

Forestry and Land Management (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Forestry and Land Management (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum do not form part of the Bill, these are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill confers on the Scottish Ministers forestry and land management functions. It removes these functions from the Forestry Commissioners in so far as they relate to Scotland, in preparation for integration of forestry policy, support, development and regulation into Scottish Government.

4. Specifically, the Bill:

- 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.

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- Transfers tree health and silvicultural¹ material testing 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. 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 to support compliance 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 to use in 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.

¹ Silviculture is defined in the UK Forestry Standard as the growing and cultivation of trees, including techniques of tending and regenerating woodlands, and harvesting their physical products.
[https://www.forestry.gov.uk/pdf/FCFC001.pdf/\\$FILE/FCFC001.pdf](https://www.forestry.gov.uk/pdf/FCFC001.pdf/$FILE/FCFC001.pdf) (page 104)

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5. The Bill is part of a larger programme of work to complete devolution of forestry that includes establishing new cross-border arrangements with the UK and Welsh Governments for the exercise of forestry functions currently delivered across Great Britain basis by the Forestry Commission; and the creation – by administrative means – of new organisational structures for forestry and land management in Scotland.

6. The Bill is the principal vehicle to make the legislative changes associated with the devolution programme; however, once the Bill has completed its passage orders will be required under sections 90 and 104 of the Scotland Act 1998 to: wind up the Forestry Commissioners as a cross-border public authority; transfer relevant property and liabilities to the Scottish Ministers; and underpin the new cross-border arrangements. Powers for the Scottish Ministers to promote, develop, construct and operate renewable energy installations on land that they manage, and to delegate that function to community bodies, will also be sought via the section 104 order due to the reservation in section D1 of schedule 5 of the Scotland Act 1998.

7. A detailed explanation of the Bill's purpose can be found in the Policy Memorandum, which also sets out the policy intentions underpinning it and the relationship of the Bill to the wider programme of work to complete devolution of forestry.

Rationale for subordinate legislation

8. The Scottish Government has had regard when deciding whether provisions should be in primary or secondary legislation and, where relevant, what subordinate legislation powers and respective Parliamentary procedures are appropriate, to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example changes to forestry practices or government policies);
- the need to make proper use of valuable Parliamentary time; and
- the need to deal with the unexpected, in order to avoid the purpose of the primary legislation being undermined (for example, development of methods which might be used to circumvent the offence of felling where a person wishes to reduce woodland cover).

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9. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken and why the selected form of Parliamentary procedure is considered appropriate. Work in connection with development of regulations under sections 24, 25, 27, 29, 31, 33 and 60 is underway in association with Forestry Commission staff and engagement with the sector will begin after Bill introduction.

Delegated Powers

Section 8 – Transfer of Plant Health Act 1967 functions

Power conferred on: the Scottish Ministers

Powers exercisable by: orders made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure (in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010) or negative procedure (depending on circumstances)

Provision

10. Section 8(2)(a) amends section 1(2) of the Plant Health Act 1967 (“the 1967 Act”) which determines the competent authorities for the purposes of exercising functions under that Act, including the exercise of order-making powers under sections 2 and 3 of the 1967 Act to, respectively, control the introduction or spread of plant pests into Great Britain. Currently, section 1(2)(a)(i) of the 1967 Act provides that the Forestry Commissioners are the competent authority for England and Scotland as regards the protection of forest trees and timber from attack by plant pests, whereas section 1(2)(a)(ii) provides that the Scottish Ministers are the competent authority as regards protection from plant pests more generally.

Reason for taking power

11. The Bill (section 70) provides that the functions of the Forestry Commissioners are no longer exercisable in or as regards Scotland and, instead, creates a new legislative framework for the management of forestry land in Scotland by the Scottish Ministers. Given this, the amendment to section 1(2) of the 1967 Act ensures that the Scottish

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Ministers will be the competent authority in relation to Scotland for dealing with all plant pests, including those which affect forest trees and timber.

Choice of procedure

12. Section 6(1) of the 1967 Act already provides that orders generally under the Act are to be laid, without further procedure, before Parliament after being made unless prohibiting or regulating the landing in or export from Great Britain of any articles, in which case such orders would be subject to the negative procedure. The procedures chosen reflect the nature of the threat. Action must usually be taken swiftly against plant pests and diseases, not just those of trees, to prevent introduction or further spread. Maintaining this power ensures a consistent approach to the exercise of regulation-making powers generally by the Scottish Ministers as competent authority under the 1967 Act in relation to all plant pests whilst still allowing an appropriate degree of scrutiny by the Scottish Parliament as regards the exercise of those powers. In relation to the former, section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 would apply to orders and require that they be laid before the Scottish Parliament as soon as practicable after being made.

Section 24 – Unauthorised felling: exemptions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

13. Section 24 exempts from the offence of unauthorised felling (set out in section 23) felling carried out in accordance with exemptions set out by the Scottish Ministers, in regulations. The regulations may, in particular, provide that the offence at section 23 does not apply to particular categories of person, particular places or activities, particular circumstances or trees of particular descriptions. As the offence of unauthorised felling applies to all trees unless there is an exemption (or unless the felling is done in accordance with a felling permission or required by the Scottish Ministers via a direction or notice), those exemptions effectively determine which situations are subject to the forestry regulatory regime under the Bill.

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Reason for taking power

14. Effective and proportionate regulation of forestry is required to maintain appropriate woodland cover and to ensure sustainable management of Scotland's forests.

15. The Forestry Act 1967 sets out the detail of the exemptions to the requirement for a felling licence, in terms of size of trees or overall volume of timber extracted over time; type of tree; or types of activities. It also sets out how the regulation of felling interacts with other legislative frameworks such as the Electricity Act 1989 and the Planning Acts. These exemptions, by virtue of being in primary legislation, are difficult to adapt and, therefore, arguably, have fallen behind practices and policies.

16. All of this technical detail will now be set out in regulations made under section 24. This offers greater flexibility and opportunity for engagement with, and input from, interested parties, creating, when considered with the system of felling permissions, a more agile regime overall. It is considered appropriate to develop these exemptions with the input of those involved in forestry, which would have been difficult without them having sight and understanding the primary legislation first. A power to set out the detail in secondary legislation allows for that detail to be developed with the input of the regulator and the sectors.

Choice of procedure

17. Section 65 requires regulations made under section 24 to be subject to affirmative procedure. The exemptions to the offence of unauthorised felling will determine what situations are regulated by the forestry regulatory regime under the Bill. A proportionate level of consultation, commensurate with the impact of the changes proposed, will be carried out as the exemptions are constructed and/or modified including, where appropriate, a Business and Regulatory Impact Assessment (BRIA). As stated in paragraph 16 this will, in the first instance, involve input from the regulator and the wider sectors interested in, or affected by, forestry. As the exemptions will determine the reach of the regime, it is considered that affirmative procedure is appropriate. This procedure provides an appropriate balance of Parliamentary scrutiny and flexibility to amend the regime to reflect policy changes or make amendments required as a result of its operation.

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Section 25 – Applications for felling permission

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

18. Section 25(3) and (4) allow the Scottish Ministers to make regulations setting out how applications for permission to fell should be made.

Reason for taking power

19. Setting out the application process in subordinate legislation facilitates adaptation of the process as technology advances (for example, for electronic applications) and to alter an application process in response to feedback to make it more streamlined. Applicants will continue to be supported by guidance covering not only the felling regime but also other considerations that applicants should be aware of.

Choice of procedure

20. Section 65 requires regulations made under section 25 to be subject to negative procedure. Where significant changes to the process of applying for permission are proposed it is intended that a proportionate level of consultation will be carried out including, where appropriate, a BRIA. However, given the administrative nature of the regulations, negative procedure is considered appropriate.

Section 27 – Decisions on applications

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

21. Section 27 sets out how decisions relating to felling permissions will be taken, including the circumstances in which conditions may not be imposed on a felling permission (s.27(5)). Section 27 requires the Scottish Ministers to have regard to sustainable forest management when making decisions (s.27(2)) and to give reasons if they refuse permission (s.27(3)).

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In addition it sets out that conditions, if set, can be varied or revoked by the Scottish Ministers (s.27(6)).

22. Section 27 also enables further provision about decisions on applications to be made in regulations (s.27(7) and (8)). In particular, regulations may include provision on the ability of the Scottish Ministers to enter land in order to make a decision in relation to an application (for example to verify information provided in an application); how decisions are to be notified; the imposition of conditions on a felling permission; and situations in which persons may be prevented from making subsequent applications in relation to the same circumstances (in order to minimise vexatious multiple applications).

Reason for taking power

23. Setting out detail relevant to how decisions are taken in subordinate legislation facilitates adaptation of the regulatory process while still providing sufficient clarity to applicants. Applicants will continue to be supported by guidance covering not only the felling regime but also other considerations that applicants should be aware of.

Choice of procedure

24. Section 65 requires regulations made under section 27 to be subject to negative procedure. Where significant changes to the process relating to how decisions are taken are proposed it is intended that a proportionate level of consultation will be carried out, including, where appropriate, a BRIA. However, given the administrative nature of the regulations, negative procedure is considered appropriate.

Section 29 – Compensation for refusal of felling permission

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

25. Section 29 provides that persons suffering loss as a result of the Scottish Ministers' decision not to issue a felling permission may be entitled to compensation in accordance with regulations made under subsection (2). Regulations under section 29(2) may include provision about persons

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entitled to compensation; the procedure for applying for compensation; information to be included in applications; the way in which compensation is to be determined; the way in which disputes about compensation are to be determined; and detail on appeals against compensation.

Reason for taking power

26. The circumstances in which compensation will be available following the refusal of a felling permission need to be considered in parallel to the situations in which permission to fell will be required, i.e. where felling is not exempt under regulations made under section 24. If the parameters of the regulatory regime change, e.g. following changes to the exemptions, the circumstances in which compensation is available may need to be revisited. In order for the system to work as a whole, these details are required to be in secondary legislation so that they can be amended in line with other changes.

Choice of procedure

27. Section 65 requires regulations made for the purposes of section 29 to be subject to negative procedure. The category of persons entitled to seek compensation are identified in the Bill so setting out how claims for compensation will be made is administrative. Setting amounts or limits, or setting out methods for calculating amounts or limits, is administrative and may need to be updated regularly. Where significant changes to the processes or the amounts available are proposed it is intended that a proportionate level of consultation will be carried out including, where appropriate, a BRIA. However, given the administrative nature of the regulations, negative procedure is considered appropriate.

Section 31 – Felling directions

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

28. Section 31 establishes a framework for the Scottish Ministers to require a person to fell trees, including the reasons for which such a requirement can be placed on a person and that such a requirement can be varied or revoked.

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29. Section 31(2) allows for the Scottish Ministers to issue directions to a person requiring the person to fell trees. These directions may include conditions relating to how the felling is carried out or actions to be taken following the felling.

Reason for taking power

30. Being able to require felling allows for the prevention of damage caused by trees (for example damage to riverbanks or risks to protected sites). The regulatory regime overall is designed to enable the Scottish Ministers to promote sustainable forest management. Allowing trees to grow in circumstances where they are causing harm runs counter to sustainable forest management and this power allows Ministers to require action where necessary.

Choice of procedure

31. This is an administrative direction-making power of the Scottish Ministers rather than a legislative power, therefore individual decisions of the Scottish Ministers will not be subject to parliamentary scrutiny. However persons subject to felling directions will be able to challenge those directions through a formal appeals process, which it is anticipated will be underpinned with an administrative, two-stage, review process (see also s60: Appeals against decisions of Scottish Ministers). The circumstances in which the Scottish Ministers will have the power to consider issuing a felling direction are clearly set out on the face of the Bill (s.31(1)). In addition, the Bill provides that regulations may be made under section 31(5) and (6) (see below) setting out further provision on the issuing of felling directions. It is also anticipated that the exercise of directions will be supplemented by guidance.

Section 31 – Felling directions (associated regulations)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

32. Section 31 establishes a framework for the Scottish Ministers to require a person to fell trees, including the reasons for which such a requirement can be placed on a person and that such a requirement can be varied or revoked.

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33. Section 31(5) and (6) provides for the Scottish Ministers to make further provision about felling directions, in particular, about the circumstances in which a felling direction may not be given; the requirements to be included in a felling direction (which could be to specify when felling should take place or what methods should be used in order to protect nearby sensitive sites); how felling directions are to be notified and the imposition of conditions on a felling direction.

Reason for taking power

34. The ability to set out, in regulations, further provision on felling directions provides for clarity to be given to the public on a matter which might reasonably affect them and enables the regulatory regime to be responsive. The number of persons to whom a felling direction might legitimately be issued is large, and the burden which might be placed upon them by a felling direction could be significant. Hence, it is important that there is transparency on the circumstances in which such a direction may be issued, and how it may be issued.

Choice of procedure

35. Section 65 requires regulations made under section 31 to be subject to negative procedure. It is intended that setting out the circumstances in which directions may be issued will be subject to a proportionate level of consultation; however, the detail relating to how such directions are issued is largely administrative and therefore negative procedure is considered appropriate.

Section 33 – Restocking directions

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

36. Section 33 establishes a framework for the Scottish Ministers to require a person to restock land with trees where (a) felling has taken place that was not subject to an exemption or within the terms of a permission (or required by the Scottish Ministers via a direction or notice), or (b) a continuing condition has not been complied with. Such a requirement can be varied or revoked.

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37. Section 33(2) allows the Scottish Ministers to issue directions to a person requiring the person to restock trees. These directions may include conditions relating to how the restocking is carried out and may also allow, with the consent of the Scottish Ministers, planting to take place on a different piece of land (sometimes referred to as compensatory planting).

Reason for taking power

38. Along with the requirement to seek permission for felling, this power is a tool designed to be used in order to maintain appropriate woodland cover and to ensure sustainable management of Scotland's forests. It provides an opportunity to restore woodland cover, where that is deemed appropriate, in line with sustainable forest management.

Choice of procedure

39. This is an administrative direction making power of the Scottish Ministers rather than a legislative power, therefore individual decisions of the Scottish Ministers will not be subject to parliamentary scrutiny. However persons subject to restocking directions will be able to challenge those directions through a formal appeals process, which it is anticipated will be underpinned with an administrative, two-stage, review process (see also s.60: Appeals against decisions of the Scottish Ministers). In addition, the Bill provides that regulations may be made under section 33(6) and (7) (see below) setting out further provision on the issuing of restocking directions. It is also anticipated that the exercise of directions will be supplemented by guidance.

Section 33 – Restocking directions (associated regulations)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

40. Section 33 establishes a framework for the Scottish Ministers to require a person to restock land with trees where (a) felling has taken place that was not subject to an exemption or within the terms of a felling permission (or required by the Scottish Ministers via a direction or notice) or (b) a continuing condition has not been complied with. Such a requirement can be varied or revoked.

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41. Section 33(8) and (9) provide for the Scottish Ministers to make regulations further provision on restocking directions, including any limits that should be applied to the ability to issue restocking directions, what restocking directions may contain (which could relate to how long they should run for and what types actions they may require); the processes for issuing restocking directions; and the imposition of conditions on the directions.

Reason for taking power

42. The ability to set out, in regulations, further provisions on restocking directions facilitates adaptation in response to changes in the needs of those who might receive them while still providing sufficient clarity. The burden which might be placed upon them by a restocking direction could be significant. Hence, it is important that there is transparency on the circumstances in which such a direction may be issued, and how it may be issued.

Choice of procedure

43. Section 65 requires regulations under section 33 to be subject to negative procedure. It is intended that setting out the circumstances in which directions may be issued will be subject to a proportionate level of consultation; however, the detail relating to how such directions are issued is largely administrative and therefore negative procedure is considered appropriate.

Section 60 – Appeals against decisions by Scottish Ministers

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

44. Section 60 provides that a person may appeal certain decisions of the Scottish Ministers and sets out which decisions they can appeal.

45. Section 60(2) and (3) allows the Scottish Ministers to set out in regulations how such appeals can be made, in particular, specifying who may make them, how they are made and how they will be determined.

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Reason for taking power

46. The ability to appeal individual decisions taken by Ministers relating to felling or restocking provides protection for individuals subject to those decisions. Setting out what can be expected in regulations provides necessary clarity to individuals, in particular relating to how they can use this option and what they can expect from the process, while maintaining flexibility in the process so it may be adapted over time if the needs of those that are regulated change.

Choice of procedure

47. Section 65 requires regulations under section 60 to be subject to negative procedure. It is intended that setting out how appeals can be made will be subject to a proportionate level of consultation including, where appropriate, a BRIA . However, the detail of how appeals are made and how they are determined is largely administrative and therefore negative procedure is considered appropriate.

Section 66 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure if amending primary legislation, otherwise negative

Provision

48. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provisions as they consider appropriate for the purposes of the Bill or any provision made under the Bill. The regulations may modify any enactment.

Reason for taking power

49. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. The power is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provisions in the Bill. The power is wide-ranging because a smooth transition from the Forestry Act 1967 to the new, devolved, regime is vital to the continued effective and proportionate regulation, support and management of forestry.

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50. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues (for example, to align forestry regulation with changes in the other regimes with which it interacts). Without the power, it may be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Scottish Parliament or the Scottish Government.

51. The power, whilst potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, in connection with, or for giving full effect to any provisions in the Bill or any provision made under the Bill.

Choice of procedure

52. Section 65 requires regulations made for the purposes of section 66 to be subject to affirmative procedure if they contain a provision which adds to, replaces or omits any part of an Act. Any other regulations made under this section are subject to negative procedure. These procedures are typical for ancillary powers.

Section 74 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure (in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010)

Provision

53. This provision allows the Scottish Ministers to commence provisions in this Bill (other than sections 65 to 67, 71 to 73 and 75, which come into force on the day after Royal Assent) on such day as they appoint by regulations. The regulations can include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

54. It is standard for the Scottish Ministers to have control over the commencement of a Bill.

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Choice of procedure

55. As is now usual for commencement regulations, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.

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