

Forestry and Land Management (Scotland) Bill

Policy memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Forestry and Land Management (Scotland) Bill introduced in the Scottish Parliament on 10 May 2017.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 11–EN);
- a Financial Memorandum (SP Bill 11–FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 11–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy Objectives of the Bill

4. Forestry contributes almost £1 billion per year to the Scottish economy and supports more than 25,000 full-time equivalent jobs.¹ Forests and woodland cover 18% of the land area of Scotland (approximately 1.4 million hectares), which represents 45% of the UK total and 60% of UK

¹ 'The economic contribution of the forestry sector in Scotland' (November 2015), pp.4–5 (<http://scotland.forestry.gov.uk/supporting/forest-industries/economic-contribution-report>).

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softwood production. Around one third of Scotland's woodland cover is on the Scottish Ministers' National Forest Estate (NFE), currently managed by the Forestry Commission's Executive Agency Forest Enterprise Scotland on behalf of the Scottish Ministers for the benefit of the people of Scotland. The remaining two thirds of woodland cover is land owned privately and by communities, third sector organisations and local authorities.²

5. Woodland and forests are important to Scotland for a wide range of reasons. Well-managed productive forests help the economy by providing timber and supporting tourism and other associated business opportunities. Woodlands and forests are also dynamic ecosystems that can help mitigate climate change, alleviate flooding, stabilise the soil and provide a home for wildlife. As part of a 'natural health service', woodlands are treasured spaces, providing physical and mental health benefits to improve the lives of people and communities.

6. The Scottish Government recognises the multiple benefits already delivered by forestry in Scotland and is committed to ensuring that forestry can deliver more in the future. In achieving its ambitions for forestry, the Scottish Government is determined to use all available powers and levers to establish a modern statutory framework, with appropriate governance and operational arrangements, to support this valuable and growing sector.

7. The Scottish Government's commitment to completing the devolution of forestry is an integral aspect of its wider ambitions for forestry in Scotland. Although forestry is broadly devolved and forestry strategy and policy in Scotland is set by the Scottish Ministers, the management of forestry in Scotland – including management of the Scottish Ministers' NFE – has remained the responsibility of the Forestry Commissioners. This is a UK Non-Ministerial Department with a statutory Board of Commissioners and, since devolution, a cross-border public authority. The Forestry Commissioners are also responsible for the management of forestry in England; in Wales, the devolution of forestry was completed in 2013.

² 'Forestry Statistics 2016' (September 2016), Table 1.1, p.4 ([http://www.forestry.gov.uk/pdf/Ch1_Woodland_FS2016.pdf/\\$FILE/Ch1_Woodland_FS2016.pdf](http://www.forestry.gov.uk/pdf/Ch1_Woodland_FS2016.pdf/$FILE/Ch1_Woodland_FS2016.pdf)).

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8. The Bill is the first of three principal activities required to complete the devolution of forestry. The following policy objectives are achieved through the Bill:

- **Improved accountability, transparency and policy alignment.** Transferring the powers and duties of the Forestry Commissioners, in so far as they relate to Scotland, to the Scottish Ministers ensures that forestry is fully accountable to Ministers and to the Scottish Parliament and that governance arrangements are simpler and more transparent. Completing devolution brings greater policy alignment between forestry and other pertinent statutory responsibilities held by the Scottish Ministers, notably climate change, biodiversity, and other parts of the plant health regime, thus aiding delivery of wider economic, environmental and social outcomes.
- **Modernisation.** Creating a new legislative framework to support, develop and regulate forestry replaces the application in Scotland of the outdated Forestry Act 1967, which is much consolidated and based on statute from 1919. The Bill reflects the modern policy environment, including introducing a regulatory regime that is more agile and better able to adapt to changes.
- **More effective use of Scotland's publicly-owned land.** Ensuring that the Scottish Ministers can manage their own forestry assets with greater flexibility and enter into arrangements to manage land owned by other people or bodies (including public sector bodies). This has the potential to establish a more integrated approach to the management of publicly-owned land and to maximise the benefits of such land to the nation. This policy objective relates to the Scottish Government's commitment to establish a land agency for Scotland.

9. Once the Bill has completed its passage, there will be two further pieces of work required to complete the devolution of forestry. The first is the passage of orders under the Scotland Act 1998 in the UK Parliament to wind up the Forestry Commissioners as a cross-border public authority and to make other consequential provisions in light of the Bill. These orders will help establish new collaborative cross-border arrangements with the UK and Welsh Governments, managed hitherto by the Forestry Commission; and make arrangements for transferring some of the Forestry Commissioners' property and liabilities to the Scottish Ministers.

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10. The second is to establish new organisational arrangements by transferring to the Scottish Government the activities presently delivered by the Forestry Commissioners in Scotland through Forestry Commission Scotland (FCS – policy, advice, regulation, grants) and Forest Enterprise Scotland (FES – an Executive Agency of the Forestry Commission which manages the NFE for forestry and other purposes). The forestry functions currently carried out by FCS will be undertaken by a dedicated Forestry Division to be created within the Environment & Forestry Directorate and a new Executive Agency called Forestry and Land Scotland (FLS) will take on functions currently carried out by FES. FLS will focus initially on the development and management of the NFE, with the potential – via powers contained in the Bill – to take on management of other land in the future. It is planned that a Scotland-wide network of local offices, which provides essential local engagement, will be retained by the Forestry Division and by FLS. The Annex shows a comparison between current structures and new ones.

11. As both the Division and Executive Agency will be part of the Scottish Administration and share the same legal identity as the Scottish Ministers, they do not need to be established in the Bill itself.

Background

12. The current arrangements for the setting of strategy and policy by the Scottish Ministers and the management of forestry, under the terms of the Forestry Act 1967, by the Forestry Commissioners leads in practice to complex governance and accountability. Stakeholders have described the set-up as unnecessarily convoluted, with an apparent disconnect between funding and accountability. FCS and FES are responsible for delivery of the Scottish Ministers' policy, are funded through the Scottish Consolidated Fund and operate as part of the Scottish Government's Environment & Forestry Directorate on a day-to-day basis, but they are not Scottish public bodies, they are not formally accountable to the Scottish Ministers and they are not subject to Scottish Government policies and practices (e.g. the Scottish public sector equality duties) or to legislation passed by the Scottish Parliament such as the Freedom of Information (Scotland) Act 2002.

13. In addition, despite the Forestry Commissioners' cross-border status, there has been a direction of travel since devolution for forestry increasingly to be managed separately by Scotland, England and Wales. In

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2013, the responsibilities of Forestry Commission Wales were transferred to a new public body – Natural Resources Wales – responsible for forestry, conservation and environmental regulation. Since then, there has been increasing uncertainty about the long-term sustainability of the Forestry Commissioners as a cross-border body.

14. The Forestry Commission's Central Services, which has provided corporate services (such as HR, Finance and IT) on a shared services basis to FCS and FES and their English counterparts, are already being split up as part of an internal Forestry Commission change project. Other 'cross-border' functions provided centrally – including delivery of Great Britain's forestry science and research strategy, common codes such as the UK Forestry Standard and Woodland Carbon Code, and some tree health functions – are at risk of disintegrating because of the ongoing uncertainty and require new agreements between the UK, Welsh and Scottish Governments to achieve an appropriate level of service to all three countries in the future. In this context, and recognising both the Scottish Ministers' ambition for forestry and the relative importance of forestry to the economy in Scotland, maintaining the status quo was not considered a valid option.

15. In June 2015, the Scottish Ministers announced that they would jointly explore options with the UK Government to complete the devolution of forestry. A Forestry Governance Project Board, consisting of senior officials from the Scottish, UK and Welsh Governments and from the Forestry Commission has been considering options in relation to legislation, financial arrangements and cross-border functions. The agreed desired outcomes of the Board's work are:

- effective arrangements for the transfer of the Forestry Commissioners' powers and duties, as they relate to Scotland, to the Scottish Ministers;
- equitable financial arrangements and an orderly 'de-commissioning' of the Forestry Commissioners as a cross-border public authority; and
- a legacy of refreshed and strengthened cross-border cooperation and partnership working between England, Scotland and Wales on relevant forestry matters.

16. The commitment to completing the devolution of forestry was reiterated in the Scottish National Party's 2016 manifesto and is one of a

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number of forestry-related commitments in the Scottish Government's Programme for Government 2016-17. In facilitating the establishment of Forestry and Land Scotland (by transferring to the Scottish Ministers the responsibility for management of the NFE, their largest land-holding in Scotland, and by enabling them to enter into arrangements to manage land belonging to others), the Bill also delivers the 2016 manifesto commitment to create a land agency to help manage Scotland's publicly-owned land in the national interest.

17. The Bill provides the legislative framework to enable delivery of a package of other policy initiatives that the Scottish Government is introducing to increase forestry's contribution to the Scottish Ministers' economic, environmental and social ambitions. Other recent measures taken by the Scottish Government include: an increase in annual planting targets as a contribution to climate change mitigation and to help guarantee future supplies of timber; action to speed up and streamline the process for the approval of woodland planting proposals; increased financial support for proposals to minimise the impact of timber transportation on Scotland's fragile rural and public roads; and an improved Community Asset Transfer Scheme to encourage communities to get involved in purchasing or leasing parts of the National Forest Estate.

Alternative Approaches

18. Alternative legislative approaches to complete the devolution of forestry were considered as part of the Forestry Governance Project Board's work. A Bill within the UK Parliament to reform the Forestry Act 1967 could have transferred the Forestry Commissioners' functions relating to Scotland to the Scottish Ministers, with the potential to update the existing forestry powers and duties, but there has been no indication that the UK Government intends to introduce primary legislation on forestry. Given that forestry is largely devolved and forestry is particularly important in a Scottish context, it was felt that legislation making new arrangements for forestry in Scotland (including establishing a new legislative and regulatory framework suited to Scottish needs) should be handled by the Scottish Parliament rather than by Westminster.

19. Another option was to use existing public bodies legislation. Orders either under the Public Bodies Act 2011 or the Public Services Reform (Scotland) Act 2010 could have been used to modify the Forestry Commissioners' functions. However, both mechanisms have limited scope

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which would have restricted the extent of the changes that could have been introduced, including the opportunity (that primary legislation gives) to set out a modern approach to regulation.

Consultation

20. The Scottish Government has consulted widely as part of the policy development process, including individual meetings with stakeholders and partners before, during and after the formal public consultation period; sector-wide summits; and engagement with Forestry Commission staff and with the Trade Unions.

21. The formal public consultation on the Future of Forestry in Scotland was launched on 31 August 2016 and ran until 9 November. A total of 604 responses were received from public, private and third sector organisations and from individuals. Non-confidential consultation responses were published in December 2016 on the Scottish Government website. The independent research company Craigforth was commissioned to undertake a formal analysis of consultation responses and this was published on 13 February 2017.³

Outcome of Consultation And Engagement

22. Overall, the responses to the consultation suggested support for completing the devolution of forestry. The Bill transfers the powers and duties of the Forestry Commissioners to the Scottish Ministers and provides a modern statutory framework for forestry in Scotland.

23. Concerns raised during the consultation relating to the legislative framework for the development, support and regulation of forestry policy are dealt with in the first section on the Bill's specific provisions below. However, as mentioned earlier, the Bill is not the only vehicle required to complete the devolution of forestry. The consultation also covered proposals on future cross-border collaboration with England and Wales (which require orders under the Scotland Act 1998) and on new organisational structures in Scotland (which will be taken forward administratively). For the purpose of promoting understanding of the wider

³ The consultation, published responses and analysis are available at <https://consult.scotland.gov.uk/forestry/future-of-forestry/> .

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context and the Bill's place in completing the devolution of forestry, sections on those two themes have also been included below.

Policy Objectives: Specific Provisions

24. This summary offers more details on the key policy areas addressed by the Bill. Each section below sets out what will change from the present situation and how stakeholder views have been considered.

Duties placed on Ministers

Sustainable forest management

25. The Forestry Act 1967 includes a general duty on Forestry Commissioners to promote the interests of forestry; the development of afforestation; the production and supply of timber and other forest products; establishing and maintaining adequate reserves of growing trees; and (in Scotland, following an amendment by the Climate Change (Scotland) Act 2009) contributing to the climate change targets. It also includes a separate duty to achieve a 'reasonable balance' between (i) productive forestry and, in Scotland, the delivery of the climate change targets and (ii) the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest.

26. The proposal to place the Scottish Ministers under a similar statutory general duty regarding forestry was supported by the majority of all types of respondent to the public consultation. Placing Ministers under a duty recognises the importance of forestry to Scotland and ensures that forestry retains a strong profile in the context of its devolution.

27. Rather than replicate the existing duty, the Bill replaces it with a modern, updated duty on the Scottish Ministers to promote sustainable forest management (SFM). SFM balances the economic, environmental and social benefits of forestry and can be defined as "the stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity and vitality and their potential to fulfil, now and in the future, relevant ecological, economic and social functions at local, national and global levels, and does not cause damage to other ecosystems" (Ministerial Conference on the Protection of

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Forests in Europe 1993). The UK Forestry Standard (UKFS) currently provides the framework for delivery of SFM in the UK.⁴

28. The importance of SFM and of the UKFS was strongly supported in consultation responses and in meetings with both industry and environmental stakeholders. There was also some discussion of the importance of other aspects, including community engagement and biodiversity. As the Scottish Ministers are already bound by statutory duties and powers, such as climate change and biodiversity duties, it is not necessary to duplicate these in the Bill.

29. The Bill also provides for the Scottish Ministers to replace the Forestry Commissioners as the competent body in relation to Scotland for tree health and silvicultural material testing under, respectively, the Plant Health Act 1967 and the Plant Varieties and Seeds Act 1964. This means that responsibility for all plant health in Scotland will now reside in one place.

Statutory duty to prepare a forestry strategy

30. Although a Scottish Forestry Strategy currently exists⁵ (published in 2006 and subject to a light-touch review in 2011) and there is a commitment in the Land Use Strategy for Scotland 2016-2021⁶ to undertake a review of the strategy, there is not a statutory duty to prepare one. Placing such a duty on the Scottish Ministers to prepare a Scottish Forestry Strategy emphasises once more the importance which the Scottish Government places on forestry and its commitment to taking a long-term view. The Scottish Forestry Strategy will set out the Scottish Ministers' objectives, priorities and policies with respect to SFM, including economic, environmental and social objectives to be realised from forestry. The Scottish Ministers must have regard to the strategy when complying with their duty to promote SFM and in exercising certain functions under the Bill, including managing forestry land, acquiring and disposing of land and delegating functions to a community body. Provision for consultation and for laying a Scottish Forestry Strategy before the Scottish Parliament

⁴ <https://www.forestry.gov.uk/ukfs> .

⁵ <http://scotland.forestry.gov.uk/supporting/strategy-policy-guidance/forestry-strategy> .

⁶ <http://www.gov.scot/Topics/Environment/Countryside/Landusestrategy> .

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will allow for appropriate engagement on and scrutiny of the development of the strategy.⁷

31. Having a statutory duty on the Scottish Ministers to prepare a forestry strategy also seeks to allay some concerns that, once forestry functions are formally part of the Scottish Government, the long-term nature of forestry activity might be more likely to be affected by shorter-term political timeframes. This view exists despite the fact that, under existing arrangements, the Scottish Ministers already direct FCS and FES activities to a large degree.⁸ The Bill requires the Scottish Ministers to keep the Scottish Forestry Strategy under review and enables revision if the Scottish Ministers feel it appropriate. It is the Scottish Government's intention that the strategy should be formally reviewed after a 10- to 15-year period to reflect the long-term objectives and outcomes for forestry and to give sufficient time for implementation and evaluation of particular initiatives.

32. In preparing the Scottish Forestry Strategy, the Scottish Ministers are required to have regard specifically to the Scottish Land Use Strategy and to the Land Rights and Responsibilities Statement (a statement of principles for land rights and responsibilities in Scotland which the Scottish Ministers must prepare under the terms of the Land Reform (Scotland) Act 2016). This requirement complements the Scottish Ministers' existing statutory responsibilities that guide relevant policy development (e.g. climate change and biodiversity duties). The approach reflects the frequently-expressed views of stakeholders that forestry has much to contribute to the delivery of wider economic, environmental and social policies in Scotland, including supporting integrated land use.

Land management

33. On land management, policy objectives centre on creating more flexibility in the use of the Scottish Ministers' NFE and enabling a wider

⁷ The Scottish Ministers may, on enactment of the Bill, adopt a previously published strategy provided that it has been prepared in accordance with the requirements set out in the Bill.

⁸ For example, through setting priorities in 'The Scottish Forestry Strategy' (footnote 5) and 'The role of Scotland's National Forest Estate and Strategic Directions 2013-16'

(<http://scotland.forestry.gov.uk/images/corporate/pdf/FES-strategic-plan.pdf>) and determining allocation of budgets (including for woodland creation grants).

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land management role to help manage Scotland's publicly-owned land in the national interest.

34. Completion of devolution means that the Scottish Ministers will manage at their own hand the NFE, their largest land holding; hitherto, this responsibility fell to the Forestry Commissioners. The Bill gives the Scottish Ministers responsibility for managing forestry land in a way that promotes SFM. The SFM duty applies to management of any forestry land, including land owned by the Scottish Ministers such as the NFE and land that the Scottish Ministers manage on behalf of another person. The Bill includes requirements that enable the public to access information on land in Scotland that is subject to the SFM duty, to promote transparency and enable the Scottish Ministers to be held to account in fulfilling their duty to manage forestry land in a way that promotes SFM.

35. The Bill includes a new power to enable management of forestry land for the purpose of furthering the achievement of sustainable development, provided this is done with regard to the Scottish Forestry Strategy. This new power creates greater flexibility in the use of the NFE compared to the Forestry Act 1967, which required all activity to be tree-related. In fact, around one third of the NFE is not afforested and recent developments on that open land – such as starter farms – have required tree-related activity to meet the Forestry Act 1967 requirements. The Bill gives the Scottish Ministers the potential to deliver more of their economic, environmental and social objectives on the open land as well as on the two-thirds of the estate that is afforested.

36. The Bill includes provision for management by the Scottish Ministers of certain other land for the purposes of furthering the achievement of sustainable development. This means that Scottish Ministers have an integrated set of land management powers to manage different types of land.

37. In addition, the Bill provides a new power for the Scottish Ministers to enter into arrangements with any person to manage land or to provide advice or assistance in relation to managing land. These arrangements may be for the purpose of promoting SFM or for furthering the achievement of sustainable development. This enables the Scottish Ministers to offer a land management and/or advice service based on the considerable expertise of the current FES, which already manages afforested and open land for a wide range of purposes. The creation of FLS from FES, taken

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with the new land management functions in the Bill, enables the Scottish Ministers to fulfil their commitment to establish a land agency for Scotland. The arrangements and any relevant terms and conditions will be a matter for agreement between the Scottish Ministers and the other party, and will guide the use of the land in question and the activities undertaken on it. In the case of public bodies, any arrangements made will need to be consistent with the public body's statutory functions or purposes.

38. The Bill enables the Scottish Ministers to delegate their land management functions to community bodies. The Forestry Act 1967 enables delegation of forestry functions to community bodies but the Bill widens the scope of the delegation to include all land management functions, contributing to the community empowerment policy agenda.

39. There are also powers to dispose of land or to acquire land (by lease, sale, gift or grant of any interest in or right over land) for the purposes of the Bill. The Bill ensures that in making any disposals of the NFE the Scottish Ministers must have regard to the Scottish Forestry Strategy. This highlights the significance of the NFE as a public, national asset but enables reconfiguration of the estate to meet strategic priorities, including delivery of the New Woodland Investment Programme.⁹

40. Land may be acquired by compulsory purchase, subject to the standard procedure for compulsory purchase orders under the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The Bill exempts some land from compulsory acquisition, including land that is subject to a forestry dedication agreement and which is being managed in accordance with an approved plan of operations. This protects the rights of those who have entered into forestry dedication agreements with the Forestry Commissioners under the Forestry Act 1967.¹⁰

⁹ <http://scotland.forestry.gov.uk/managing/work-on-scotlands-national-forest-estate/land-and-building-sales/new-woodland-investment-programme>.

¹⁰ Forestry dedication agreements (FDAs) were used by the Forestry Commissioners prior to 1981 as a means of promoting forestry. An FDA is a binding legal agreement between the Forestry Commissioners and a land owner which makes a charge on the land it covers to use that land for the growing of timber.

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41. Powers in relation to the use of land for the production of renewable energy, and the ability to delegate this function to community bodies, will be sought via an order under section 104 of the Scotland Act 1998 due to the reservation in Section D1 of schedule 5 of that Act.

42. Engagement with stakeholders showed that many recognised that, while timber production is essential, the NFE also provides other benefits. Stakeholders also commented on FES's existing land management expertise and the logic of that being shared with other organisations for the wider good and as a way of better integrating approaches to land management. Others were concerned that a wider land management role might detract from the focus on forestry. The Scottish Government remains firmly committed to supporting the guaranteed production of timber from the NFE in support of Scotland's timber processing sector. The Scottish Forestry Strategy, which will be laid before the Scottish Parliament, will include clear commitments about the management of the NFE in relation to forestry and timber production.

Felling and restocking regulation

43. Effective and proportionate regulation of forestry is required to maintain appropriate woodland cover and to ensure sustainable management of Scotland's forests. While the Forestry Act 1967 focused on timber production, the new regime allows for a broader view to be taken. Consultation responses were generally supportive of the principles of felling and restocking regulation, which will be tied to SFM principles.

44. The Bill sets out powers to:

- regulate felling (including refusing permission or granting permission with or without conditions, e.g. on restocking);
- require felling to be undertaken; and
- require restocking of land where trees have been felled illegally.

45. In contrast to the Forestry Act 1967, where all the detail of the regulation is included in the primary legislation, enabling powers allow for a more modern, flexible regime where specific details will be set out in secondary legislation. The form that applications and permissions can take is not prescribed in the primary legislation, allowing for processes that are proportionate to the activities that they seek to regulate. An ability to vary conditions or requirements is included in order to allow for pragmatic

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responses to changing circumstances, given the timescales over which conditions or requirements can apply.

46. Setting out the details of the regime in secondary legislation allows for greater opportunities to engage with the sector and the public and to adapt them over time if policies or practices change. Work in connection with development of the regulations is underway in association with Forestry Commission staff and engagement with the sector will begin after Bill introduction. The secondary legislation will be laid before the Scottish Parliament in the course of 2018, with final commencement of the new framework planned for 2019.

47. Regulation is underpinned by a more straightforward regime of offences and a more transparent appeals process. Powers of entry are available in order to investigate suspected non-compliance and a system of remedial notices is also available, to require remedial action to be taken in the case of non-compliance. Where remedial notices fail, the Scottish Ministers are able to take remedial action themselves via step-in powers and to recover their expenses in doing so.

48. Penalties, which varied across the offences in the Forestry Act 1967, have been aligned (so that the same maximum fine is applicable for all offences) and are no longer tied to timber values, since illegal felling can relate to woodlands with environmental or social value as much as to those with a significant economic value. In addition, the scale of any unauthorised felling can be taken into account when determining penalties to be applied, due to the maximum fine being applicable to each tree felled.

49. The need for a level playing-field between the state and non-state timber sector was often raised during discussions with industry stakeholders. As a result, in line with section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Bill binds the Crown, introducing parity between the state and non-state timber sector in terms of the statutory regulation of felling and restocking. This means that Forestry and Land Scotland (FLS), as a forest manager, will be subject to the same regulatory framework as other forestry managers. Keeping FLS separate from the Forestry Division, which will regulate forestry, helps avoid any potential conflicts of interest.

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Other provisions

50. The Bill includes general powers to enable the Scottish Ministers to fulfil their functions under the Bill. These include powers to conduct research and carry out inquiries, collect data and publish statistics or other information, to provide education and training, and to establish corporate bodies. The Scottish Ministers may also provide financial assistance, including grants and loans, and the Bill enables charging in respect of the functions in the Bill. The latter will enable the existing charging arrangements in place for activities on the NFE (e.g. in connection with the provision of tourist, recreational or sporting facilities) to be carried forward when management transfers to the Scottish Ministers. The Scottish Ministers will also retain the powers to charge under the Plant Health Act 1967 and Plant Varieties and Seeds Act 1964 when they take over tree health and silvicultural material testing functions from the Forestry Commissioners.

Cross-border collaboration

51. As mentioned in paragraph 14, selected functions of the Forestry Commissioners operate on a cross-border basis across Great Britain, mainly funded through the UK's Department for Environment and Rural Affairs (DEFRA) on behalf of England, Scotland and Wales but also with some additional funding from FCS and FES for Scottish-specific activities.

52. The Scottish Government is committed to ensuring that there are ongoing effective cross-border arrangements where it makes sense and where these meet Scottish needs. One of the agreed outcomes being sought by the cross-government Forestry Governance Project Board (FGPB) is a legacy of refreshed and strengthened cross-border cooperation and partnership working between England, Scotland and Wales on relevant forestry matters. The FGPB is due to make recommendations to the three Administrations about the equitable division of the existing DEFRA budget for all cross-border functions and about how continuing collaboration and partnership working between the three countries will operate and be reviewed in the future to guarantee an appropriate level of service to all three countries.

53. An order under section 104 of the Scotland Act 1998 in the UK Parliament will be required to help set up these arrangements following the passage of the Bill. While final decisions have still to be made, it is

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anticipated that Scotland will take the lead on delivering some of the functions on behalf of England, Scotland and Wales.

54. The consultation proposed three priorities for continuing cross-border collaboration: forestry science and research; tree health; and common codes such as the UK Forestry Standard. Most respondents either agreed with these three priorities, including the suggestion that arrangements could be set out in a Memorandum of Understanding, or proposed additional areas for consideration, such as inventory and forecasting or international policy. There was support for Scotland leading on some or all of these aspects and, where comments focused on delivery, there was support for the continued existence of Forest Research, the Forestry Commission's research agency.¹¹

55. In continuing discussions with the UK and Welsh Governments and the Forestry Commission, the Scottish Government will ensure that the following points raised by stakeholders are taken into account:

- the desire to avoid duplication of effort by replicating the same functions unnecessarily in more than one country;
- the need to reach an effective and sustainable arrangement that ensures each country contributes proportional funding to new arrangements;
- the need to maintain continuity of service in moving to the new arrangements, particularly in relation to forestry research and tree health; and
- that any new governance arrangements should consider how the views / needs of the wider forestry sector are captured.

New Organisational Arrangements

56. As mentioned above, FCS and FES are the two principal public bodies operating on behalf of the Forestry Commissioners in Scotland. FCS promotes forestry, advises on and implements forestry policy, administers grants and regulates the forestry sector. FES is an Executive Agency of the Forestry Commissioners with responsibility for managing the Scottish Ministers' NFE.

¹¹ <https://www.forestry.gov.uk/forestresearch> .

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57. Once the Bill has passed and forestry powers and duties have been transferred to the Scottish Ministers, the intention is to implement the proposals as set out in the consultation, whereby forestry functions previously carried out by FCS will be undertaken by a dedicated Forestry Division and a new Executive Agency called Forestry and Land Scotland will take on functions carried out by FES (see the Annex for a comparison between current structures and new ones, including the planned retention of a network of local offices).

58. In the consultation, the majority of organisations commenting on the proposals for organisational change supported them; however, the majority of individual respondents disagreed with the proposals. The three most frequently-made points by those disagreeing with the proposals were that the management of Scotland's forests should:

- be or remain independent and be the responsibility of a stand-alone organisation which is separate from government;
- be managed by forestry experts/professionals, rather than by civil servants; and
- sit within a single organisation and not be divided between two different bodies.

59. A small number of respondents suggested alternatives to the consultation proposals. Most of these suggestions suggested a single body covering both FCS and FES functions but with different models proposed, including: a single directorate within a Government Department; a single Executive Agency; or a Non-departmental Public Body (NDPB) at arm's length from Government. Others suggested two separate bodies, either Executive Agencies of the Scottish Government or a Non-Ministerial Department (FCS) and an independent company owned by the Scottish Government (FES).

60. The Scottish Ministers have carefully considered the concerns expressed by respondents and have concluded that transferring existing forestry functions into a dedicated Forestry Division and a Forestry and Land Scotland Executive Agency represents the best way of delivering the Scottish Government's ambitions for forestry. Advantages of this approach are set out below.

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61. The **skills and knowledge** of existing FCS and FES staff are highly valued. Employees from both organisations are already civil servants of a Central Government Department (the Forestry Commissioners) and will remain civil servants when they are transferred into the employment of the Scottish Government. This would not happen if an NDPB were created. The planned structures will maintain a strong public sector role in forestry policy and delivery, minimise disruption to staff and the sector and ensure retention of specialist skills.

62. The Scottish Government has many specialist functions amongst its staff, e.g. economists, procurement specialists, lawyers. As both the Division and the Executive Agency will be part of the Scottish Government, opportunities for interchange of staff will still be easily possible and will be actively encouraged at both management and other levels. It is important that those staff involved in regulation and policy have a good awareness of operational land management practice, and vice versa.

63. The Scottish Ministers recognise the importance of **local engagement and knowledge** in current structural arrangements. A network of local offices will be retained as part of the transfer to the Scottish Government.

64. The Scottish Ministers acknowledged in the consultation that they had considered the option of establishing a **single organisation** to undertake the functions currently performed by FCS and FES. However, the arguments in favour of one body (e.g. maintaining links between policy and delivery or retaining skills expertise) can still be achieved within the planned new structures. In addition:

- FCS and FES are already operating as two organisations, each with a specific focus and with different officials leading them who report to the Director of Environment & Forestry (albeit under current arrangements they are appraised by a Forestry Commissioner under arrangements for UK Senior Civil Servants). Some stakeholders have commented that maintaining a separation between the regulatory functions and the operational land management functions avoids confusion and retains appropriate separation between the regulator and the regulated.
- Bringing FCS functions into the Scottish Government recognises that FCS already operates as part of the core Scottish Government on a day-to-day basis in terms of the policy advice

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provided to Ministers. Formalising that arrangement through establishing a dedicated Forestry Division also brings the potential for greater cohesion and alignment with other relevant policy areas.

- FES is already an Executive Agency (of the Forestry Commissioners) and is classified by the Office of National Statistics as a public corporation for national accounting purposes because more than 50% of its annual income is derived from commercial sales. The public corporation classification gives it the flexibility to roll forward reserves from one financial year to another; it is expected that the same status will continue to apply when Forestry and Land Scotland (FLS) takes on the FES functions. Bringing FCS functions into FLS would increase the proportion of FLS's funding from Scottish Government grant in aid, reduce the proportion of commercial income and thereby risk its public corporation classification and the associated financial flexibility.
- Some respondents noted that Transport Scotland is an Executive Agency where policy and delivery are in one place (there are other examples – such as prisons – where policy and delivery remain separate). However, there are differences between forestry and transport: Transport Scotland is not a regulator so there is no potential for conflict of interest; also transport is a reasonably discrete area of policy, whereas practical management of the NFE already covers much more than the remit of forestry policy (e.g. renewables, biodiversity, recreation, flooding prevention, farming) and in future FLS may take on an even wider land management role.

65. As for creating **two separate agencies**, established Scottish Government policy is a strong presumption that new public bodies are established only in exceptional circumstances. The Scottish Ministers do not believe that there is any justification to establish two separate forestry public bodies, such as two Executive Agencies. There is a commitment to establish a land agency from existing agencies and this is best achieved by basing that organisation – Forestry and Land Scotland – on FES (which has a strong track record of excellence in land management for forestry and for other purposes). Creating two forestry public bodies would defeat the aim for greater policy cohesion mentioned above and it is likely that there would be additional cost.

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66. Some stakeholders also expressed concern about losing the existing Forestry Commission brand, which they see as of particular value. As the current brand belongs to the Forestry Commissioners, branding for state forestry functions in Scotland will need to be adapted for the future. The Scottish Government is aware of the need to avoid any unnecessary costs or disruption. FCS and FES already have budgets for the replacement of corporate items such as signs and clothing and, as set out in the Financial Memorandum, it is anticipated that additional costs can be subsumed within the overall budget provision. This position will continue to be monitored to assess level of budgets received and affordability.

Effects On Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development Etc.

Equal opportunities

67. The public sector equality duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities. An Equality Impact Assessment (EQIA) has been completed and is published to coincide with the introduction of the Bill.¹²

68. The Bill provides a legislative framework for forestry. It does not make changes to specific policies relating to forestry in Scotland (for example, the detail that is currently set out in the Scottish Forestry Strategy, how the National Forest Estate is managed, or how new planting is funded or approved) and therefore the EQIA makes no assessment of impact on those policies.

69. The EQIA does assess the impact on the current Forestry Commission workforce in Scotland of being transferred to the Scottish Government. The Forestry Commission currently complies with the English Specific Equality Duties, publishing information on its workforce in terms of the composition of the workforce, recruitment and leavers, and other related issues on four protected characteristics (age, disability, ethnicity (race) and sex). In Scotland, public authorities are required to gather and use detailed information on nine protected characteristics, adding to the list

¹² The EQIA is available at www.gov.scot/forestry/devolution.

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pregnancy and maternity, gender reassignment, sexual orientation, religion or belief, and marriage and civil partnership. This means that, for example, they must show what steps they are taking to address an issue brought to light by employee monitoring data. In Scotland, there is also a specific duty to develop and publish a set of evidence-based equality outcomes every four years.

70. The EQIA has taken account of the fact that FCS and FES were already moving towards operating under the Scottish regime and therefore concluded that the impact will be positive although minimal, if compared to the likely position if the two organisations had continued to move towards a Scottish model of evidence gathering and reporting. Impacts are likely to be limited to the policies that the Scottish Government has in place that go beyond requirements set out in statute, such as additional support for carers and, recently, EU citizens.

Human rights

71. The Scottish Government considers that the Bill does not give rise to any human rights concerns and complies with the European Convention on Human Rights (ECHR).

72. The Bill updates the regulatory regime requiring permission to carry out tree-felling, and provides a standard suite of enforcement powers in respect of felling decisions, including powers of entry to land and powers to serve felling/restocking directions and compliance or remedial notices as further underpinned by offences. The exercise of those powers potentially engages rights under Article 1 Protocol 1 ECHR (A1P1) (protection of property) in respect of the control of use of forestry land. However, A1P1 rights are not absolute and may be interfered with if this can be justified in the public interest, is proportionate and is subject to conditions provided for by law; the Bill respects those requirements. In relation to refusals of felling permissions, the Bill also provides appropriate powers for compensation.

73. So far as potentially engaging Article 6 ECHR (right to a fair hearing), the Bill provides appropriate rights of appeal in respect of decisions relating to felling permissions, including refusal to grant permission; decisions to set conditions; refusal to vary or revoke those conditions; and decisions relating to compensation where a loss is suffered due to permission being refused. A person will also be able to appeal the decision to give a felling direction or a restocking direction and the refusal to vary or revoke such a

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direction. In addition, rights of appeal exist in respect of refusal to vary or discharge a notice to comply, decisions to give remedial notices and refusal to vary or revoke a remedial notice. There is further scope to challenge decisions by way of judicial review. The Bill therefore respects Article 6 requirements.

74. The exercise of powers of entry also potentially engages Article 8 ECHR (right to respect for privacy and family life) although the Bill limits those powers to exclude entry to dwelling houses. Again that right is not absolute and can be interfered with in accordance with the law and where necessary in a democratic society in the interests of the economic well-being of the country, for the prevention of disorder or crime or for the protection of the rights and freedoms of others, and where proportionate. The Bill respects those requirements.

75. As mentioned above, whilst the Bill also provides general powers to acquire land for the purposes of the Bill this is by agreement, failing which by compulsory purchase. In respect of the latter this is subject to the standard procedure for making and confirming compulsory purchase orders under the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, which includes provision for compensation.

Island communities

76. The Bill applies to all communities across Scotland; the Scottish Government has not identified any specific impacts on island communities. None of the three Island Councils (Orkney, Shetland and Comhairle nan Eilean Siar) submitted formal consultation responses nor has raised any concerns with the Scottish Government.

Local government

77. Six councils submitted responses to the formal public consultation on the proposals for the Bill. Their responses confirmed the Scottish Government's assessment that the Bill does not have a direct impact on local authorities in discharging their current duties nor does it place any additional duties on them.

Sustainable development

78. The Scottish Government has as its overall purpose to focus government and public services on creating a more successful country,

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with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

79. The Bill contributes to sustainable economic growth by placing a duty on the Scottish Ministers to promote SFM, as mentioned above. This reflects international obligations, following the 1992 Rio Earth Summit and more recently included in the United Nation's 2015 Sustainable Development Goals. The Bill also introduces a new duty to manage specified land for the purpose of furthering the achievement of sustainable development.

80. A Business and Regulatory Impact Assessment (BRIA) has been carried out and is published to coincide with the introduction of the Bill. It concluded that the Bill's provisions have no direct, immediate financial implications for businesses or individuals.

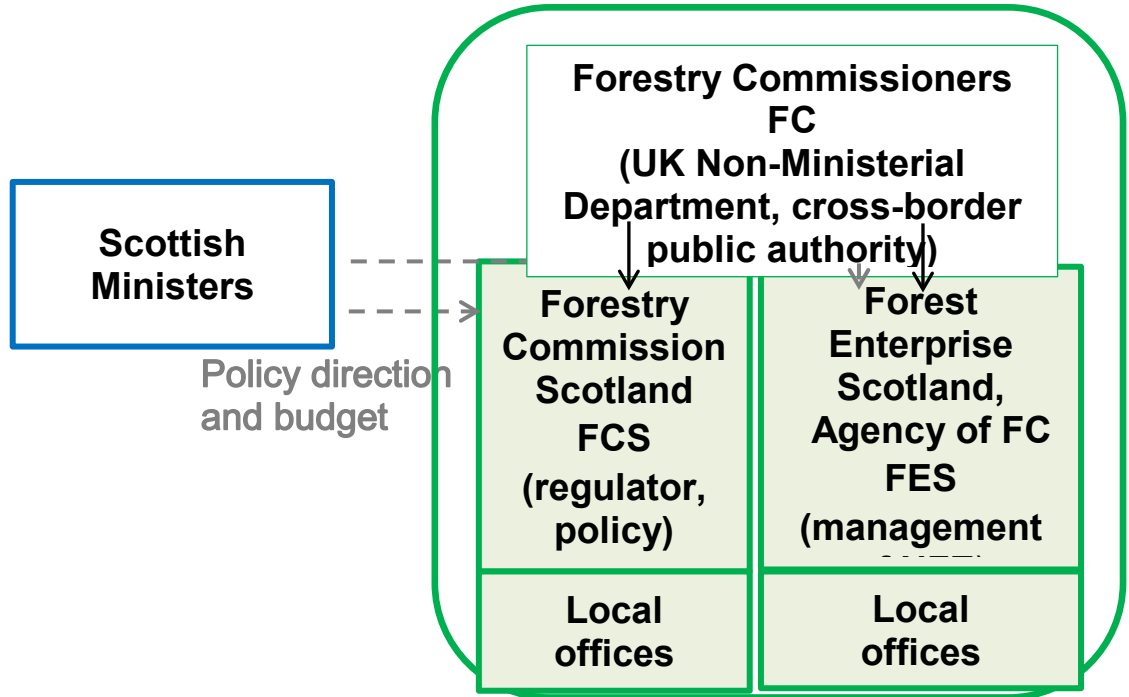
81. A Strategic Environmental Assessment pre-screening report has also been completed.¹³ Although forestry makes a significant contribution to Scotland's environment (e.g. by alleviating climate change or providing habitat for wildlife), the Bill does not make changes to the policies or to the existing arrangements for the funding of FCS and FES which might affect that contribution. The Scottish Government's assessment that the Bill's provisions do not have any likely environmental impacts was supported by the relevant Consultation Authorities.

82. It is recognised that, after the Bill has been passed, other aspects of work to complete the devolution of forestry will be of interest to businesses, woodland owners and wider stakeholder groups and will need to be considered carefully for regulatory and environmental impacts. This includes the subordinate legislation that will set out the details about how felling is regulated, the development of the Scottish Forestry Strategy and the establishment of arrangements for collaboration with the UK and Welsh Governments. The Scottish Government is committed to continuing to engage with stakeholders on the detail of this work as it develops and to undertaking further BRIAs and/or full Strategic Environmental Assessments if and when necessary.

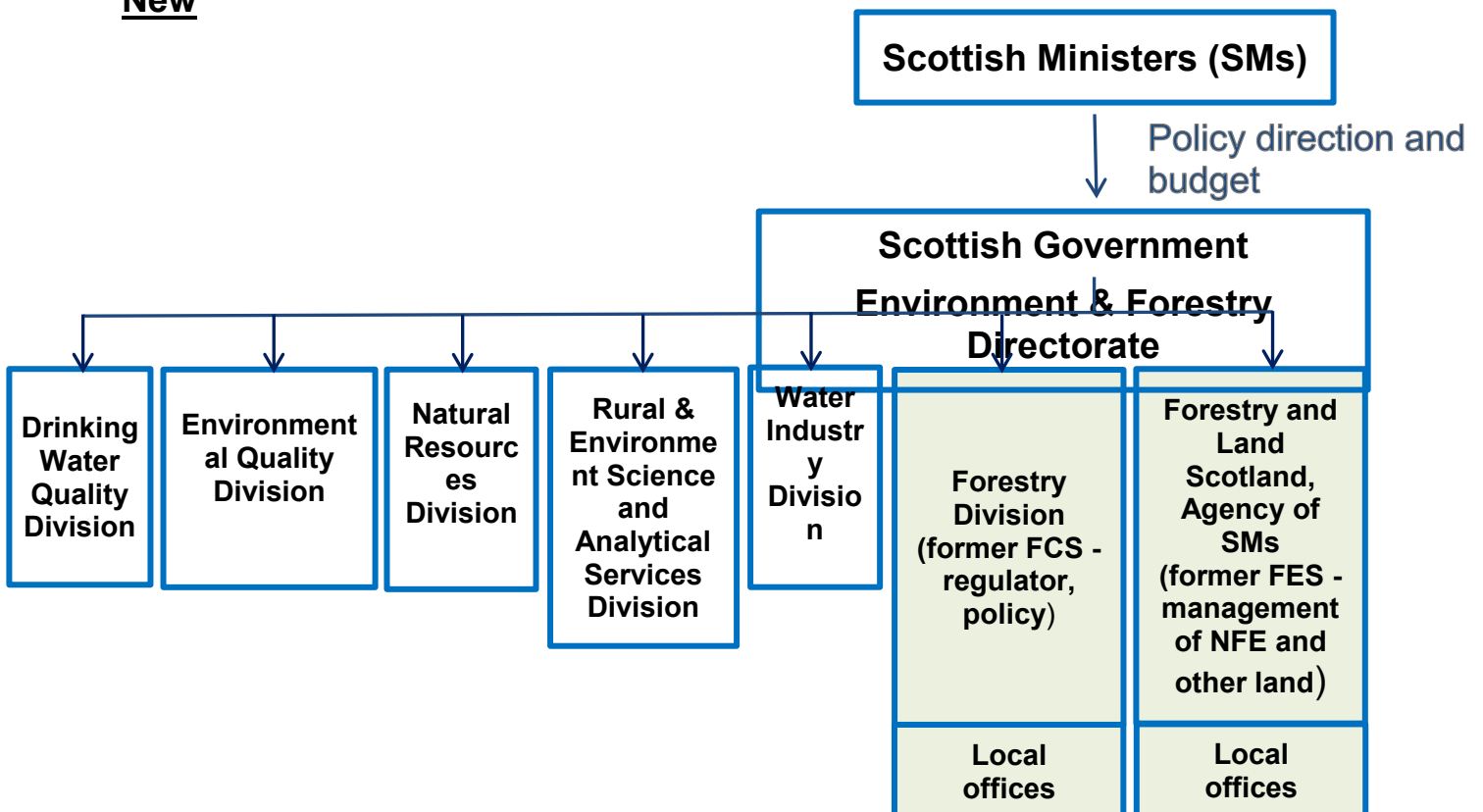
¹³ The BRIA and Strategic Environmental Assessment pre-screening report are available at www.gov.scot/forestry/devolution.

Annex - Comparison between current and new organisational arrangements in Scotland

Current



New



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Forestry and Land Management (Scotland) Bill

Policy memorandum

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