

FORESTRY AND LAND MANAGEMENT (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE ACT

Part 4 - Felling

38. **Part 4** comprises 9 chapters. An overview of the Part is provided at section 21 and a list of key terms is at section 22.

Section 23 - Offence of unauthorised felling

39. **Section 23** creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of unauthorised felling. Where the offence is committed in respect of more than one tree the maximum fine is to be determined as if the person had been convicted of a separate offence in respect of each tree.
40. Section 23(1)(a) and (b) set out where the offence does not apply. Under section 23(1)(a) a person is exempt from the offence if the felling is carried out in accordance with regulations made by the Scottish Ministers under section 24. Regulations under section 24 may provide that the offence does not apply to particular categories of person, particular places or activities, particular circumstances and trees of particular descriptions. Section 76(2)(a) provides that regulations under section 24(1) are subject to affirmative procedure. Under section 23(1)(b), the felling of a tree is not an offence if the felling is carried out in accordance with a felling permission (section 27), a felling direction (section 34), a restocking direction (section 36), a registered notice to comply (section 38), a remedial notice (section 54) or a registered remedial notice (section 56).

Sections 25 – 33 - Felling permission

41. **Chapter 3** of Part 4 makes provision for regulation of felling through felling permissions issued by the Scottish Ministers.
42. Section 25(1) and (2) provides for an owner or - with the written permission of an owner - an occupier of the land on which a tree is located to apply to the Scottish Ministers for permission to fell a tree. Section 25(3) enables the Scottish Ministers, by regulations, to make further provision about applications for felling permission. Regulations may include provision about the way in which applications are to be made and the information to be provided in applications. Section 76(1)(b) provides that regulations under section 25(3) are subject to negative procedure.
43. **Section 26** creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of knowingly or recklessly providing false or misleading information in an application for felling permission.
44. **Section 27** makes provision about decisions on applications. The Scottish Ministers may grant an application (with or without conditions) or refuse an application, and must have regard to their duty (under section 2) to promote SFM in making a decision.

*These notes relate to the Forestry and Land Management (Scotland)
Act 2018 (asp 8) which received Royal Assent on 1 May 2018*

Subsections (4), (5), (6) and (7) respectively make provision about (a) the type of conditions that can be included in a felling permission, which can include conditions setting out any steps to be taken after the felling is carried out (“continuing conditions”), (b) the ability of the Scottish Ministers to require, as a continuing condition on a felling permission, information to be provided to them, (c) specify circumstances in which conditions cannot be imposed, and (d) enable conditions to be varied or revoked. Section 27(8) provides that the Scottish Ministers can, by regulations, make further provision about decisions on applications for felling permissions. Regulations may, in particular, include provision about matters set out in subsection (9). Section 76(1)(c) provides that regulations under section 27(7) are subject to negative procedure.

45. If the Scottish Ministers refuse an application they must give reasons for the refusal (section 27(3)). Under section 32(1), a person who suffers loss as a result of the Scottish Ministers’ refusal of a felling permission is entitled to compensation in accordance with provisions made in regulations by the Scottish Ministers. Section 32(2) provides that regulations may include provision about the persons entitled to compensation, the procedure for applying, information to be provided in applications, the way in which the amount of compensation is to be determined, the way in which any disputes about compensation are to be determined, and appeals about decisions relating to compensation. Section 76(1)(d) provides that regulations under section 32(1) are subject to negative procedure.
46. [Section 28](#) creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of failure, without reasonable excuse, to comply with a continuing condition on a felling permission granted to a person.
47. [Section 29](#) provides for the Scottish Ministers to be able to, in certain circumstances, vary a felling permission by way of a notice. Those circumstances are detailed in subsection (1) and subsection (3) sets out matters that the notice must set out or specify.
48. [Section 30](#) provides for the Scottish Ministers to be able to, in certain circumstances, suspend a felling permission by way of a notice. Those circumstances are detailed in subsections (2) and (3) and subsection (5) sets out matters that the notice must set out or specify.
49. [Section 31](#) provides for the Scottish Ministers to be able to, in certain circumstances, revoke a felling permission by way of a notice. Those circumstances are detailed in subsection (1) and subsection (3) sets out matters that the notice must set out and specify.
50. [Section 33](#) makes provision about the interaction between regulation of felling under the Act and tree preservation orders (TPOs) made or having effect as if made under section 160 of the Town and Country Planning (Scotland) Act 1997 (which is consequentially amended by paragraph 2 of schedule 1 of the Act). Section 33(1) enables the Scottish Ministers to refer an application to fell in respect of a tree which is covered by a TPO which requires consent for felling to the planning authority that made the TPO, or to make a decision on the application themselves. If the Scottish Ministers wish to exercise the power to decide on the application themselves they must comply with the consultation requirements at subsection (2).
51. Subsection (3) provides that where an application is referred to a planning authority, the application is to be treated as an application to the planning authority for consent to fell the tree under the TPO and the provisions of the Town and Country Planning (Scotland) Act 1997 apply. The offence of felling without permission is disapplied in circumstances where an application has been referred to a planning authority under section 33(1)(b), the authority has consented to the felling, and the felling has been carried out in accordance with that consent (subsection (4)).
52. Where a felling permission, a felling or restocking direction, a registered notice to comply, a remedial notice or a registered remedial notice exists in relation to a tree

covered by a tree preservation order, felling carried out in accordance with it will not breach a TPO (subsections (5) and (6)).

Sections 34 and 35 - Felling directions

53. **Chapter 4** of Part 4 makes provision for the Scottish Ministers to require felling.
54. **Section 34** makes provision for the issue of directions by the Scottish Ministers requiring that trees are felled (“felling directions”). Subsections (1) and (2) set out the circumstances in which a direction can be given ((a) to prevent deterioration or further deterioration in the quality of timber of the trees, (b) to improve the growth of other trees or (c) to prevent or reduce harm caused by the presence of trees)) and the person (the owner of the land on which the trees are located) to whom a direction can be given. The Scottish Ministers must under subsection (3) have regard to their duty to promote SFM (under section 2) when deciding to give a felling direction and may vary or revoke directions including any conditions imposed on directions (subsection (5)).
55. Subsection (4) requires the Scottish Ministers to consult a planning authority before giving a felling direction in relation to a tree covered by a TPO and to have regard to any representations made by that authority. Subsection (6) enables the Scottish Ministers to, by regulations, make further provision about felling directions. Regulations may include provision about the circumstances in which a direction may not be given, requirements to be included in a direction, how directions are to be notified, and the imposition of conditions on a felling direction (which may include steps that must be taken after the direction is complied with). Section 76(1)(e) provides that regulations under section 34(6) are subject to negative procedure.
56. **Section 35** creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of failure, without a reasonable excuse, to comply with a felling direction (including any condition imposed on it) given to a person.

Sections 36 and 37 - Restocking directions

57. **Chapter 5** of Part 4 makes provision for the Scottish Ministers to require restocking.
58. **Section 36** makes provision for the issue of directions by the Scottish Ministers requiring an owner of land to stock particular land (“restocking directions”). Subsection (1) sets out the circumstances in which a direction may be given and subsection (2) provides detail on what the Scottish Ministers may require under a direction.
59. The Scottish Ministers must have regard to their duty to promote SFM (under section 2) when deciding to give a restocking direction and may vary or revoke a direction including any conditions imposed on the direction (subsections (4) and (5)). Subsections (6) and (7) make provision enabling an owner who has been served with and complies with a restocking direction to recover the costs of compliance from another person in circumstances where that other person (a) was responsible for the felling to which the restocking direction relates, or (b) failed to comply with the continuing condition on a felling permission to which the restocking direction relates.
60. Subsection (8) enables the Scottish Ministers to, by regulations, make further provision about restocking directions; regulations may include provision about the persons to whom a restocking direction may not be given, the circumstances in which a direction may not be given, requirements to be included in a direction, how directions are to be notified, and the imposition of conditions on a direction (which may include steps that must be taken after the direction is complied with). Section 76(1)(f) provides that regulations under section 36(8) are subject to negative procedure.
61. **Section 37** creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of failure, without a reasonable excuse, to comply with a restocking direction (including any condition imposed on it) given to a person.

Sections 38 to 44 - Continuing conditions on felling permission, felling directions and restocking directions: notices to comply, and registration of notices

62. Chapters 6 and 8 of Part 4 permit the Scottish Ministers to register certain notices.
63. Section 42 defines, for those purposes, the meaning of “register”. In respect of the notices specified at section 42(2), ‘register’ means register the information contained in a notice in the Land Register for Scotland or (as the case may be) record the notice in the General Register of Sasines. There is no statutory requirement on Scottish Ministers to register a notice. The effect of registration is that the obligations imposed by the notice may be accessed by any prospective new owner and are automatically passed to any future owners of the land to which they relate. The notices are:
- (a) a notice to comply (under section 38(2));
 - (b) a notice of variation (under section 40(2));
 - (c) a notice of discharge from compliance (under section 41(2));
 - (d) a remedial notice (under section 56);
 - (e) a notice of liability for expenses (under section 64); or
 - (f) a notice of discharge of liability for expenses (under section 66(2)).
64. Section 43 makes provision about the description of land to be included in registrations of the notices set out at (a)–(f) of paragraph 64.
65. Section 38 makes provision for the Scottish Ministers to apply to register a notice to comply with a felling direction, a restocking direction or a continuing condition on felling permission (if the felling allowed by the permission has been carried out). Such a notice is called a “notice to comply”. An owner (including a new owner) who fails, without reasonable excuse, to comply with a registered notice to comply commits an offence punishable upon summary conviction by a fine of up to level 5 on the standard scale (section 39).
66. Section 40 makes provision enabling the variation of registered notices, defined at subsection (2) as a registered notice to comply or a registered remedial notice. In order to vary a registered notice—
- (a) the Scottish Ministers must agree to variation of the relevant registered notice;
 - (b) all of the owners of the land must agree to variation of the relevant registered notice; and
 - (c) the agreement must be in writing, and a notice (called a “notice of variation”) must be registered by the Scottish Ministers (section 40(3)). The variation only comes into effect once the notice of variation is registered (subsection (4)).
67. Section 41 requires the Scottish Ministers to apply to register a notice of discharge from compliance where—
- (a) they are satisfied that a relevant registered notice has been complied with; or
 - (b) they have agreed in writing with an owner of land to which a relevant registered notice relates that the notice is to be discharged.
68. Where there is more than one owner of the land, agreement from all of the owners is not required: the Scottish Ministers may reach agreement to discharge the registered notice with any of the owners (section 41(1)(b)). The relevant registered notice is only discharged once the notice of discharge is registered.
69. Section 44 provides that the Keeper of the Registers of Scotland is not required to investigate or determine the accuracy of information contained in notices to comply,

notices of variation, notices of discharge from compliance, remedial notices, notices of liability for expenses, or notices of discharge of liability for expenses.

Sections 45 to 67 - Compliance

Temporary stop notices

70. [Section 45](#) provides for the Scottish Ministers to give “Temporary Stop Notices” (TSNs) where they have reason to believe that unauthorised felling is being carried out. Subsection (3) sets out matters that a TSN must contain and subsection (4) allows for TSNs to impose conditions. Subsection (5) allows for TSNs to be varied or revoked. Subsection (6) and (7) detail how TSNs are served. Subsections (8) and (9) detail when TSNs have effect, including limiting them to a maximum of 28 days. Subsection (10) provides that a person may stop any activity specified in the TSN despite any provision in any agreement relating to the trees or the land to which the notice relates. Subsection (11) provides the Scottish Ministers with the power to enter land to which the TSN relates in order to monitor compliance and subsection (12) ensures that felling permissions or felling or restocking direction cannot be given while a TSN is in place.
71. [Section 46](#) creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of failure, without reasonable excuse, to comply with a TSN.
72. Under section 47, a person who suffers loss as a result of a TSN served where felling was, in fact, authorised is entitled to compensation in accordance with provisions made in regulations by the Scottish Ministers. Section 47(3) provides that regulations may include provision about the procedure for applying, information to be provided in applications, the way in which the amount of compensation is to be determined, the way in which any disputes about compensation are to be determined, and appeals about decisions relating to compensation. Section 76(1)(g) provides that regulations under section 47(3) are subject to negative procedure.

Requests for information

73. [Section 48](#) provides powers for the Scottish Ministers to request information about compliance with felling permission conditions, felling and restocking directions (including any associated conditions), registered notices to comply, remedial notices (including any associated conditions) or registered remedial notices for the purpose of monitoring compliance with those. The persons from whom the Scottish Ministers may request the information are set out in subsection (3).
74. [Section 49](#) creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of knowingly or recklessly providing false or misleading information in response to a request for information under section 48.

Site visits with the consent of the owner or occupier

75. Section 50(1) enables the Scottish Ministers to enter land mentioned in subsection (2) to monitor compliance with felling permission conditions, a felling or restocking direction (including any associated conditions), a registered notice to comply, remedial notice (including any associated conditions) or a registered remedial notice. The power is only exercisable with the consent of an owner or occupier of the land mentioned in subsection (2). If consent is given, the Scottish Ministers may exercise the powers in section 62.

Powers of entry

76. [Sections 51 to 53](#) provide the Scottish Ministers with powers of entry to land for the purposes of—

- (a) determining whether unauthorised felling has taken place or is taking place;
- (b) determining whether they need to give a felling or restocking direction; or
- (c) determining whether a person has failed or is failing to comply with a condition on a felling permission, a felling or restocking direction (including any associated conditions), a registered notice to comply, a remedial notice or a registered remedial notice.

Remedial notices

- 77. [Section 54](#) makes provision about remedial notices, as defined at subsection (2). Subsection (1) enables the Scottish Ministers to give a person a remedial notice if it appears to them that the person has failed or is failing to comply with a condition on felling permission, a felling or restocking direction (including any associated conditions) or a registered notice to comply.
- 78. Section 54(3) requires that the Scottish Ministers give a copy of a remedial notice to the owner of the applicable land. Subsection (4) provides that a person may take any steps or stop any activity specified in the remedial notice despite any provision in any agreement relating to the trees or the land to which the notice relates or any associated conditions of the felling permission, felling or restocking direction or, as the case may be, registered notice to comply, which would otherwise prevent that person from doing so. Subsection (5) provides that the Scottish Ministers may vary or revoke a remedial notice (including any associated conditions).
- 79. Subsection (6) enables the Scottish Ministers, by regulations, to make further provision about remedial notices. Regulations may include provision about the imposition of conditions on a remedial notice, which may include steps that must be taken after the notice is complied with (subsection 7). Section 76(1)(h) provides that regulations under section 54(6) are subject to negative procedure.
- 80. [Section 55](#) creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of failure, without reasonable excuse, to comply with a remedial notice (including any associated conditions). Section 56 enables the Scottish Ministers to apply to register remedial notices, specifying the matters set out in subsections (a) and (b). Section 57 creates an offence, punishable upon summary conviction by a fine of up to level 5 on the standard scale, of failure, without reasonable excuse, to comply with a registered remedial notice.

Giving documents to owner or occupier

- 81. [Section 58](#) makes provision for how notices or other documents are to be given to an owner or occupier of land for the purposes of Part 4 of the Act where the person's name or address cannot be ascertained after reasonable enquiry.

Step-in power

- 82. [Section 59](#) provides powers for the Scottish Ministers to enter land to which a remedial notice (including any associated conditions) or registered remedial notice relates and to take the steps, or stop the activity, set out in the notice. The step-in power may be exercised in circumstances where a person has failed to comply with a remedial notice (including any associated conditions) or registered remedial notice within the period specified in it for compliance.

Powers of entry and step-in power: application to court

- 83. [Section 60](#) provides that, in connection with the exercise of powers under sections 45, 51, 52, 53 and 59 the Scottish Ministers may apply to the sheriff, a summary sheriff

or a justice of the peace for a warrant to enter the land concerned and, if necessary, to use reasonable force in doing so.

84. Subsection (3) provides that a warrant may only be granted if the sheriff, summary sheriff or justice of the peace is satisfied, by evidence on oath, that the conditions specified in that subsection are met. Subsection (4) provides that a warrant may not authorise entry to Crown land, entry to a dwelling or the use of force against an individual. Subsection (5) makes provision about expiry of warrants.

Powers of entry and step-in power: offences

85. [Section 61](#) creates two offences, each punishable upon summary conviction by a fine of up to level 5 on the standard scale. The offences are of intentionally obstructing the Scottish Ministers in exercising their powers under sections 45, 51, 52 or 53 (powers of entry) or section 59 (step-in power).

Powers of entry and step-in power: further provision

86. [Section 62](#) makes further provision for the purpose of the exercise by the Scottish Ministers of the powers in sections 45, 50, 51, 52, 53 and 59. As set out in subsection (2) of that section, this includes powers for the Scottish Ministers to take onto the land other persons, materials and equipment as may be reasonably be required; to take samples; to mark things for identification purposes; to require access to, inspect or take copies of information (including information kept in a computer) and to gather evidence. However, these powers may be exercised only at a reasonable time and do not authorise entry to a dwelling (subsections (3) and (4)). Moreover, a person exercising the power must on request produce written evidence of that person's entitlement to do so (subsection (5)). If the Scottish Ministers cause damage in exercising the powers listed in subsection (1) they must take reasonable steps to remedy the damage or, if it is not possible to do so, must pay compensation (subsection (6)). If the Scottish Ministers enter unoccupied land in exercising the powers listed in subsection (1) they must leave the land as effectively secured against unauthorised entry as they found it and, if they cause loss or damage by failing to comply with that requirement, they must pay compensation (subsections (7) and (8)).
87. Subsection (9) provides that references to the Scottish Ministers in the sections listed from (a) to (g) include persons authorised (in writing) by the Scottish Ministers. This enables the Scottish Ministers to authorise persons to perform the specified functions on their behalf.

Step-in power: recovery of expenses

88. [Section 63](#) makes provision enabling the Scottish Ministers to recover from the person who has failed to comply with a remedial notice (including any associated conditions) or registered remedial notice expenses in connection with the exercise of the Scottish Ministers' section 59 step-in power. The expenses which may be recovered are set out in subsection (2), and include administrative expenses and interest.
89. [Section 64](#) provides powers for the Scottish Ministers to apply to register a notice of liability for expenses specifying the matters set out in that section. This is for the purposes of enabling them to recover the expenses including (in accordance with section 65) from any new owner of the land to which the notice relates unless the liability was discharged prior to the acquisition of the land by the new owner (see section 66).
90. [Section 65](#) makes provision to enable the recovery of expenses from a new owner of land, who will become severally liable for those expenses along with the former owner of the land, where a notice of liability for expenses is registered in relation to the land at least 14 days before the date on which the new owner acquired a right to the land (subsections (1) and (2)). However, subsection (3) provides that the former owner of

the land does not cease to be liable for expenses and interest under section 63 by virtue only of ceasing to be the owner of the land. Moreover, subsections (4) and (5) provide the new owner with a right to recover from the previous owner any amount paid by the new owner in satisfaction of the liability for the expenses and interest due under section 63, including in the case where the new owner ceases to own the land.

91. **Section 66** introduces a requirement for the Scottish Ministers to apply to register a notice of discharge of liability of expenses where liability for expenses and interest to which a registered notice of liability for expenses has been discharged. The Scottish Ministers must specify the matters in subsection (2) in the notice.

Time limit for prosecution

92. **Section 67** makes provision about the time limit for prosecution of offences under sections 23, 26, 28, 35, 37, 39, 46, 49, 55 or 57. It states that proceedings must be commenced within three years of the commission of the offence (or in the case of a continuous contravention, after the last date on which the offence was committed) and within six months of the date on which evidence that the prosecutor believes sufficient to justify proceedings comes to the prosecutor's knowledge. It defines the date on which proceeding shall be deemed to be commenced by reference to the Criminal Procedure (Scotland) Act 1995, section 136(3).

Section 68 - Appeals

93. Section 68(1) creates a right of appeal against certain decisions by the Scottish Ministers under Part 4 as specified under that subsection. Subsection (2) provides that the Scottish Ministers, by regulations, may make further provision about appeals under subsection (1). The matters which may in particular be provided for in regulations are set out in subsection (3). Section 76(1)(i) provides that regulations under section 68(2) are subject to the negative procedure and may modify any enactment (including the Forestry and Land Management (Scotland) Act 2018) (subsection (4)).