12 June 2017

Dear Lynn

Forestry and Land Management (Scotland) Bill at Stage 1

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

Section 24 - unauthorised felling: exemptions

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

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

It would however remove the opportunity to enter into open and detailed discussions on exemptions with interested parties, with all those involved fully informed of the detail of the proposed primary legislation now that the Bill has begun its Parliamentary scrutiny, in order to draft them. Those discussions are intended to review the current exemptions, determine whether changes are required and, if necessary, make those changes as the new
Section 27: decisions on applications

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

The Scottish Government has proposed a framework in this Bill that ties decision making to sustainable forest management (SFM). In relation to decisions on applications, section 27(2) requires Ministers to have regard to SFM in making decisions – we therefore require the powers in Section 27(8) not to set the principles on which decisions are made but to set out, in order to provide clarity to applicants, how the process of decision taking will work. This could cover a broad range of detail such as how site visits to assess an application would be conducted, what communication the applicant can expect from the regulator and the period of time that must elapse before an application can be made again after permission is refused. Those details are, of course, crucial to potential applicants but the Scottish Government considers negative procedure strikes the correct balance between the need for flexibility in the system and the need to make proper use of Parliamentary time while ensuring suitable scrutiny.

Section 29: compensation for refusal of felling permission

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

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

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

**Section 64: charging**

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

In particular, please explain the circumstances in which this power might be exercised and the types and level of fees which might be imposed under this section. Why does the Scottish Government consider that taking a power to impose such charges by way of executive action is appropriate, as opposed (for example) to a power to set and amend charges by way of subordinate legislation?

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

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

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

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