RURAL ECONOMY AND CONNECTIVITY COMMITTEE

FORESTRY AND LAND MANAGEMENT (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH LAND & ESTATES

Scottish Land & Estates is a member organisation that uniquely represents the interests of both land managers and land-based businesses in rural Scotland. Scottish Land & Estates has members with interests in a great variety of land uses, including commercial and amenity forestry and woodlands. Consequently, the Forestry and Land Management (Scotland) Bill is of considerable interest and importance to our members and we welcome the opportunity to provide this submission.

In our response to the Scottish Government’s “The Future of Forestry in Scotland” Consultation at the end of 2016, our opening remark was that given the importance of forestry to all aspects of Scottish life, “it is important that we think about any changes carefully to ensure we are putting in place good and workable structures to help Scotland make the most of this valuable resource going forward”. This response focuses, entirely pragmatically and from years of practical experience, on what we believe will deliver good and workable structures for the forestry industry and for the wider social and environmental objectives Scotland wishes to see forestry and woodlands deliver.

Summary of key points
1. **Future structure of the forestry authority/land agency** – we have a major concern with the government’s current proposals. That is, we do not believe they will best enable the retention of forestry expertise within the public sector. We are also concerned about the extension of the role of what is currently the National Forest Estate (NFE) to include the management of other land. There are often competing objectives for land management that it will not necessarily be easy to resolve in the best way from inside a single agency.

2. **Structure of the Bill and definitions** - The Bill as currently drafted is in our view poorly structured in contrast to the Forestry Act 1967 which is much more straightforward to understand. Further definition is required in respect of key terms as too much is simply left to Ministerial discretion. Clear definitions and/or criteria need to be provided for sustainable forest management, sustainable development and communities. In particular where significant new powers such as compulsory purchase are proposed, the lack of clarity is of significant concern to our members. Also the definition of community bodies is loose and not consistent with that in the Community Empowerment (Scotland) Act 2015 – we see no reason why it should not be consistent.

3. **Business Impact** - The forestry industry, as with other businesses requires security and certainty and this Bill should be viewed in the wider policy context. Environmental as well as industry pressures, combined with agricultural land prices mean that Scotland is facing a major land use change going forward. Large scale afforestation cannot continue apace without a proper wider plan taking into account harvesting and the roads networks for instance. It is important that this Bill does not create barriers or negatively impact what is currently working well. We are keen to work with the Scottish Government to ensure that this Bill is as easily understood as possible and fits with wider Scottish Government objectives.
Sustainable Development and Compulsory Purchase

4. We have concerns over the combined effect of both s.9 ‘Management of forestry land’ and s.13 “Management of land to further sustainable development”, with s.16 “Compulsory purchase of land”. This is particularly so given that definitions of sustainable forest management and sustainable development are not given. We do not believe that the private interest in land has sufficiently been taken into account in these proposals. There is a need to think about the impact these compulsory purchase provisions could have on the viability of the remainder of a land holding, and the impact on the business and property interests of the owner.

5. There is a question that should be explored more fully which is whether compulsory purchase of forestry land and land for sustainable development purposes is appropriate at all? We do not believe it is. For the past 60 years, the Forestry Commission has relied on the voluntary approach to acquire land; a culture of co-operation that has worked well.

6. Secondary Legislation - The Bill is an enabling one with much left to secondary legislation. While we understand the general logic for enabling bills, i.e. so that provisions can more easily and responsively be updated in future, forestry is in many ways a special case. Forestry is a very long-term investment and investors seek as much certainty and security as possible before making a commitment. Regulation that is easily changed without the scrutiny of the primary legislation process, is therefore counter-intuitive for this particular industry.

We are particularly concerned about a very broad provision to allow Scottish Ministers to make charges in relation to the provisions in this Bill. Forestry Commission Scotland (FCS) does not at the moment make charges and we do not believe this should change.

7. Felling and Restocking Provisions - Given that the felling and restocking provisions in the 1967 Act have served the industry well for the last 50 years, we cannot see why they have not simply been taken over into this Bill. The failure to do so leaves some serious omissions.

8. Registers of Scotland – we do not believe there is a need to register felling and restocking requirements, which by their nature are short-term obligations, with Registers of Scotland.

Context in which this Bill is being developed

Scottish Land & Estates recognises that this proposed legislation is about the completion of the devolution of forestry, and thus the break-up of the Forestry Commission between the different parts of Great Britain.

We are also in Scotland hoping to develop forestry legislation that will stand us in good stead for 30 plus years. This legislation is being developed and considered at a time when we are likely to see substantial land use changes coming forward in this and subsequent decades. There are a range of factors that are coming together to make this a pivotal moment that will shape rural areas for decades to come. The overarching debate that has been gaining momentum in recent years has been around the need to reform agricultural policy so that it more clearly delivers in the public interest and especially takes better
account of environmental concerns such as climate change, water management and quality and biodiversity. This debate has been accelerated by the United Kingdom’s decision in June 2016 to leave the European Union.

This is relevant to forestry not just because forestry grants are funded as part of the current CAP through the Scotland Rural Development Programme, but because we know from past experience that changes in the nature of agriculture and the value of agriculture ground can be a catalyst for more tree-planting. Particularly in the upland context, agriculture may in the coming years find itself challenged if, as we expect, farmers will have to be more market-orientated. In short, options for tree planting of various types may become more attractive than farming. There is also the possibility that we may find in some instances that land currently used for agricultural is not managed and that we see more in the way of natural regeneration, which will still require management.

Forestry is a vitally important and profitable industry for rural Scotland, more so than is the case in other parts of the United Kingdom, and the Scottish Government has clearly set out its own desire to see forestry expansion. Again, if we are to learn from the past, we need to ensure that where forestry occurs, either planned or naturally, that we are able to manage it for the outputs and outcomes we wish it to deliver. This means ensuring that Scotland has a rural freight network that supports timber production, there are people in rural areas with the right training and skills to manage forestry and that we have policies and practices that support our objectives.

While the Bill will of course not deliver all of the above, it must be seen to be part of an integrated suite of measures that are developed to achieve Scotland’s forestry, and wider land use, ambitions.

The Structural Arrangements
While the Bill itself does not set out the new proposed structural arrangements for the forestry authority in Scotland, they are there by implication, since the Bill places all duties and powers directly with Scottish Ministers.

The Policy Memorandum which accompanies the Forestry and Land Management (Scotland) Bill acknowledges that during the Future of Forestry consultation last Autumn, concerns were raised by a number of responders about the proposed new arrangements. That is, to create a forestry division within Scottish Government and an executive agency to manage the National Forest Estate and other land. Despite these concerns, the memorandum gives reasoning for continuing with the proposal.

Scottish Land & Estates is concerned by the proposals and believes there is an important and continuing role for the Forestry Commission (Forestry Commission Scotland) in Scotland. That is, to provide technical leadership with a widely-based understanding of forestry in the countryside, to continue to supervise forestry grant schemes and standards, and to manage Scotland’s national forest estate. This could build on the Commission’s achievements in Scotland to date which when taken as a whole over the years that the Commission has been in operation, have been considerable.

Our major concern in terms of forestry becoming a division of government is the potential loss of expertise. While forestry and other land management is necessarily long-term in
nature, government terms are relatively short, and government policy and divisions are also often subject to major changes of direction and of personnel.

We propose the retention of FCS, but as a Scotland only body. Our reasoning is that in the first instance it would be an easier and less disruptive process to complete. Secondly, since Scottish Ministers would appoint a Board of Commissioners, they would not only have control and accountability, but also access to knowledge and advice from that Board. Thirdly, it would allay concerns over loss of expertise.

The potential extension of the role of Forestry and Land Scotland (FLS) to include the management of other land (through the mechanisms in sections 14, 15 and 16) for sustainable development purposes also gives cause for concern. It may appear convenient to create one agency to manage land controlled by Scottish Ministers, for a range of purposes. However, there are often different and juxtaposed objectives for the primary purpose of land management that it will not necessarily be easy to resolve in the best way from inside a single agency. Two agencies may find a compromise between competing objectives, which leads to a better outcome in fact for integrated land management and sustainable practice, whereas a single agency may either become stuck or simply override one objective in favour of another. For example, there is a potential difficulty even within this Bill, in as much as it is not clear whether sustainable development or sustainable forest management has primacy in determining how an area of land is managed.

It is further not clear from the Bill what the governance arrangements will be for FLS. Other government agencies tend to have non-executive boards for scrutiny. From the diagram given in the Policy Memorandum this does not appear to be the case with this agency. The diagram shows FLS being treated more akin to another division of government. It seems odd that the government would not wish to set up two agencies and gives good justification for this, but seems to want to set up two divisions of government. We would appreciate clarity on the government’s thinking on this matter.

Specific Comments on the Bill

Part 2, Chapter 1 – General Forestry Functions
We are content with S.2, the duty to promote sustainable forest management.

We are pleased to see a duty at S.3 to prepare a National Forestry Strategy, although we do have some comments on this section. Firstly, we would like to see inclusion in the Bill of a regular review period for the strategy. We would be comfortable with this being no more frequently than every 10 years. Secondly, it is also not clear from the current provisions how the national strategy will relate to regional and local priorities. This is an important issue in terms of forestry, since the nature of forestry can be quite different from one part of Scotland to another. We would like to see inclusion of a provision that strengthens the dialogue between forestry and planning such that local authorities take cognisance of the National Forestry Strategy.

We are content with sections 4, 5 & 6.

Part 2, Chapter 2 – Tree Health and Silvicultural Material Testing Functions
We are happy to support the provisions in this chapter. Scottish Land & Estates believes it is vital to continue to work with the rest of the UK on such matters.
**Part 3, Management of Land by Scottish Ministers**

s.10 to 13 – these sections provide some definitions, but we feel that a number of definitions are missing from the Bill.

The Bill should define “sustainable forest management” as set out in the accompanying policy memorandum.

The Bill needs to be more explicit in relation to "sustainable development". Sustainable development is a broad concept first captured in the Brundtland Report of 1985, and as the policy memorandum correctly identifies is an important idea that is further embodied in international obligations including most recently the Paris Climate Change Agreement and the UN’s Sustainable Development Goals. However, it remains a difficult concept to capture in a single definition and we appreciate this is the case. This is largely why it was also not defined in the Land Reform (S) Act 2016 or the Community Empowerment (S) Act 2015. However, given its use in this Bill in connection with compulsory purchase it is vital that criteria are at least provided for how land will be considered for such purchase. We suggest the criteria used in s.56 of the Land Reform (S) Act 2016 would be suitable to follow for the purposes of this Bill. This would provide clarity and consistency.

How “land” is to be defined for the purposes of compulsory purchase for sustainable development, how compensation is to be determined and what the appeals process will be, are also not included in the Bill. For consistency and clarity these aspects should be contained within primary legislation.

We are concerned that community bodies are also defined differently in this Bill than they are in the Community Empowerment (Scotland) Act. Section 19(3) of this Bill effectively allows for less stringent criteria to be applied to determining what constitutes an eligible community body. It is not clear why this would be the case, particularly given that the accompanying policy memorandum makes reference to this Bill’s contribution to the Community Empowerment agenda. Further, the Policy Memorandum does not say anything about how the Bill and the Community Empowerment (S) Act relate to each other. It is again vital we have clarity on this definition and on the relationship. Our feeling is that since there does appear to be a desire to see the Community Empowerment agenda linked to this Bill, that the definition of community bodies given in the Community Empowerment (S) Act should be used in this Bill.

There is a concern amongst our members that with such loose definitions and criteria as are given in the Bill at present, the private interest in land is not sufficiently protected or balanced against the, albeit laudable, desire to manage land sustainably and empower communities.

A further issue relating specifically to s.13 is that the land referred to in subsection (2) of 13 is:

- land that the Scottish Ministers acquire under section 15(1)(b) [power to acquire land] or 16(1)(b) [power to purchase land compulsorily].
- where the Scottish Ministers have entered into an arrangement under section 14(1) to manage land for the purpose of this section, that land.
This seems to apply to newly acquired or purchased land, and land where Scottish Ministers enter into arrangements to manage land, but not to existing land owned by Ministers or that land which is currently part of the National Forest Estate but is not forestry.

In fact, the Bill seems to make the assumption that all the land currently known as the National Forest Estate is forested, when this is not the case.

s.14 – Power to enter into arrangements

We find the wording of s.14(1) particularly unclear for three reasons. Firstly, we seek clarity that this section is about Scottish Ministers managing land on behalf of another. Secondly, we seek clarity that the arrangement would be by mutual consent, as the explanatory notes would seem to indicate. Thirdly, in situations where the manager of the land does not hold legal title, we seek clarity as to the nature of the arrangement and the owner’s involvement.

s.15 – 20 – Acquisition and disposal of land

s.16 - compulsory purchase. There is a question that should be explored more fully which is whether compulsory purchase of forestry land and land for sustainable development purposes is appropriate at all? We do not believe it is. For the past 60 years, the Forestry Commission has relied on the voluntary approach to acquire land; a culture of co-operation that has worked well.

We have serious concerns over the combined effect of both s.9 ‘Management of forestry land’ and s.13 “Management of land to further sustainable development”, with s.16 “Compulsory purchase of land”. This is particularly so given that the definition of “sustainable forest management” and the criteria for achieving “sustainable development” are not clear. In its broadest terms, it would be possible to claim that a better balance between environment, economy and society could be achieved on a great deal of land in Scotland, thus making it subject to potential compulsory purchase, since ideas of an appropriate balance are subjective. To be clear we see a great deal of value in sustainable behaviour and recognise its value not only to society in general, but to the future of the industry. However, when land may be compulsorily purchased on this basis, it is vital to understand exactly what the tests and criteria for this will be.

Scottish Land & Estates is aware of the wider review and legal discussion around compulsory purchase and it is important that any reference to compulsory purchase in relation to forestry land and land for sustainable development is not seen in isolation. We feel that wider review should be completed and a proper justification made before inclusion of compulsory purchase in this Bill.

Compulsory purchase is in many senses a draconian power, which should only be resorted to once best endeavours have been used to acquire by negotiation and agreement and where there is a clear public interest involved. Given the importance of both human rights and private property rights it is vital that this area is very carefully considered. Compulsory purchase should be proportionate to the need for it and by the least intrusive means. The sacrifice of forestry land business interests for the public good requires to be properly recognised and fairly and fully compensated for and where landowners and businesses have incurred costs due to an abortive scheme, they should be compensated for those costs.
We also have concerns that the acquiring authority may ‘cherry pick’. In this regard there is a need to think about the impact these compulsory purchase provisions could have on the viability of the remainder of a land holding. It may be that an area of forestry or other land is being utilised in a way which adds substantially to the viability of a land-based business, and without it the business could be put into jeopardy. In the case of a small to medium sized farm for example, a single compulsory purchase may be devastating. However, without limit on the number of applications or area of land that may be compulsorily purchased, the owner’s private interest could be seriously compromised.

The Scottish Government also has, separate to this Bill, published guidance which sets out its policy on the use of compulsory purchase orders in Scotland. The guidance states that a compulsory purchase order can allow organisations (including Scottish Ministers) to acquire land without the owner’s permission, where there is a strong enough case for this in the public interest. It sets out the issues to be considered and compensation required where compulsory purchase is being thought about. Significantly sustainable development is not mentioned in this guidance.

**Part 4 - Felling Provisions**

The overriding question our members have expressed about the felling and restocking provisions set out in this Bill, is why have they not simply been lifted from the 1967 Act which has served us so well? While there are some areas of the detail of felling and restocking guidance that we might want to see changed so that work can take place in a more streamlined and intuitive way, this can be achieved without change to the primary legislation. The reasons for the changes that have been made here are therefore not clear and there appear to be a number of omissions in the proposed provisions which are likely to prove problematic.

In particular:

- This Bill needs to be clear about what constitutes “a tree” for the purpose of applying for a felling licence. The 1967 Act gives diameter measurements, so that only trees at a particularly stage of growth and establishment fall into the requirement for a felling licence. We think it is essential that the 1967 Act definitions are retained. If these are not retained, the forestry authority may find itself considering felling licences for simple scrub removal. This is a waste of everyone’s time and of valuable and limited resources.

- The 1967 Act also includes a range of circumstances in which “exemptions” to the need to apply for a felling licence apply. These are sensible and remain relevant today and should therefore appear in this Bill. There is no justification made for their omission.

There is also concern about the definition of felling – “to intentionally kill a tree” – which is not accurate, since a) the felling of broadleaf trees can result in coppice rather than killing, and b) trees may be killed by other means such as chemical controls.

If the 1967 Act is repealed and felling provisions are not brought over into this Bill, this raises a question about validity of existing licences and, in particular, the long-term forest plans which forestry and woodland owners have been asked to adopt. Many of the 1967
provisions are embedded within and fundamental to the operation of these long-term plans which have cost a considerable amount in time and money to produce. It is not clear what now happens in relation to the permissions in these plans if the 1967 Act is repealed and felling provisions are to change. It would be a major piece of work to start to review all of the plans that have already been put in place, and there would be little appetite for this from the majority of private owners.

We do not believe there should be a requirement to register felling and restocking requirements with Registers of Scotland. There is no current requirement to carry out this registration process, and it is unclear what the advantage would be to doing so, especially since the Keeper of Registers of Scotland is not required to investigate or determine whether the information submitted is accurate. Other relatively short term burdens on land relating to grant schemes, which can be of a similar duration and carry similar legal obligation are not required to be registered and we question why felling and restocking notices should be singled out for inclusion.

We are unaware that the current register of felling licences and restocking obligations operated by FCS has resulted in significant default in compliance and as it is likely to increase costs and complexity there would appear to be no demonstrable benefit. It should be noted that the Keeper is also under considerable pressure to meet other government objectives such as voluntary land registration. Any diversion of resource for little benefit does not seem appropriate.

s.57 recovery of expenses from new owner. The extent of the liability of the previous owner, who becomes severally liable with the new owner, appears to have no end as the Bill is currently drafted. We question the sense of this approach, and would like to see, for the benefit of both parties, an end date to the obligation on the previous owner or a mechanism similar to current and previous grant schemes which, with consent, transfers obligations to the new owner.

**Part 5 – General Powers**

s.64 – Charging

The provision is too broad and unspecific. At the moment FCS do not charge forest owners and managers and we do not think this should change. The process of, for example, applying for a felling licence, is already costly enough in terms of agents’ time, and there should be no further disincentives to contributing positively to Scotland’s forestry objectives, which charging might be perceived as being.

**Part 6 – General and Final Provisions**

s.65 – Regulations

s.65 sets out the issues which are left to secondary legislation. As stated in the summary of key points at the start of this document, particularly in relation to forestry and the nature of the forestry industry, we do not believe so much should be left to secondary legislation. Forestry is a very long-term investment and investors seek as much certainty and security as possible before making a commitment. Regulation that is easily changed without the scrutiny of the primary legislation process, is therefore counter-intuitive for this particular industry. The more certainty the better investment will be and the more chance there is of the Scottish Government achieving its woodland expansion targets.
Other pieces of legislation such as the Land Reform (S) Act 2016 have also, despite concerns raised by both stakeholders and parliamentarians, taken the approach of leaving a significant level of detail to secondary legislation. We would reiterate our long-held view that this is not conducive to effective and clearly understood legislation.

Scottish Land & Estates
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