FORESTRY AND LAND MANAGEMENT (SCOTLAND) BILL – ANALYSIS

1. Introduction

1.1 The Bill is the first of three principal activities required to complete the devolution of forestry. It aims to:

- Improve 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.”

- Modernise – “Creating a new legislative framework to support, develop and regulate forestry replaces the application in Scotland of the outdated Forestry Act 1967…. 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).”

1.2 Once the Bill has completed its passage, there will be a “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 establish new collaborative cross-border arrangements with the UK and Welsh Governments (see Annex 1 for the stages of the Bill and additional actions – all expected to be complete by 1 April 2019). Scottish Government will also establish new organisational arrangements with the FCS regulatory and grants role 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) to take on the functions currently carried out by FES (see Annex 2).

2. The Bill – key points

2.1 The Bill would place a duty on Scottish Ministers to “promote sustainable forest management.” Sustainable Forest Management is ‘a concept recognised internationally as the management of forests according to the principles of sustainable development and achieving a balance between the three main pillars of economic, environmental and socio-cultural objectives.’ (explanatory notes) – this becomes clear in the second duty.
2.2 “The Scottish Ministers must prepare a forestry strategy [which …] must include objectives, priorities and policies with respect to (a) the economic development of forestry, (b) the conservation and enhancement of the environment by means of sustainable forest management, (c) the realisation of the social benefits of forestry.”

2.3 The management of publicly owned forest land will be for:

(a) the economic development of forestry, (b) the conservation and enhancement of the environment by means of sustainable forest management, (c) the realisation of the social benefits of forestry

However, there are also provisions to use land for “sustainable development”, which is not restricted to “tree-related” activities. (Explained in the policy statement to the Bill).

2.4 The Bill would also give Scottish Ministers, through the agency (not the forestry authority function), the power to manage the land of any person “that the person has the right to manage”, and to provide advice, both for the purposes of SFM and of sustainable development. It is not clear how this would relate to the type of (charged for) services that private sector professionals and businesses already provide.

2.5 The Bill would enable 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 would widen the scope of the delegation to include all land management functions – “contributing to the community empowerment policy agenda”. See Appendix 1, Delegation to Communities

2.6 It would also provide for the new agency to dispose of and acquire land, as happens with FES now, and also provide for compulsory purchase (except for land in forestry dedication agreements). The current Act provides for compulsory purchase (see Annex 3), but this new power would be to enable purchase of land for sustainable development – which, as is explained elsewhere, is not just tree-related. Though the Bill text also appears to restrict the purposes to those related to delivery of the (to be developed) forestry strategy. See Appendix 2, Compulsory Purchase

2.7 The specific inclusion of detailed language on “community bodies” provides a textual link for which opposition politicians (and perhaps SNP ones) could suggest additional text in order to use the Bill as a basis to propose substantive changes to the public forest land.

2.8 Powers will also be sought for the use of public forest land for the production of renewable energy, and the ability to delegate this function to community bodies.

3. Additional elements of the Bill

3.1 Felling licences: The detail of this will be set out in secondary legislation.

3.2 Deletions: Sections in the 1967 Act on timber haulage, vermin and renewable energy have been removed. There is also no requirement akin to ‘repositioning’ to keep the National Forest Estate the same size.
3.3 **Forest Research**: The Scottish Ministers are given powers to conduct research, collect data and publish statistics and provide education and training. There is no reference in the bill to Forest Research for a requirement to collaborate with the rest of the UK on matters such as Forest Research, although the accompanying policy statement is reassuring about the need for this.

4. **Areas for clarification**

4.1 ‘… and land’ Whereas the 1967 Act was strictly focused on forestry, the Forestry and Land Bill includes a new dimension on ‘other land’. This land is defined in section 13, but there appears to be some circularity with section 15 and we have asked for clarification as to the meaning of these sections. This land is to be used for ‘sustainable development’, may be acquired in various ways including compulsory purchase, and let to communities. Whereas the use of Forestry Land is kept in focus by the requirement to maintain a current Forestry Strategy with economic, environmental and social objectives, this section appears to give extremely broad scope to ministerial discretion.

4.2. ‘Felling means intentionally killing a tree’ This is a strange redefinition since it is possible to fell a broadleaved tree without killing it, and to kill a tree without felling it. We may wish to advise on more appropriate terminology in Part 4.

Eleanor Harris
May 2017

**APPENDIX 1 – Delegation of functions to communities**

1. How can Ministers delegate functions?

Section 18 enables Scottish Ministers to delegate their functions under this act to communities. This delegation:

- May only be in relation to land let to the community
- May be on such terms as the Scottish Ministers delegate
- May be varied or revoked at any time
- Does not affect the Scottish Ministers’ ability to carry out the functions delegated.

2. Who are the communities to whom can they delegate functions?

The Community body must have written confirmation from the Scottish Ministers that they are ‘satisfied that the main purpose of the body is consistent with furthering the achievement of sustainable development’. A community body is defined as follows, although ‘The Scottish Ministers may disapply any or all of the requirements in relation to a particular body’:
• have over 20 members, the majority of whom must be members of the community, and be open to any member of the community;
• define what the community is, have a written constitution, and have community benefit amongst its aim;
• have proper arrangements for financial management, and apply any surplus funds for the benefit of the community.

3. What is the community obliged to do?

• Exercise the delegated function in the way best calculated to meet climate change targets;
• With regard to the Forestry Strategy if on ‘forestry land’;
• With regard to ‘sustainable development’ if on other land.

4. What does this replace in the 1967 Act?

In 2010, similar sections were inserted in the 1967 Act (p.9-10). There do not appear to be any differences between the old and new sections except a) to reflect the new structure of direct control of Scottish Ministers; b) to include the new ‘sustainable development’ functions of Forestry and Land Scotland.

APPENDIX 2 – Compulsory purchase of land

The Scottish Law Commission is currently reviewing compulsory purchase, on an unclear timescale: https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/compulsory-purchase/

In 2014 the Forestry Commission reported on the Land Reform Review Group Report, which recommended,

“The Group recommends that local communities should have statutory land rights which would include a right to register an interest in land, the existing right of preemption over land and a right to buy land, as well as rights to request the purchase of public land and to request Scottish Ministers to implement a Compulsory Purchase Order.”

However, in 2015, Andy Wightman (now a Green MSP) described compulsory purchase as a ‘blunt response’ and recommended developing different instruments to diversify Scotland’s land ownership: http://www.andywightman.com/briefings/docs/briefing_7.pdf

It is not clear how the new bill in itself can be interpreted as giving the Scottish Ministers more powers than the Forestry Commissioners had under the old Act (extract below).

One could argue perhaps that the Forestry Commissioners’ power is effectively a ‘dead letter’, and keeping it suggests there are thoughts of reviving it. It was extensively used for afforestation in the 1950s, but is not clear whether there are any recent cases of the Forestry Commission / Scottish Ministers using powers of compulsory purchase.
The possibility was discussed regarding amenity woodland expansion from 2009: http://scotland.forestry.gov.uk/images/corporate/pdf/ForestExpansion.pdf

“The Forestry Commission has had little direct involvement with new woodland creation in recent years. However, direct intervention does provide an opportunity for targeted woodland creation in priority situations where access to the land can be secured. [...] Some consultees raised the use of compulsory purchase powers to achieve woodland creation on derelict urban and mining land, with local authorities undertaking compulsory purchase and Forestry Commission Scotland taking on the site and creating woodland. While this would remain an exceptional process, the viability of the model for very high public benefit situations will be explored.”
FORESTRY DEVOLUTION IN SCOTLAND
Legislative process: the Bill

10 May 2017
Forestry and Land Management (Scotland) Bill introduced to Scottish Parliament

Stage 1
- Rural Economy and Connectivity (REC) Committee scrutiny: call for evidence, scrutiny, consideration of Finance & Constitution Committee and Delegated Powers & Law Reform Committee reports
- REC Committee reports
- Debate in main chamber: motion to agree general principles of Bill
- If agreed, Bill moves to stage 2

Stage 2
- REC Committee detailed considerations
- Government and non-government amendments considered and voted on by Committee
- Amended Bill remitted back to main chamber

Stage 3
- Further detailed consideration in main chamber
- Government and non-government amendments considered and voted on by all MSPs
- Debate in main chamber: motion to pass Bill (as amended at stage 3)

ROYAL ASSENT
The Monarch's agreement, required to make a Bill into an Act of Parliament

Scotland Act Orders (following Royal Assent)
Secondary Legislation under 2018 Act (following Royal Assent)
Forestry and Land Management (Scotland) Act 2018

NEW FORESTRY MANAGEMENT SYSTEM FOR SCOTLAND
FORESTRY DEVOLUTION IN SCOTLAND
Comparison between current and new organisational arrangements in Scotland

CURRENT

Scottish Ministers
Policy direction and budget

Forestry Commissioners
FC
(UK Non-Ministerial Department, cross-border public authority)

Forestry Commission Scotland (FCS)
(regulator, policy)

Local offices

Forest Enterprise Scotland (FES)
agency of FC
(management of NFE)

Local offices

Scottish Ministers
Policy direction and budget

NEW

Scottish Ministers (SMs)
Policy direction and budget

Scottish Government

Environment & Forestry Directorate

Forestry Division
(former FCS - regulator, policy)

Local offices

Forestry and Land Scotland
agency of SMs
(former FES - management of NFE and other land)

Local offices

Rural & Environment Science and Analytical Services Division

Water Industry Division

Drinking Water Quality Division

Environmental Quality Division

Natural Resources Division