlying the taking of a power to make provision about persons who are entitled to compensation, and how it is intended that this will interact with the provision in section 29(1), that a person suffering loss as a result of the Scottish Ministers' decision to refuse an application for felling permission is entitled to compensation in accordance with regulations made under subsection (2).

The entitlement to compensation is tied to a person having suffered a loss as a result of permission being refused. While the principle is clear, the power at section 29(2) is required in order to specify what the boundaries are. In the simplest circumstances, for example where a forest owner applies for felling permission for trees grown for timber, the loss is clearly identifiable and the person suffering that loss is not likely to be in question. In which case, the person entitled to compensation would be the forest owner and the loss would be the value of the trees to the timber market that (s)he has clearly lost out on. In more complex situations, however, the situation will be less clear. For example, where another party (with permission of the owner) has applied for permission to clear trees for a purpose unrelated to selling any extracted timber, that person may fall into a category of person that Minister may or may not want exclude given the remoteness, or not, of the loss and the relationship that person has with the owner. In recognition of the fact that not all relationships between owners and applicants will be straightforward, and that not all felling is carried out in order to extract timber, the power at section 29(2) is required to allow Ministers to specify and set down all the technical detail on what type of person is entitled to compensation.

Section 64: charging

4. Please explain the policy intention behind the taking of the power, in section 64 of the Bill, for the Scottish Ministers to impose charges of such amounts as they consider appropriate, for the purposes of or in connection with the carrying out of their functions under the Bill.

In particular, please explain the circumstances in which this power might be exercised and the types and level of fees which might be imposed under this

section. Why does the Scottish Government consider that taking a power to impose such charges by way of executive action is appropriate, as opposed (for example) to a power to set and amend charges by way of subordinate legislation?

The Bill enables Scottish Ministers to manage, in their own name, the National Forest Estate (NFE). The NFE is Ministers' largest landholding and is currently managed predominantly on a commercial basis by Forest Enterprise Scotland, an executive agency of the Forest Commissioners which has public corporation status. Paragraph 34 of the Financial Memorandum sets out the scale of commercial activity on the estate and the range of activities that generate income. The policy intention is that, on transfer of management to Scottish Ministers, the estate should continue to be able to be managed commercially and that Ministers should have appropriate powers to determine, via executive action, the scale and nature of charges.

Further, the Bill enables Scottish Ministers to reach agreements with other persons to manage land on their behalf or provide a land management service. Other persons may be public bodies, private companies or individuals, with the option of a commercial rate being charged where this is considered appropriate. The Bill also provides powers for Ministers relating to the support and development of the forestry sector, notably powers to provide information and research. Scottish Government policy is that Scottish Ministers should be able to recover costs for, and potentially charge at a commercial rate, for these services.

Requiring that charges are set and amended by way of subordinate legislation would constrain Scottish Ministers' commercial activities and risk involvement in new opportunities (for which charges may not yet have been agreed by Parliament). Exercise of powers would be taken forward in compliance with the fees and charges section of the Scottish Public Finance Manual. Furthermore, setting low-level charges such as car parking and leasing plots for bee hives by executive action is not considered proportionate in terms of Parliamentary time.

