SUBORDINATE LEGISLATION COMMITTEE

AGENDA

17th Meeting, 2009 (Session 3)

Tuesday 19 May 2009

The Committee will meet at 2.15 pm in Committee Room 6.

1. *Tobacco and Primary Medical Services (Scotland) Bill*: The Committee will take evidence on the delegated powers in the Bill at Stage 1 from—

   Mary Cuthbert, Head of Tobacco, Sexual Health and HIV Policy, and Edythe Murie, Principal Legal Officer, Scottish Government.

2. *Tobacco and Primary Medical Services (Scotland) Bill*: The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill at Stage 1.

3. *Climate Change (Scotland) Bill*: The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill in its Stage 1 report.

4. *Schools (Consultation) (Scotland) Bill*: The Committee will consider the delegated powers provisions in this Bill at Stage 1.

5. **Draft instruments subject to approval**: The Committee will consider the following—

   - the Proceeds of Crime Act 2002 (Cash Searches: Constables in Scotland: Code of Practice) Order 2009 (SSI 2009/draft);

6. **Instruments subject to annulment**: The Committee will consider the following—

   - the Purity Criteria for Colours, Sweeteners and Miscellaneous Food Additives (Scotland) Regulations 2009 (SSI 2009/167);
   - the Period to Prepare an Adoption Allowances Scheme (Scotland) Order 2009 (SSI 2009/168);
the Swine Vesicular Disease (Scotland) Order 2009 (SSI 2009/173);
the National Health Service (Pharmaceutical Services, Charges for Drugs
and Appliances and Charges to Overseas Visitors) (Scotland) Amendment
Regulations 2009 (SSI 2009/177);
the Justice of the Peace Courts (Sheriffdom of South Strathclyde,
Dumfries and Galloway) Revocation Order 2009 (SSI 2009/180);
the Individual Learning Account (Scotland) Amendment Regulations 2009
(SSI 2009/176);
the Education (School Lunches) (Scotland) Regulations 2009
(SSI 2009/178).

7. **Instruments not laid before the Parliament:** The Committee will consider the
following—

the Products of Animal Origin (Disease Control) (Scotland) Amendment
Order 2009 (SSI 2009/174);
the Planning etc. (Scotland) Act 2006 (Commencement No. 8) Order 2009
(SSI 2009/179).

8. **Instruments not subject to parliamentary procedure:** The Committee will
consider the following—

the Sea Fish (Specified Sea Areas) (Regulation of Nets and Other Fishing
Gear) (Scotland) Amendment Order 2009 (SSI 2009/165).

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Clerk to the Subordinate Legislation Committee
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The papers for this meeting are as follows—

**Agenda Items 1-8**

Legal Brief  
SL/S3/09/17/1 (P)

Summary of Recommendations  
SL/S3/09/17/2

**Agenda Item 2**

Tobacco & Primary Medical Services Government Response  
SL/S3/09/17/3

**Agenda Item 3**

SLC Climate Change Bill Stage 1 report  
SL/S3/09/17/4

Climate Change Bill - Government response to SLC stage 1 report  
SL/S3/09/17/5

Paper from the clerk  
SL/S3/09/17/6

**Agenda Items 5-8**

Government Responses  
SL/S3/09/17/7
The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

**Agenda Item 2**  Tobacco and Primary Medical Services (Scotland) Bill

**Section 2** – power to provide that a display of tobacco products or smoking related products which also amounts to an advertisement is to be treated for the purpose of offences under the Bill and the Tobacco Advertising and Promotion Act 2002 as an advertisement and not a display or as a display and not an advertisement

The Committee may wish to consider that, having obtained further explanation from the Scottish Government, it may find the proposed power acceptable in principle and that it is subject to negative resolution procedure.

**Section 3(1)** - power to impose requirements in relation to the display in the course of business of prices of tobacco products or smoking related products in a place where tobacco products are offered for sale

The Committee may wish to consider that, having obtained further explanation from the Scottish Government, it may find the proposed power acceptable in principle and that it is subject to negative resolution procedure.

**Section 8(2)(e)** - power to determine the form and manner of an application for registration in the Register of tobacco retailers

The Committee may wish to consider that, having obtained further explanation from the Scottish Government, it may find the proposed power acceptable in principle and that no procedure is appropriate.
Section 17 – power to provide that in its application to vessels, vehicles and other moveable structures, Chapter 2 of the Bill shall be subject to such modifications as Scottish Ministers consider necessary or expedient

The Committee may wish to consider that the power under section 17 to modify Chapter 2 of the Bill in its application to vessels, vehicles and movable structures appears, as presently drafted, too wide in scope but having regard to the Scottish Government response the Committee may wish to recommend that the Scottish Government bring forward an amendment to make it clear that the power is to be applied only where it is necessary or expedient to make the existing law in Chapter 2 apply effectively to movable structures.

The Committee may wish to recommend to the lead committee that, if the Scottish Government does not bring forward an amendment to make it clear that the power is to be applied only where it is necessary or expedient to make the existing law in Chapter 2 apply effectively to movable structures, affirmative rather than negative procedure would be appropriate to provide adequate scrutiny.

Section 30– section 17C arrangements: persons with whom agreements can be made (New section 17CA(1) of the National Health Service (Scotland) Act 1978)

The Committee may wish to report to the lead committee in relation to the powers in section 30 (inserting new section 17CA(1) of the 1978 Act) that, having obtained further explanations from the Government, it finds such powers acceptable in principle, and that it is appropriate that they are subject to negative resolution procedure.

The Committee may also wish to consider whether it draws the Committee’s questions and the responses from the Government to the attention of the lead committee. This would be by way of further explanation of the provisions in the National Health Service (Scotland) Act 1978 as amended, and clarification of the proposed use and scope of these delegated powers.

Section 31: Eligibility to be a contractor under the general medical services contract (New section 17L(1) of the 1978 Act)

The Committee may wish to report in relation to the delegated power in section 31 (inserting new section 17L(1) of the 1978 Act, that having considered the Government’s response, it finds the power acceptable in principle, and that it is appropriate to be subject to negative resolution procedure.
### Agenda Item 3  Climate Change (Scotland) Bill

The Committee may wish to note and comment on the Scottish Government’s response to the Committee’s stage 1 report.

### Agenda Item 4  Schools (Consultation) (Scotland) Bill

**Section 22(2) - Commencement and short title**

The Committee may wish to find the further clarification provided by the Scottish Government in relation to the proposed power under section 22 to be satisfactory, such that it may wish to be content with the power as set out in that section, and that on the understanding that the power in section 22 to amend enactments is to be construed strictly it is not subject to parliamentary procedure.

### Agenda Item 5  Draft instruments subject to approval


The Committee may wish to consider if it is content with these instruments.

### Agenda Item 6  Instruments subject to annulment

**The Purity Criteria for Colours, Sweeteners and Miscellaneous Food Additives (Scotland) Regulations 2009 (SSI 2009/167)**

The Committee may wish to find the Scottish Government’s explanation for not consolidating the 1995 Regulations acceptable and to report to the lead committee and the Parliament accordingly.
The Period to Prepare an Adoption Allowances Scheme (Scotland) Order 2009 (SSI 2009/168)

The Committee may wish to consider drawing this instrument to the attention of the lead Committee and the Parliament on the grounds that in relation to article 2 there has been a drafting error insofar as that article contains what is a patently incorrect reference to ‘Regulations’ rather than ‘Order’, but this error not being such as to affect the meaning or operation of the instrument.

In relation to the point concerning the citation of powers in the preamble, the Committee may wish to take the view that an acceptable response has been received in relation to the point raised.

The Swine Vesicular Disease (Scotland) Order 2009 (SSI 2009/173)

The Committee may wish to report to the lead committee and the Parliament that—

(a) in relation to articles 16 and 17 of this Order, an explanation has been sought and provided by the Scottish Government as to the meaning and effect of the provisions, with which the Committee is satisfied;

(b) in relation to the powers of inspectors contained in articles 38 and 39, and the restrictions on persons contained in paragraph 7 of Schedule 1, an explanation has been sought and provided by the Scottish Government, with which the Committee is satisfied;

The Committee may wish to note and welcome the Government’s undertaking to review these provisions the first time that the instrument is amended (for other reasons), and to give careful consideration to providing for a judicial warrant procedure along the lines set out in the question posed to the Government;

(c) in relation to paragraph 4(4) of Schedule 2, there is a drafting error, which the Scottish Government undertakes to correct. It may be considered that the error is not likely to affect the operation of the instrument.

The National Health Service (Pharmaceutical Services, Charges for Drugs and Appliances and Charges to Overseas Visitors) (Scotland) Amendment Regulations 2009 (SSI 2009/177)

The Committee may wish to report to the Parliament that it finds satisfactory for its interests the explanation given by the Scottish Government within the letter provided to the Presiding Officer dated 8th May 2009 for the failure to comply with article 10(1)

The Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) Revocation Order 2009 (SSI 2009/180)

The Committee will wish to consider if it is content with the explanation provided by the Scottish Government for the failure to comply with the 21 day rule, and if so, to report accordingly.

The Individual Learning Account (Scotland) Amendment Regulations 2009 (SSI 2009/176)

The Education (School Lunches) (Scotland) Regulations 2009 (SSI 2009/178)

The Committee may wish to consider if it is content with these instruments.

Agenda Item 7 Instruments not laid before Parliament

The Products of Animal Origin (Disease Control) (Scotland) Amendment Order 2009 (SSI 2009/174)

The Committee may wish to report on this instrument on the grounds that—

(a) in article 2 of the Order (and its heading) there is a drafting error so far as the title of the 2008 Order is referred to as including the word “Animals” rather than “Animal”. It may be considered that this error is not likely to affect the validity or operation of the instrument;

(b) in article 12 (inserting a new paragraph 3A of Schedule 3 to the principal 2008 Order) there is a drafting error in respect that “seropositive pig meat” (3 words) is referred to, whereas the defined term in article 3(c) of this Order is “seropositive pigmeat” (2 words). It may be considered again that this error is not likely to affect the validity or operation of the instrument.

The Planning etc. (Scotland) Act 2006 (Commencement No. 8) Order 2009 (SSI 2009/179)

The Committee may wish to consider if it is content with this instrument.
The Committee may wish to report this instrument to the Parliament on the basis that there is a doubt as to vires given that it is not competent to regulate relevant British fishing boats or non-British fishing boats outside the Scottish zone as new article 3(1A)(b) and (c) purports to do.

The Committee may also wish to comment that there remains a doubt as to whether the relevant article can be read down as within competence under section 101 of the Scotland Act as the Scottish Government suggests.
8 May 2009

Dear Ms McKinlay

Tobacco and Primary Medical Services (Scotland) Bill at Stage I

Thank you for your letter of 29 April 2009 in connection with the above Bill.

Section 2 – power to distinguish adverts from display

The Committee asks the Scottish Government—

- to explain the justification for the use of negative procedure when the exercise of the power and choice of regulatory regime impacts on the level of penalties applicable.

The Scottish Government notes that the power provided for in section 8 of the Tobacco Advertising and Promotion Act 2002 is also used for other provisions. That power is available to prescribe all of the requirements for a display of tobacco products. Since there may be an area of overlap between a display and an advertisement, section 8 of the 2002 Act then goes on to confer power to distinguish between these in the same set of regulations.

That power is therefore not directly comparable to the power in section 2. The Bill fundamentally changes the law by banning the display of tobacco products. There is thus no need for the type of power in section 8 of the 2002 Act to regulate displays, but there remains a need to allocate displays to one category or another. Negative procedure is appropriate for this limited purpose. The difference in approach results from the fact that the regulations under the Bill have a much narrower scope than those in the 2002 Act.
Section 3(1) – requirements in relation to display of prices

Given that the power in section 3(1) defines the limits of permitted behaviour and therefore the scope of the offence provisions, and that it replicates the power in section 8 of the Tobacco Advertising and Promotion Act 2002 (‘the 2002 Act’), the Scottish Government is asked—

- why it is considered that negative procedure is appropriate given the nature of this power and that regulations under section 8 of the 2002 Act are subject to affirmative procedure.

The power in section 3(1) is available only to set requirements for a display of prices, rather than to regulate a display of tobacco products as is the case in the 2002 Act. Again, it is not the equivalent of section 8 of the 2002 Act, as it is much reduced in scope. The requirements are liable to be technical in nature and do not impose any more stringent limits on permitted behaviour than other similar regulations. Given the narrow scope of the power, negative procedure is considered appropriate.

Section 8(2)(e) – form and manner of application for registration

The Scottish Government is asked—

- in what manner or by what means does it propose to publish or otherwise make known to potential applicants the ‘form and manner’ of an application determined by the Scottish Ministers if this is not to be prescribed in subordinate legislation?

The Scottish Government will produce information on how to make an application for registration on the Scottish Government website and in other guidance and publicity material.

The Scottish Government is asked—

- if it considers that it would be more appropriate for the form and manner of an application under section 8(2)(e) to be specified in regulations, whereby the requirements would be clear and transparent and potential applicants would have access to them and know what they had to do in order to make a valid application for registration?

The Act and the “prescribed information” will contain the essential requirements as to the contents of an application. Parliament has scrutiny over these and these will be clear and transparent to anyone who reads the regulations, therefore, in the view of the Scottish Government, the subordinate legislation will contain the key elements of the registration scheme.

As to the form and manner of the application, the Scottish Ministers will make this information widely available, but do not feel that it requires to be specified in regulations. The intention is to make the form of application as user friendly as possible and they will consult widely and pay attention to ongoing feedback from users.

The prescribed content of an application is in the legislation and cannot be altered, but flexibility over the form and manner of application will allow for speedy alterations and improvements to the information captured on the system to suit users, both tobacco retailers
and enforcement authorities. The Scottish Government’s view is that this is the right balance between legislative and administrative provision.

There is plenty of legal precedent for this approach. The protection of Vulnerable Groups (Scotland) Act 2007, section 71 (forms) is an example where the form and manner of applications to a scheme are for Ministers to determine.

**Section 17 – power to modify application to vehicles/vessels**

Given that the power in section 17 is very broad and has the potential to alter any aspect of the regime for the register of tobacco retailers as it applies in relation to vehicles, vessels and other moveable structures, the Scottish Government is asked—

- if it would not be possible for to specify and to restrict the nature, scope and extent of ‘modifications’ which may be provided for in regulations under this section?

The Scottish Government does not consider this a broad or unrestricted power. The power in section 17 obliges them to make only “necessary” or “expedient” modifications to apply the measures set out in chapter 2 to vessels, vehicles and moveable structures. This test constitutes a restriction on the power.

The Scottish Government is asked—

- given the potential scope and effect of the power, for the justification for its view that negative procedure provides an adequate level of parliamentary control, particularly where it appears that the power could be used to make alternative provision in relation to significant matters such as offences and sentencing?

The Scottish Government’s view is that the power only allows the Scottish Ministers to make modifications where it is necessary or expedient to make the existing law apply effectively to moveable structures. The test of what is necessary and expedient is a strict test and it would not be possible under that test to introduce anything beyond that which is necessary or expedient to ensure that the measures in chapter 2 can be appropriately adapted to vessels, vehicles and moveable structures.

For those reasons they do not consider that the power has a wide scope and effect. Negative procedure is appropriate, since the existing law has to be applied within strict parameters.

**Section 30 – (new section 17CA(1)) arrangements – persons with whom agreements can be made – conditions which can be prescribed**

The Committee asks the Scottish Government—

- whether it considers that the effect of the power in section 17CA(1) is actually to permit the general prescription of conditions before a Health Board can make a section 17C agreement for the provision of primary medical services rather than simply a power to prescribe criteria for eligibility to perform such service, and is that the intended effect of this power?

One of the intentions behind the provisions in the Bill regarding primary medical services is to achieve greater consistency in the eligibility of providers of primary medical services. The intention is, therefore, to bring the powers to prescribe conditions in section 17CA(1) broadly...
into line with those in section 17L(1). The Scottish Government considers, therefore, that the effect of the power in section 17CA(1) is to permit the general prescription of conditions before a Health Board can make a section 17C agreement for the provision of primary medical services rather than simply a power to prescribe criteria for eligibility to perform such service.

- what it considers this power adds, beyond the existing provisions in section 17E of the 1978 Act to make regulations with respect to section 17C arrangements, and in particular section 17E(3)(ca). That paragraph provides the regulations can impose conditions (including as to qualifications and experience) to be satisfied by persons performing primary medical services in accordance with section 17C arrangements)?

There is an important distinction to be made between persons who provide primary medical services, that is the persons with whom the Health Board enters into agreements under section 17C (who may broadly be described as “contractors”), and those persons who perform the services (who may or may not be such persons). The provisions in the new section 17CA of the Act relate to providers/contractors, not performers. Section 17E(3)(ca) relates to the power to impose conditions to be satisfied by persons performing primary medical services in accordance with section 17C arrangements. This is accordingly different from the power in the new section 17CA(1).

- whether there is any intention to prescribe further conditions beyond those relating to eligibility?

The core eligibility criteria are now set out in the new section 17CA and the current intention is that the power in 17CA will be used to prescribe additional conditions as to eligibility, but the Scottish Government considers that it is appropriate to provide for the same flexibility to prescribe conditions under the new section 17CA(1) as is provided under the current and new section 17L(1).

Section 31 – (new section 17L(1)) – general medical services contracts – conditions which can be prescribed

In the context that the Scottish Government's Delegated Powers Memorandum describes the effect of this delegated power as – “Regulations may impose conditions on Health Boards as to the persons they may enter into contracts with” the Committee may wish to ask the Government to explain—

- if it is considered that the effect of the power in the new section 17L(1) is actually to permit the general prescription of conditions before a Health Board can make a general medical services contract with a contractor (which is the current position in section 17L), rather than simply to impose conditions as to eligibility, and is that the intended effect of this power?

It is considered that the effect of the power in the new section 17L(1) is the same as in the current section 17L(1), that is to permit the general prescription of conditions before a Health Board can make a general medical services contract with a contractor, and not simply to impose conditions as to eligibility.

and

- if there is any intention to prescribe further conditions beyond those relating to eligibility?
The core eligibility criteria are now set out in the new section 17L and the current intention is that the power in 17L(1) will be used (as is the current power) to prescribe additional conditions as to eligibility, but the Scottish Government considers that it is appropriate to retain the flexibility of the powers in the current section 17L(1).

Schedule 1 – fixed penalty scheme – following aspects:

Schedule Para 3 – time after which fixed penalty can’t be given
Para 4 – prescribe amount of fixed penalty and discounted amount
Para 11(2) – power to modify time to pay

The Committee also agreed to obtain a further explanation as to the proposals for exercise of the powers to change significant elements of the fixed penalty scheme set out in paragraphs 3, 4 and 11(2) of schedule 1 and why it is considered that negative procedure is appropriate.

The Scottish Government notes that officials are invited to give evidence on this matter on 19 May.

Yours sincerely

Gillian Russell
Divisional Solicitor
Subordinate Legislation Committee

Climate Change (Scotland) Bill

The Committee reports to the lead committee as follows—

Introduction

1. At its meetings on 27 January\(^1\) and 24 February 2009\(^2\) the Subordinate Legislation Committee considered the delegated powers provisions in the Climate Change (Scotland) Bill at Stage 1. The Committee submits this report to the Transport, Infrastructure and Climate Change Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (DPM).\(^3\)

3. The Committee’s correspondence with the Scottish Government is reproduced in the Annex.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill.

5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 9, 11, 15, 17, 20, Schedule 1, paragraphs 2(2), 6(1), 7(5), 8(2) and 9(3), sections 23, 24, 35, 38, 39, 40(2), 42(1) and (2), 43, 44(1), 50, 52(3), 53(4), 54(3), 55(1), (2), (3) and (4), 56(4) and (5), 57(3), 58, 59 and 67.

Section 4 - Setting annual targets

6. Section 4 imposes a requirement on the Scottish Ministers to set annual targets for the maximum amount of the net Scottish emissions account, by order. Subsection (2) states for which years the targets must be set. The Scottish Ministers intend to set targets in batches; the first batch will be for 13 years (2010-2022), with subsequent targets set in batches of 5 years until the last batch, which will be 3 years in length (2048-2050). The dates in advance, by which each batch

\(^1\) Official Report 27 January 2009
\(^2\) Official Report 24 February 2009
\(^3\) Delegated Powers Memorandum
of targets must be set are also given. The annual targets must be set in accordance with provisions in section 3.

7. The Committee queried (given that there was no explanation of this in the DPM) whether there should be any requirements for consultation on the face of the Bill, on setting the annual targets by order, with specified bodies or persons who may have interest in the proposals.

8. The response from the Scottish Government noted (amongst other matters, as set out in the Annex to this Report) that annual targets shall be set for the whole of Scotland, and so far as there are no targets for specific industries or sectors, that does not indicate that specific persons or bodies should be prescribed to be consulted on an order before it is made. The Government shall also require to take into account the advice of the relevant advisory body, prior to setting the annual targets by order.

9. Following this further explanation given by the Scottish Government, the Committee concluded that there was a sufficient explanation of why there are no further consultation requirements prescribed on the face of the Bill.

10. The Committee was therefore content with the delegated power in section 4, and that it is subject to affirmative procedure.

Section 6 - Modifying annual targets

11. Section 6 allows the Scottish Ministers to modify certain parts of sections 3 and 4 by order. Subsection (1) (c) enables the Scottish Ministers to modify any of the dates set out in section 4 (the dates of the batches of annual targets, and/or the advance date by which the target must be set) and subsection (1)(d) allows modification of the criteria to which Ministers must have regard when setting the annual targets. Subsection (4) sets out that the Scottish Ministers may only exercise these powers if they consider it appropriate to do so.

12. The DPM offered no explanation as to why this flexibility to change these matters is needed, and the approach contrasts with sub-section (2) and (3), where Ministers require to show it is no longer necessary for the annual targets to be set by reference to the 3% reduction, or require to show there have been significant changes to the basis on which the annual target was set. The Committee therefore asked for further explanation.

13. The Committee considers that the Government’s response on section 6 offers a proper explanation; that it has considered how section 6(4) might possibly have been restricted by reference, for example, to changes reflecting changes in the UK, European or international position/criteria, but it was considered this would not be appropriate.

14. The response also highlighted that Parliament shall be asked to approve any changes by affirmative procedure, and that a sufficient degree of flexibility is required because the annual targets require to be set up to 2050.
15. The Committee, being satisfied with the response in relation to section 6, is content with the delegated powers in that section, and that they are subject to affirmative procedure.

Section 12 - The net Scottish emissions account

16. Section 12(2) enables the Scottish Ministers to make provision by regulations about how and in what circumstances carbon units are credited to and debited from the net Scottish emissions account, and the manner in which this is to be done.

17. Section 64(7)(a) of the Bill proposes that the first regulations under section 12(2) shall be by affirmative procedure, but the second or subsequent regulations shall be by negative procedure. However, affirmative procedure is retained where the regulations shall make provision altering the amount by which a carbon unit credited or debited to the net emissions account for a period either reduces or increases the account for that period. The DPM explains that this is because of the significant effect this could have on the account.

18. The DPM also explained that the initial regulations will set out how and in what circumstances carbon units are credited to and debited from the net emissions account, which will be a key component of the operation of that account. Affirmative resolution procedure was therefore considered appropriate for the initial regulations.

19. The Committee notified the Scottish Government that it does not generally favour the use of the lesser degree of scrutiny of negative procedure for second or subsequent regulations, as is provided for in section 64(7)(a) in relation to section 12(2), while the first set of regulations are subject to affirmative procedure. The Committee sought further explanation on this matter from the Scottish Government, on why this is appropriate for this particular Bill.

20. The Committee considered that the Scottish Government’s response gave persuasive argument for the specific reasons why the procedures for regulations under sections 12 and 18 of the Bill were chosen. The Committee considered that there is sufficient explanation that the choice of procedure is appropriate for these particular sections of this Bill. In particular, the Committee noted that it appears from the Government response that further regulations after the first regulations under these sections are likely to be highly technical in subject matter, and any changes that increase or decrease the net Scottish emissions account shall be by affirmative procedure.

21. The Committee was content with the delegated powers in section 12, and that they are subject to affirmative procedure on the first occasion, but the second and subsequent Regulations will be subject to negative resolution, other than regulations making provision to alter the amount by which a carbon unit credited or debited to the net Scottish emissions account for a period reduces or increases the account for that period. (This is provided for in section 64(7)(a)).
22. The Committee also reports that generally it does not favour the use of affirmative procedure for a first set of regulations and negative procedure for second and subsequent regulations. However, in the instance of section 12 of this Bill, it was satisfied that the Scottish Government has provided sufficient reasons why this choice of procedure appears to be suitable.

Section 14 - Scottish share of emissions from international aviation and international shipping

23. International aviation and international shipping emissions are generally not directly emitted in a specific country. Section 14(1) and (2) allow the Scottish Ministers to specify by order how certain emissions from international aviation and shipping are to be attributable as “Scottish emissions”. Section 14(3) requires the Scottish Ministers to seek advice from the relevant body defined in section 5(5) prior to making an order. Section 14(4) requires the Scottish Ministers to publish a statement if the advice of the relevant body is not followed.

24. The DPM explained in justification for this delegated power that, as international aviation and international shipping emissions are generally not directly emitted in a specific country, it is necessary to specify how certain amounts of these emissions will be allocated to the net Scottish emissions account. This allocation may also need to change over time, particularly if a European or international agreement makes such a change necessary in the future. There is no current international agreement on how to allocate these emissions to States.

25. Given the significance of this power within the Bill, the DPM contained no explanation in relation to appropriate consultation before making an order under section 14, or why it was considered appropriate that there should be no particular prescribed consultation requirements on the face of the Bill. The Committee therefore asked for further explanation on this aspect.

26. The Committee accepted the further explanation offered by the Scottish Government, as to why there are no specific requirements for Scottish Ministers to consult with specified persons or bodies on the terms of an order under section 14, within the Bill.

27. The Committee therefore reports that it is content with the delegated power in section 14, and that it is subject to affirmative procedure.

Section 18 - Carbon units and carbon accounting

28. Section 18(1) allows the Scottish Ministers to create a scheme for the purpose of monitoring the use of carbon units, including registering them and keeping track of them. The scheme may establish and maintain accounts in which carbon units may be held, and between which they can be transferred. Section 18(2) allows existing schemes, which might be established in future by Ministers, to be adapted for the purposes set out in subsection (1).

29. The DPM explains that it may be necessary (in future) to create a scheme to monitor the use of carbon units. “The trading of units across borders can be
complicated and it is not yet known whether such a scheme is necessary. However, if it does become necessary, these provisions allow for such a scheme to be created.”

30. The Committee notified the Scottish Government that it does not generally favour the use of the lesser degree of scrutiny of negative procedure for second or subsequent regulations, as provided for in section 64(7)(b) in relation to section 18(1), while the first regulations shall be subject to affirmative procedure. The Committee sought further explanation on this matter from the Scottish Government. (The issue here is similar to that in relation to section 12 of the Bill).

31. The Committee considered that the Scottish Government’s response gave persuasive argument for the specific reasons why the procedures for regulations under sections 12 and 18 of the Bill were chosen. The Committee considered that there is sufficient explanation that the choice of procedures is appropriate for these particular sections of this Bill. In particular, the Committee noted that it appears from the Government response that further regulations after the first regulations under these sections are likely to be highly technical in subject matter. Also, any changes which increase or decrease the net Scottish emissions account, or which specify a new type of carbon unit which may have an effect that account, shall be by affirmative procedure.

32. The Committee was content with the delegated powers in section 18, and that they are subject to affirmative procedure on the first occasion, but the second and subsequent Regulations will be subject to negative resolution, other than regulations making provision specifying a carbon unit of a kind not previously specified in regulations which shall be subject to affirmative procedure (as provided for in section 64(7)(b)).

The Committee also reports that generally it does not favour the use of affirmative procedure for a first set of regulations and negative procedure for second and subsequent regulations. However, in the instance of section 18 of this Bill, the Scottish Government has provided sufficient reasons why this choice of procedures appears to be suitable.

Section 19 – Meaning of advisory body

Section 20 and Schedule 1- Scottish Committee on Climate Change

33. Section 19(1) enables the Scottish Ministers to designate by order, a body or person to carry out the advisory functions as set out in the Bill. In the absence of an order made under section 19(1), the Scottish Ministers will seek advice from the UK Committee on Climate Change established by the UK Climate Change Act 2008 (as set out in section 5(5) of this Bill). An order under section 19 shall be subject to affirmative resolution procedure. Such an order may in future specify the Scottish Committee on Climate Change as the advisory body.

34. By section 20, the Scottish Ministers may by order establish the Scottish Committee.
35. Schedule 1 of the Bill makes further provision for the constitution and membership of the Scottish Committee on Climate Change. By paragraph 2(3) of Schedule 1, the members of that Committee shall be appointed by the Scottish Ministers.

36. The Committee considers the delegated powers in sections 19, 20 and Schedule 1 to be acceptable. The Committee draws to the attention of the lead and secondary committees for the Bill (in relation to the effect of the delegated powers contained in sections 19, 20 and Schedule 1) that the Explanatory Notes with the Bill (paragraph 33) and the Policy Memorandum (paragraph 31) indicate that Ministers will require to seek expert, independent advice from the advisory body, but the Bill provides –

(a) in section 19(1) and (5), that a designated advisory body may be any public body as Ministers consider appropriate, which may be a person or body with functions of a public nature (not necessarily independent of the Scottish Ministers or Government), and

(b) in Schedule 1, paragraph 2, that the members of the Scottish Committee on Climate Change shall be appointed by the Scottish Ministers.

37. The Committee acknowledges, however, that in relation to those statements in the Policy Memorandum and Explanatory Notes, “independent” is capable of having different meanings and does not necessarily refer to a body which is wholly independent of the Scottish Ministers.

Section 26 – Guidance to advisory body
Section 27 – Power to give directions to the advisory body

38. Section 26 provides that the advisory body (to the Scottish Ministers) must have regard to any guidance given by the Scottish Ministers to it in relation to the exercise of its functions under the Act. However, Ministers may not give guidance as to the content of any advice or report. This includes power to vary or revoke the guidance.

39. Section 27 provides that the Scottish Ministers may, if they consider it appropriate, give the advisory body directions as to the exercise of its functions under the Act. However, Ministers may not give directions as to the content of any advice or report. This includes the power to vary or revoke the directions. Unlike guidance, directions issued in relation to the functions of the advisory body shall be binding on the body.

40. The Committee considers that the delegated powers contained in sections 26 and 27 are acceptable to be in the form of guidance and directions (respectively) issued by the Scottish Ministers, and those powers would not be more appropriately expressed in the form of subordinate legislation. The remit of the Committee in regard to these sections is to so
consider whether the powers would be more appropriate to be expressed in that form.

41. The Committee draws to the attention of the lead and secondary committees for the Bill the delegated powers conferred on the Scottish Ministers in sections 26 and 27 to issue directions and guidance to the advisory body given that the Explanatory Notes (at paragraph 33) and the Policy Memorandum (at paragraph 31) indicate that the advisory body shall provide independent advice to the Scottish Ministers.

Section 36 - Duties of public bodies relating to climate change

42. Section 36 empowers the Scottish Ministers to impose ‘climate change duties’ by order, on public bodies. A public body, as defined in sections 19(5) and 65, is a person or body with functions of a public nature. ‘Climate change’ is not defined in the Bill. ‘Climate change duties’ are neither listed nor defined in section 36. Section 36(3) provides that an order under this section may, in particular, impose climate change duties on all public bodies, public bodies of a particular description, or individual public bodies. Different climate change duties may be imposed on different public bodies or descriptions of public body. Section 36(4) provides that before laying a statutory instrument containing an order before the Scottish Parliament, the Scottish Ministers must consult, in so far as reasonably practicable, with such associations of local authorities and such other persons as the Scottish Ministers consider appropriate. Section 36(6) requires the Scottish Ministers to co-operate with a relevant public body to help that body comply with its climate change duties.

43. Given the width of these powers and the lack of definition with respect to public bodies and climate change duties, the Committee asked the Scottish Government about the meaning and scope of ‘public bodies’ and ‘climate change duties’, and whether consideration had been given to the type of ‘public bodies’ which could be subject to climate change duties. It was apparent from the Scottish Government response that Ministers did give consideration to the types of bodies to be subject to the duties, but ‘felt that it was not appropriate to list the bodies to which the duties might be applied’. A public body as defined in the Bill is a person or body with functions of a public nature. ‘Functions of a public nature’ are not defined. The definition of ‘public body’ is therefore ambiguous and potentially very wide. This is in effect acknowledged in the third paragraph of the Scottish Government response, in which it is stated that ‘It is not possible to know exactly which public bodies may need to become subject to statutory climate change duties at various points over the course of the forty years which the framework is designed to cover.’ In the response, the Scottish Government stated that it was never the intention to define ‘climate change duties’ more specifically elsewhere in the Bill. The response commented on the need for flexibility to be able to respond to or in anticipation of circumstances which cannot be foreseen at the present time.

44. The Committee considered that it would be possible to provide a list of bodies in the Bill so that Parliament (in approving the Bill) could assess whether these are the bodies to which the powers should apply. A power to add bodies to
the list or modify the list subject to affirmative procedure would allow Parliament to remain in control of the definition of ‘public bodies’.

45. The Committee reports to the lead committee that the power under section 36(1) to impose climate change duties on public bodies is extremely wide in its scope, in particular as neither the public bodies which may be subject to climate change duties nor climate change duties themselves are adequately and clearly defined.

46. The Committee also recommends that this could be mitigated to some extent by provision of a list of public bodies to whom the power is to apply along with a power to add to the list subject to affirmative procedure. This would be in line with the approach adopted to other regimes regulating public bodies such as freedom of information.

Section 37 – Guidance to relevant public bodies

47. Section 37(1) provides that ‘relevant public bodies’ are required to have regard to any guidance given to them by the Scottish Ministers in relation to climate change duties. A ‘relevant public body’ is a body which has climate change duties by virtue of section 36(1). Before issuing guidance the Scottish Ministers have a duty to consult the same bodies as those specified in section 36(5) with respect to the imposition of climate change duties. Guidance issued under this section has to be published by Scottish Ministers.

48. The guidance which the Scottish Ministers can issue and which public bodies will have to have regard to will not be subject to any form of parliamentary procedure or scrutiny. Section 37 does not give any indication of, nor does it provide any limitation on, the nature or scope of the guidance which the Scottish Ministers can give.

49. The Committee therefore asked the Scottish Government for more information as to the function and likely content of such guidance.

50. The response from the Scottish Government stated that guidance will indicate how specific climate change duties should be discharged and that it is intended to assist in developing consistency of approach across those public bodies to which climate duties apply.

51. The Committee considered that the response did not aid its consideration of this power. The Committee concluded that it would be appropriate for the Parliament to have a role in scrutinising the guidance produced under section 37 because of its potential impact, and recommends that guidance under this section should be laid before Parliament for a period prior to implementation, and any resolutions of the Parliament made in respect of the draft guidance during that period taken into account.

Section 46 - Variation of permitted times for making muirburn

52. Section 46 inserts a new section 23A into the Hill Farming Act 1946 (“the 1946 Act”). Section 23 of that Act currently prohibits muirburn between certain
dates. Subsection (1) of new section 23A of the 1946 Act provides the Scottish Ministers with an order-making power to specify different dates before which, and after which, it is lawful to make muirburn in any year. Subsection (3) stipulates that the Scottish Ministers may make an order under subsection (1) only if they consider it necessary or expedient to do so in relation to climate change. The effect of this power is therefore to allow the Scottish Ministers to change the dates between which muirburn may be conducted so as to have regard to the impact of this activity on climate change. The section does not contain a requirement for consultation of affected landowners or others prior to the making of an order.

53. The committee asked the Government why it does not consider that provision for consultation is necessary or appropriate in order to take into account the impact on landowners that any changes might cause.

54. The Scottish Government acknowledges that it would be appropriate to consult with parties likely to be affected by changes to the times at which muirburn may be made. They point to their perceived difficulties in identifying a specific body or specific bodies whom they might be obliged to consult. However, they do refer to what is stated to be their standard practice of consulting on a non-statutory basis with potentially interested parties and consider that this would be appropriate and reasonable in the circumstances.

55. The Committee was content with the response in respect that it may be taken to confirm that informal consultation with potentially interested parties will take place in advance of any instrument.

Section 47 - Power to modify functions of Forestry Commissioners

56. The Forestry Commissioners were established by the Forestry Act 1967. Section 47 confers on the Scottish Ministers the power to modify the functions of the Forestry Commissioners in or as regards Scotland. The Committee was concerned about the potential scope of the proposed power to modify the functions of the Forestry Commissioners in or as regards Scotland. The Committee was concerned about the potential scope of the proposed power to modify the functions of the Forestry Commissioners in or as regards Scotland. Section 47(2) imposes limitations on the circumstances in which Scottish Ministers may exercise the power to modify under section 47(1) but the section does not impose any restrictions or limitations on the nature, scope or extent of any modification of the Forestry Commissioners’ functions. The power could have the potential to alter, quite radically, the Forestry Commissioner’s functions, either by the addition of new functions or by the removal of existing functions.

57. The Committee asked the Scottish Government if consideration had been given to the imposition of a restriction on the power. The Scottish Government response did not address the committee’s concerns. The response refers to the limitation on the circumstances in which the power may be exercised, namely to comply with Scottish Ministers duties under sections 1, 2 and 3 of the Bill (namely the 2050 target, the interim target and annual targets) or otherwise in relation to climate change. However, it was the Committee’s view that the limitation on the circumstances in which the power may be exercised does not place any limitation on the nature, scope or extent of any modification of the Forestry Commissioners’ functions which may arise in consequence of the exercise of that power beyond that it must be for a climate change purpose. It is the absence of limitations on
what may be done in consequence of the exercise of the power which was of concern, not the circumstances in which the power may be exercised, which circumstances are subject to limitations.

58. Section 47(3) gives examples of what an order may in particular enable the Forestry Commissioners to do. They indicate how wide-ranging the consequences and impact of the exercise of the power may be. The question is whether the climate change purpose should be allowed to overrule any other considerations as to what should properly be the functions of the Forestry Commissioners.

59. The Committee draws to the attention of the lead committee that the power under section 47(1) to modify the functions of the Forestry Commissioners in or as regards Scotland is, in the opinion of the Committee, very wide in its scope as there is no limitation within the power on what may be done in exercise of the power beyond that it must deliver a climate change purpose.

Section 52(1), (2) and (4) - Waste prevention and management plans
Section 53(1), (2), (3) and (5) - Information on waste
Section 54(1), (2), (4) and (5) - Recyclable waste: facilities for deposit etc.
Section 56(1), (2), (3) and (6) - Procurement of recyclate - regulations

Section 52 empowers the Scottish Ministers, by regulations, to place a duty on specified persons to prepare waste prevention and management plans. Section 53 enables the Scottish Ministers, by regulations, to require specified persons to provide information to SEPA about the waste that they produce. Section 54 enables the Scottish Ministers to make regulations which may require receptacles to be provided by persons of the kinds specified for a broad range of types of waste. Section 56 gives the Scottish Ministers powers to require specified persons to ensure that particular things procured or constructed by or on behalf of them contain or include a certain proportion of recyclate, which is waste that has been recycled.

60. The Committee’s concerns with respect to these 4 sections related to the lack of specification in the provisions with respect to the kinds or classes of persons who would be (or whom it was anticipated would be) subject to duties under the various sets of regulations. In particular, the regulations could apply to domestic activities or individuals in the absence of any express restriction.

61. In its response to questions posed by legal advisers on these sections, the Scottish Government state that it is not possible at present to be specific as to the classes of persons on whom duties may fall. They explain their reasons for this response. No firm proposals have as yet been drawn up. The Scottish Government have admitted that they are not yet clear how these powers will be used. It is not clear what restrictions if any will be applied to the exercise of these powers. There is nothing on the face of these powers to restrict their application and in particular to exclude non-commercial activity.

62. The Committee took the view that whether or not duties could be applied to domestic activities is a policy matter to be decided by the lead committee and
Parliament, but that if the lead committee or Parliament considers that the powers should have no application to non-commercial activity then this should be made express on the face of the Bill.

63. **The Committee therefore reports to the lead committee and to Parliament that these powers are expressed in very broad terms and that there is nothing on the face of the Bill to restrict their application to purely commercial activity.**

**Section 57(1), (2) and (4) – Targets for reduction of packaging etc.**

64. Section 57 enables the Scottish Ministers, by regulations, to set targets to reduce the amount of packaging used and to require specified persons to comply with those targets. Targets may also be set for the reduction of greenhouse gas emissions produced by packaging.

65. Given the lack of information offered in the DPM in relation to the scope or extent of these powers, the committee sought clarity with respect to the scope of the powers and whether the powers were drawn no more widely than required.

66. In its response, the Scottish Government point out that producers of packaging are already subject to a producer responsibility regime and that in terms of waste in general producer responsibility is a requirement of community law. This is why retailers and not producers were specifically mentioned in the Delegated Powers Memorandum.

67. Section 57 places no limits on the persons who may be subject to regulations under this section. The Committee was concerned about the potential scope of the application of these regulations and to the fact that there are no restrictions within the provisions themselves on the persons who may be subject to duties under the regulations. In particular the committee was concerned that duties imposed by regulations may be extended to non-commercial applications.

68. The Committee took the view that whether or not duties could be applied to domestic activities is a policy matter to be decided by the lead committee and Parliament but that if the lead committee or Parliament considers that the powers should have no application to non-commercial activity then this should be made express on the face of the Bill.

69. **The Committee reports that Parliament should be made aware that these powers are expressed in very broad terms and that there is nothing on the face of the Bill to restrict their application to commercial activity.**

**Section 64 – Subordinate legislation**

70. This section contains the general subordinate legislation provisions, including the specification of the affirmative or negative procedures applying to the order or regulation-making powers in the Act.

71. The power to modify enactments in section 64(3) is framed at its widest. There is no express limitation placed on that power, with reference to the provisions or purposes of the Bill. This is a “Henry VIII power” which does not
contain a limit on the purposes of the power and which can be attached to any other power to make subordinate legislation under the Act. The Committee considers however that it should be implied within section 64(3) as drafted that any modification shall be for the purposes of the provisions of the Act, at least. However, this is still a very wide proposed power to modify enactments.

72. Generally, the Committee would take as a starting point that such a “Henry VIII” power, framed in this way, is unacceptable, unless sufficient justification is provided for the width of the power required, which should be in exceptional circumstances. Accordingly, the Committee requested further explanation, to establish why this power may be justifiable for this particular Bill.

73. The response from the Government explains that this is a wide-ranging Bill, and “it is difficult to know in advance which powers might need to modify enactments. That is why section 64(3) is expressed as applying generally”. The response also highlights that certain powers proposed in the Bill are potentially wide in effect, for example the powers in section 36 and 47 in relation to the imposition of duties on public authorities in relation to climate change, and the power to modify the functions of the Forestry Commissioners in or as regards Scotland. The modification of, for example, the Forestry Act 1967 would be the “main method by which the power would be used, rather than being merely ancillary.”

74. In essence therefore, the response from the Government indicates that it considers that such a wide power to modify enactments (by way of affirmative procedure regulations or orders in future) is required for this particular Bill, given the potential width, or uncertain future effects, of some of the other delegated powers proposed in the Bill, and so that a general power to modify for the purposes of this particular Bill is required. The Committee accepted this explanation as sufficient, while noting that the effect of this power to modify enactments (including this Act) may be potentially very wide in effect. The Committee also noted that modifications of enactments by future subordinate legislation under the Bill shall require to be affirmed by Parliament.

75. Accordingly, the Committee considered that in the instance of this particular Bill, the proposed general power contained in section 64(3), which enables orders or regulations to modify any enactment (including the Act) by affirmative procedure is acceptable.
ANNEX

Response from Scottish Government

Climate Change (Scotland) Bill at stage 1

1. Thank you for your letter of 28 January 2009 to Paul Johnston regarding the Subordinate Legislation Committee’s consideration of the Climate Change (Scotland) Bill at Stage 1.

For ease of reference I have set out each of the points raised, followed by the Scottish Government response.

Section 4 - Setting annual targets

2. The Committee asked the Scottish Government—

   in relation to sections 4 and 6, on what basis it has considered that there should be no requirements on the face of the Bill to the effect that Ministers shall consult on the terms of an order under those sections (setting or modifying annual targets) with specified persons or bodies who may have particular interest in the proposals?

3. Scottish Government response—

   i. When setting annual targets (section 4) and modifying them (section 6), Ministers must first seek the advice of the relevant body (sections 5 and 7 respectively). Section 5(5) provides that the relevant body is the UK Committee on Climate Change or a person or body designated under section 19(1), in practice an existing body or a Scottish Committee on Climate Change.

   ii. The Scottish Government has committed to utilising the UK Committee on Climate Change in the short to medium term before reviewing the situation. The UK Committee comprises leading experts on the subject of climate change. Paragraph 1(3) of Schedule 1 to the UK Climate Change Act 2008 sets out the areas of experience and knowledge that the national authorities, which include the Scottish Ministers, must have regard to securing for the Committee as a whole when appointing its members. This includes an understanding of the differences in circumstances between England, Wales, Scotland and Northern Ireland.

   iii. If Ministers decide to lay an instrument which makes provision different from that recommended by the Committee, section 5(3) of the Bill requires that they publish a statement explaining why. This is intended to enhance transparency and scrutiny.

   iv. The annual targets in the Climate Change (Scotland) Bill apply to the entire Scottish economy. The Bill contains no targets for individual sectors of the economy in order to allow sufficient flexibility for policies to be put in place to reduce emissions in the most cost effective ways possible, without disproportionately disadvantaging any particular industry in Scotland. This is
reinforced by the fact that the duty to ensure that the net Scottish emissions account is reduced in line with the annual and longer-term targets in the Bill is placed upon the Scottish Ministers alone.

v. These factors, combined with the provisions requiring the advice of the relevant body, means that it is not felt necessary to require additional consultation on the proposed levels of the annual targets, or on proposed modification of these levels, both of which will be set by orders subject to affirmative resolution.

Section 6 - Modifying annual targets

4. The Committee asked the Scottish Government—

(a) to explain and justify why it is considered, in relation to the power in section 6(4), that this may be exercised in any circumstances where the Scottish Ministers consider it appropriate to do so; and

(b) whether more defined circumstances in which it would be appropriate to exercise the power (in a similar manner to section 6(2) and (3)) could be prescribed, for instance where it becomes necessary for the achievement of targets?

5. Scottish Government response—

i. The power in section 6(1)(c) enables the Scottish Ministers to amend the dates for which batches of annual targets must be set. The power in section 6(1)(d) enables the Scottish Ministers to amend the criteria which Ministers must have regard to when setting annual targets. Section 6(4) stipulates that Scottish Ministers may make orders under sections 6(1)(c) and (d) only if they consider it appropriate to do so. Consideration was given to whether it would be desirable to limit the exercise of these powers by reference to particular conditions which must be met but this was rejected because of the factors outlined below.

ii. The dates set out in section 4(2) mirror the dates for which carbon budgets will be set by the UK Government under the Climate Change Act 2008. This recognises that total emissions reductions in Scotland depend in part upon policies which are reserved and therefore that the batches of annual targets should take account of the levels at which UK carbon budgets are set. It also provides greater certainty for the many organisations which operate both in Scotland and other parts of the UK. It is necessary for Scottish Ministers to be able to amend the annual target dates should the Secretary of State ever exercise the power in section 23(1) of the UK Act to change the length or timing of the UK carbon budgets.

iii. Consideration was given to drafting this section so that the power could only be exercised in order to keep Scottish annual target batch dates in line with the UK carbon budgets or other relevant European or other international agreements. However, it was felt that this was unnecessarily restrictive given the differences between the Scottish annual target model and other emissions reduction models in place elsewhere. Any amendments made under the section
6(1)(c) provision would be subject to affirmative resolution and therefore open to considerable Parliamentary scrutiny.

iv. The target setting criteria in section 4(4) represent the areas and issues which the Scottish Ministers believe are relevant and appropriate to have regard to when setting annual targets. The framework established by the Climate Change (Scotland) Bill is designed to last until at least 2050. It may become appropriate to amend these criteria at some point in the coming four decades. Given this lengthy timescale, it is felt that there needs to be considerable flexibility to adapt these criteria to best fit current thinking and therefore it would not be desirable to attempt to try to restrict the use of the section 6(1)(d) power in a specific way. Once again, any such amendment will be subject to the level of Parliamentary scrutiny afforded by affirmative resolution procedure.

v. With regard to the Committee’s suggestion that the exercise of the power in section 6(4) be restricted so that it is used only, for example, where it becomes necessary for the achievement of targets, we consider that this would be difficult to achieve satisfactorily. It would be difficult to argue that changing the dates for which batches of targets are set affects the ability to achieve those targets because it is the level at which any particular target is set which is the key factor in whether or not it is achievable. Similarly, it would be difficult to draw a direct link between changing the target setting criteria and the achievability of targets themselves.

vi. Finally, it is worth noting the duty in section 7 of the Bill which requires that Ministers seek the advice of the relevant body before making an order under section 6. If the order makes provision different from that recommended by the relevant body, Ministers must publish a statement explaining why. This provides another safeguard as to the use of the section 6 powers.

Section 12 - The net Scottish emissions account

6. The Committee notified the Scottish Government that it does not favour the use of the lesser degree of scrutiny of negative procedure for second or subsequent regulations, as provided for in section 64(7)(a) in relation to section 12(2), rather than affirmative procedure.

7. The Committee asked the Scottish Government—

(a) whether it could re-consider if all regulations under section 12(2) could be by affirmative procedure, and

(b) if it does not take this view, if it could fully explain to the Committee what types of “technical” provisions would be subject to second and subsequent negative procedure regulations under section 12(2) (but would not be provisions that would attract affirmative procedure under section 64(7)(a)); could a description of these provisions be put in the Bill; and why it is considered appropriate those provisions should be subject to negative procedure, while the other provisions should be subject to affirmative procedure?
8. **Scottish Government response—**

i. The Scottish Government does not take the view that affirmative resolution is necessary for all regulations made under section 12(2). The first regulations made under this section will be used to establish the circumstances in which carbon units will be credited to or debited from the net Scottish emissions account and the manner in which this is to be done. This first set of regulations will be subject to affirmative resolution, as will any amendment to them or to subsequent regulations which would have a fundamental impact on the operation of the net Scottish emissions account by altering the amount by which carbon units increase or decrease that account.

ii. It is envisioned that second and subsequent regulations which would attract negative procedure would be instruments designed to align emissions trading schemes operating in Scotland, such as the EU Emissions Trading Scheme (EU ETS), with the net Scottish emissions account. These regulations are likely to be very technical and detailed in nature but would be unlikely to change the fundamental operation of the net Scottish emissions account.

iii. For example, in Phase II of the EU ETS (up to and including the year 2012) nearly all emissions allowances are allocated to industry free of charge. Participants only have to pay for extra allowances necessary to offset emissions over and above their allocation. However, in Phase III of the EU ETS (2013-2020), auctioning will become the default method of distributing allowances, rather than free allocation. In sectors of industry not subject to specific exemptions, 20% of allowances to be distributed will be auctioned in 2013, gradually increasing to 70% in 2020. Additionally the electricity generation sector in most Member States will not receive any free allowances from 2013 onwards. The proportion they would have received will also be auctioned. Work is underway within the Scottish Government to develop section 12 regulations covering the operation of the EU ETS up to and including 2012. However, although the principles of Phase III of the EU ETS are known, there are currently a great number of uncertainties about how it will actually operate in practice. It is almost certain that the first set of section 12 regulations, put in place to enable the net Scottish emissions account to operate appropriately in 2010-2012, will need to be amended to take account of the changes to the EU ETS from 2013. The aim of these amendments will simply be to enable the EU ETS allowances used by installations in Scotland to continue to be properly accounted for. The amended regulations will not change the amounts by which individual EU ETS allowances increase or decrease the net Scottish emissions account. The Scottish Government therefore considers that negative resolution is appropriate in such circumstances. This follows the approach taken in the equivalent sections of the UK Climate Change Act (sections 27 and 28).

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**Section 14 - Scottish share of emissions from international aviation and international shipping**

9. **The Committee asked the Scottish Government—**
in relation to section 14, on what basis it has considered that there should be no requirements on the face of the Bill to the effect that Ministers shall consult on the terms of an order with specified persons or bodies who may have particular interest in these proposals?

10. Scottish Government response—

i. Emissions from domestic aviation and domestic shipping are considered to have been emitted from sources in Scotland and therefore fall within the scope of the Bill’s targets by virtue of section 13(a). An order made under section 14(1) of the Bill would designate a share of emissions from international aviation and international shipping as being attributable to Scotland. The effect of such an order would be to include these emissions within those which count towards the reduction targets set in the Bill. This does not amount to specific targets for either the aviation or the shipping industries because the Bill’s targets apply to Scotland’s emissions taken as a whole, not to individual sectors. This, combined with the requirement in section 14(3) that Scottish Ministers request advice from the relevant body (the expert Committee on Climate Change or Scottish equivalent), and the related requirement to publish a statement setting out any reasons for not following that advice should that be the case, meant that it was not felt necessary to require consultation on the terms on any order made under section 14(1).

Section 18 - Carbon units and carbon accounting

11. The Committee notified the Scottish Government that it does not favour the use of the lesser degree of scrutiny of negative procedure for second or subsequent regulations, as provided for in section 64(7)(b) in relation to section 18(1), rather than affirmative procedure.

12. The Committee asked the Scottish Government—

(a) whether it could re-consider if all regulations under section 18 could be by affirmative procedure, and

(b) if it does not take this view, if it could fully explain and justify to the Committee why it is considered appropriate that the first use of the regulation-making power under section 18 together with any regulations making provision specifying a carbon unit of a kind not previously specified) should be subject to affirmative procedure, whereas all other second or subsequent regulations under section 18 should be subject to negative procedure?

13. Scottish Government response—

i. The Scottish Government does not take the view that affirmative resolution is necessary for all regulations made under section 18. Once a scheme is established under section 18(1) for registering or otherwise keeping track of carbon units, including the establishment and maintenance of accounts for holding such units, and the designation or establishment of a person or body to administer
the scheme, it is considered that any further regulations made under section 18(1) would be used simply to vary the operation of this scheme.

ii. For example, a second or subsequent set of section 18(1) regulations might be necessary at some point in the future to create an additional account within which carbon units may be held because of changes to the way in which carbon units are traded at a UK or international level. This is considered to be an administrative procedure. Similarly, it may become necessary to change the level of the charges that users of the scheme are required to pay, to cover the reasonable operating costs of the scheme. Changes of these types would not fundamentally alter the carbon accounting scheme established in the first set of regulations made under section 18(1) and negative resolution is therefore considered sufficient for second and subsequent regulations which seek to make such amendments.

iii. By comparison, specifying a new type of carbon unit would have a significant effect because of the direct relevance to the net Scottish emissions account. Regulations making such a specification would therefore be subject to affirmative resolution.

iv. This follows the approach taken in the equivalent sections of the UK Climate Change Act (sections 26 and 28).

Section 36 - Duties of public bodies relating to climate change

14. The Committee asked the Scottish Government—

- Whether consideration was given to the type of ‘public bodies’ which could be subject to climate change duties and, if so, whether ‘public bodies’ for purposes of this section could be better defined;

- Whether consideration was given to providing a definition of ‘climate change duties’ which did not refer back to section 36(1) and, if so, whether ‘climate change duties’ for purposes of this section could be more specifically defined; and

- Given that climate change duties are not precisely defined and given that any order under section 36 could potentially affect a very wide range and large number of public bodies, whether consideration was given to providing for a broader range of persons whom the Scottish Ministers are obliged to consult under section 36(4) and (5)?

15. Scottish Government response—

i. In response to part (a) of the question, section 19(5) of the Bill provides that the term ‘public body’ means any body with a function of a public nature. This definition applies to section 36 by virtue of section 65 of the Bill. When drafting the Bill, consideration was given to the lists of public bodies in both the Freedom of Information (Scotland) Act 2002 and the Public Appointments and Public Bodies etc. (Scotland) Act 2003. However, given that the policy intention is only to use
the powers in section 36 when it is considered necessary in the future (about which more detail is given below) it was not felt appropriate to list the bodies to which the duties might be applied. It was considered more appropriate to use the general term ‘public bodies’.

ii. Apart from the set of specific provisions in Part 5, the Climate Change (Scotland) Bill is principally designed to set long-term statutory emissions reduction targets for Scotland and to establish the framework of annual targets, reporting and scrutiny to drive the policies for delivering the emissions reductions necessary for meeting these targets. The public sector can act as an exemplar by reducing its own emissions in line with the Bill’s targets. The Scottish Ministers wish to work in partnership with public bodies to achieve this but recognise that as emissions reductions become more difficult and more expensive to achieve it may become necessary to place duties on certain public bodies to take specific action. If this does become necessary, section 36(6) of the Bill specifically requires Scottish Ministers to co-operate with relevant public bodies to help them comply with their climate change duties.

iii. It is not possible to know exactly which public bodies may need to become subject to statutory climate change duties at various points over the course of the forty years that the Bill’s framework is designed to cover. If the Bill were to include a list of the public bodies relevant to section 36 it would be highly likely that bodies would need to be included in the list for the sake of completeness but upon which climate change duties may never need to be applied. This approach could also limit the Bill in terms of future application to any new bodies which are created between now and 2050. It was therefore considered appropriate to retain flexibility as to which public bodies climate change duties might be applied to.

iv. Section 36(5) of the Bill contains the safeguard that Scottish Ministers must consult with associations of local authorities or other persons (it is intended that this should be the representative bodies for the part of the public sector in question or, if there are none, the specific public bodies themselves) before laying a draft of a statutory instrument containing an order under section 36(1). Scrutiny is further strengthened by the requirement that such orders be subject to affirmative resolution.

v. In response to part (b) of the question, it was never the intention to define ‘climate change duties’ more specifically elsewhere in the Bill. Given the complex nature of climate change and the long-term nature of the emissions reduction framework established by the Bill, it was felt that this power should be flexible enough to be used in reaction to or anticipation of circumstances which cannot be foreseen at the present time.

vi. It is intended that the term ‘climate change duties’ be sufficiently broad to encompass measures designed to mitigate specific public bodies’ contribution to climate change, ways in which the bodies may adapt to the effects of climate change, or ways in which they may carry out their functions with regard to the objectives of mitigation and adaptation.
vii. In response to part (c) of the question, the Scottish Ministers are required to consult with associations of local authorities or other persons as the Scottish Ministers consider appropriate. As explained above, the term ‘other persons’ is intended to cover representative bodies for the part of the public sector in question (other than local authorities) should they exist, or, if they do not, the specific public bodies themselves. However, because the specific public bodies to which duties might be applied are not listed in the Bill in order to retain the flexibility sought for this power, it was not considered appropriate to set out a more specific or broader list of persons whom the Scottish Ministers would be obliged to consult.

Section 37 – Guidance to relevant public bodies

16. The Committee asked the Scottish Government for more information as to the function and likely content of this guidance.

17. Scottish Government response—

i. Guidance issued under section 37(1) will indicate how specific climate change duties should be discharged. This is intended to assist in developing consistency of approach across those public bodies to which specific section 36 duties apply. For example, and for illustrative purposes only, a duty might be applied requiring certain public bodies to take account of greenhouse emissions in new procurement contracts. Associated guidance issued under section 37 might set out examples of best practice as to how this might be achieved.

Section 46 - Variation of permitted times for making muirburn

18. The Committee asked the Scottish Government—

whether or not it considers it would be appropriate to consult the hill farming community, landowners and others who may be affected on the dates which may be appropriate for muirburn, in advance of making an instrument.

19. Scottish Government response—

i. The Scottish Government agrees that it would be appropriate to consult with parties likely to be affected by any proposed change to the times at which muirburn may be made. However, the Scottish Government considers that the introduction by section 46 of the Bill of provision in a new section 23A of the Hill Farming Act 1946 to create a statutory duty to consult would be impractical. Unlike sections 36(4) and 37(2) of the Bill, which require the Scottish Ministers to consult with, among other persons, associations of local authorities prior to placing climate change duties on public bodies and giving guidance about those duties, there is no one organised body or group of individuals that specifically or particularly represent the interests of those who are involved in the practice of making muirburn. In addition, the Scottish Government is not aware of any existing statutory body or agency with any particular role or statutory function in relation to muirburn.
ii. Muirburn may be made by any person, both a landowner or a tenant, anywhere in Scotland. The Scottish Government considers that in the absence of any organised persons or bodies representing those who may make muirburn, its standard practice of consulting on a non-statutory basis with potentially interested parties is appropriate and reasonable in the circumstances. Such a means of consultation will help to ensure that the views of those generally with an interest in muirburn are obtained and taken into account, as opposed to obtaining views from persons or groups whose remit or experience does not in particular concern the activity of muirburn.

Section 47 - Power to modify functions of Forestry Commissioners

20. The Committee asked the Scottish Government—

Given that the proposed power under section 47(1) to modify, by order, the functions of the Forestry Commissioners in or as regards Scotland does not contain any limitation with respect to the nature, scope or extent of any such modification, has the Scottish Government given consideration to the imposition of a restriction, within the power, on the nature, scope and extent of any modification which may be made; and, whether or not any such consideration has been given, does the Scottish Government not consider that such a limitation would be both feasible and appropriate?

21. Scottish Government response—

i. The Scottish Government considers that the power in draft section 47(1) to modify the functions of the Forestry Commissioners in or as regards Scotland is limited by section 47(2) to the effect that the Scottish Ministers may only make such an order where they consider it necessary or expedient to do so in order to comply with their duty under sections 1, 2 or 3(1)(b) to meet the targets set out in those provisions, or otherwise in relation to climate change.

ii. Any modifications to the functions of the Forestry Commissioners in or as regards Scotland contained in an order under section 47(1) may therefore only be made for purposes demonstrably related to the mitigation of the effects of climate change. The Scottish Government's position is that consideration has been given to limiting the power in section 47(1), and that it is both feasible and appropriate that the power should be limited in such a way that it requires to relate to climate change purposes.

iii. The Committee will also have noted that, in terms of section 64(4), an order to be made under section 47(1) will be subject to affirmative resolution procedure, thereby ensuring that any such order will require to be debated and approved by the Parliament before it can be made.

Section 52(1), (2) and (4) - Waste prevention and management plans

22. The Committee asked the Scottish Government—
(a) What kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

(b) Would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?

Section 53(1), (2), (3) and (5) - Information on waste

23. The Committee asked the Scottish Government—

(a) What kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

(b) Would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?

Section 54(1), (2), (4) and (5) - Recyclable waste: facilities for deposit etc.

24. The Committee asked the Scottish Government—

(a) What kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

(b) Would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?

Section 56(1), (2), (3) and (6) - Procurement of recyclate - regulations

25. The Committee asked the Scottish Government—

(a) What kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

(b) Would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?
Scottish Government response—

i. In respect of sections 52, 53, 54, and 56 the Committee asks about the classes of persons on whom the Scottish Government believes duties under eventual regulations may fall. It is not at present possible to be specific, since in none of these cases has the Scottish Government yet drawn up firm proposals for regulation. In addition to policy considerations (which might, for example, mean exemptions for small businesses or particular sectors), actual regulations, which are not foreseen in the current economic circumstances, will have to be drawn up according to the economic, market and environmental position at the time. There is, however, no intention to apply regulations made in terms of any of these sections to private individuals acting in a non-business capacity.

Section 57(1), (2) and (4) – Targets for reduction of packaging etc.

26. The Committee asked the Scottish Government to fully explain and justify (given that no such explanation is given in the Delegated Powers Memorandum) why—

(a) unlike the approach taken in Part 1 of the Bill, the Government requires to take the powers in section 57(1) and (2), in so far as they propose that any targets without limit (set by any method) may be set for the reduction of packaging or the reduction of emissions produced by packaging, or requirements on persons to comply with those targets;

(b) given that the Memorandum refers to the possibility of targets being imposed on retailers, the Government requires to impose those targets or requirements on any types of persons (individuals or legal persons) who might be specified in the Regulations, and

(c) On what basis it has considered that there should be no requirements on the face of the Bill to the effect that Ministers shall consult on the terms of the regulations with specified persons or bodies that may have particular interest in the proposals?

27. Scottish Government response—

i. With regard to part (a) of the question, concerning the power in section 57(1) to set targets, the Bill requires that this power be exercised through regulations. A different approach from that taken in Part 1 is required since producers of packaging are already subject to a producer responsibility regime. In Scotland, this is set out in the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (SI 2007/871). These, in turn, implement the requirement in Article 7 of the Packaging and Packaging Waste Directive (94/62/EC) that return, collection and recovery systems be established. The Scottish Government does not consider it appropriate to transfer responsibilities to itself for meeting packaging targets when a statutory scheme placing considerable responsibilities on producers is already in place.
ii. Furthermore, in terms of waste in general, producer responsibility is a requirement of Community law - see, for example, Article 8 of the recently revised Waste Framework Directive (2008/98/EC). The power to set targets in respect of packaging is obviously less far-reaching in its effects on life in Scotland than the targets in Part 1 may potentially be. It is not limited because very different targets may be appropriate for different forms of packaging on different kinds of product - and indeed the appropriate targets will vary widely according to the state of the market.

iii. Part (b) of the Committee's question on Section 57 asks why the Bill refers to the imposition of targets on persons other than retailers. A great deal of the packaging in circulation does not pass through the hands of retailers, so requirements to reduce these forms of packaging would need to be set for other categories of person. Even where packaging does pass through the hands of retailers, it may well be appropriate to place reduction requirements on producers instead. (As indicated above, these persons are the object of existing producer responsibility legislation in any case.) This does not mean that the Delegated Powers Memorandum's reference to retailers was necessarily wrong. Measures to reduce the amount of packaging reaching consumers in particular, for example, would be likely to be addressed at retailers.

iv. Part (c) of the Committee's question on Section 57 concerns the lack of a specific provision on consultation. The Scottish Government's usual practice is to consult with interested parties when making secondary legislation. It seemed, therefore, unnecessary to require this on the face of the Bill.

Section 64 – Subordinate legislation

28. The Committee asked the Scottish Government—

Why (in contrast for example to the approach taken in sections 74 and 75 of the Judiciary and Courts (Scotland) Act 2008))—

(a) it is considered that section 64(3) requires to contain a power for orders or regulations to modify any enactment (including the Act) by affirmative procedure (a “Henry VIII power”), without any reference to the purposes of such modification, for example, for the purposes of making consequential, incidental, transitional, transitory, or savings provisions; and

(b) if the Government could re-consider whether the power to make supplementary, incidental or consequential provision could be limited to the purposes of giving full effect to, any provision of the Act, and the power to make transitory, transitional or saving provisions could be limited to being in connection with the coming into force of any provision of the Act?

29. Scottish Government response—
i. With regard to part (a) of the question, the Scottish Government considers that it is necessary for the power in section 64(3) to be available for use in wider circumstances than those prescribed in section 64(2)(b) for making consequential, incidental, transitional, transitory, or savings provision.

ii. For example, the power in section 47 enables the Scottish Ministers to modify the functions of the Forestry Commissioners in or as regards Scotland. It is likely that doing so will necessitate the modification of enactments, because the existing functions of the Forestry Commission are mainly set out in the Forestry Act 1967. The modification of that Act would be the main method by which the power would be used, rather than being merely ancillary. Section 36(1) provides a similar case because it might be necessary to modify enactments applying to local authorities, for example, to reflect the new climate change duties.

iii. This is a wide-ranging Bill and it is difficult to know in advance which powers might need to modify enactments. That is why section 64(3) is expressed as applying generally.

iv. Turning to part (b) of the question, the Scottish Government considers that dividing the section 64(3) powers in the way described would result in some of the ancillary powers being subject to the ‘full effect’ test and others subject to the ‘in connection with the coming into force’ test. As previously stated, it is difficult in advance to know which of the ancillary powers will be needed in practice. The Bill contains such a wide range of different powers that a particular set of subordinate legislation in a particular subject area might, for example, need to ‘mix and match’ a consequential provision with a saving. It was not felt that having to use different tests in this manner would add to the level of scrutiny which will have to be applied.

v. The Judiciary and Courts (Scotland) Act 2008, contains separate standalone “ancillary” and “transitional provision etc.” powers in sections 74 and 75, but it also contains a full list of incidental etc. powers within section 71. Section 64(2) (b) of the Climate Change (Scotland) Bill takes a similar approach to section 71(2) (a) in that Act.

I hope this information is helpful to the Committee.
CLIMATE CHANGE (SCOTLAND) BILL

Transport, Infrastructure and Climate Change Committee

Stage 1 Report

SCOTTISH GOVERNMENT RESPONSE

5 May 2009
## High-level Summary

<table>
<thead>
<tr>
<th>The Committee welcomes the Bill and endorses its general principles.</th>
<th>Scottish Ministers welcome the Committee's support for the Scottish Government's world leading legislation to tackle climate change.</th>
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<tbody>
<tr>
<td>The Committee affirms its support for the inclusion of the six key greenhouse gases within the Bill and agrees with the general balance of opinion that the 80% emissions reduction target for 2050 is the minimum which is necessary.</td>
<td>Scottish Ministers welcome this recognition and support for these key elements of the Bill.</td>
</tr>
<tr>
<td>The Committee believes that the framework for emissions reductions targets set down for the period between 2010 and 2019 needs to be more robust. The Committee wishes to see the interim target brought forward from 2030 to 2020, in line with changes proposed by the UK Government in advance of international discussions due to take place in Copenhagen later in 2009.</td>
<td>The Scottish Government has committed to introducing a new 2020 interim target in the Bill to replace the existing 2030 target. This new target will be pivotal in incentivising early action to reduce greenhouse gas emissions during the next decade, steered by the statutory annual targets to be set in line with the 2020 target.</td>
</tr>
<tr>
<td>The Committee calls on the Scottish Government to put before the Parliament at the earliest possible date a comprehensive strategy document outlining how it intends to achieve the targets set out in the Bill.</td>
<td>The Strategic Overview Project looks at the high level measures required in each sector to meet our 2020 targets and the transformational measures that we will need to achieve our 2050 target and deliver a low carbon economy. One of the key outputs of the Strategic Overview Project will be an Indicative Delivery Plan which will be published in summer 2009. This will involve engagement with key stakeholders and act as a bridge to the more detailed statutory Report on Policies and Proposals which will set out the measures to deliver our annual targets to 2022, to be published summer 2010.</td>
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## Recommendation 1

The Committee recommends that the Scottish Government increases its efforts to identify the means by which the 18 to 20 month reporting time [for reporting emissions] can be reduced and keeps this Committee up to date with its progress in meeting this objective. The Committee notes the potential expertise offered by SEPA in the field of emissions monitoring and recommends that the Scottish Government considers how this could best be employed to support the Bill framework.

A review of the process of producing the annual disaggregated greenhouse gas inventories has been commissioned jointly by the UK Government and Devolved Administrations. The review will consider the practicability of whether data can be published earlier, as well as the potential to produce provisional Scottish emissions estimates in advance of the final Scottish inventory. The Committee will be advised of the progress of this work.

SEPA is among the key data providers to the UK’s emissions inventories. The Scottish Government will continue to work with SEPA to explore how it can support the delivery of climate change objectives.

## Recommendation 2

The Committee recommends that the Scottish Government investigates whether preliminary emissions data could be useful in informing Scottish Government policy on climate change in advance of the availability of the official figures.

When producing the final annual assessment of Scottish greenhouse gas emissions, a significant amount of time is devoted to data quality assurance processes. As stated in response to Recommendation 2, the Scottish Government is reviewing whether data can be published earlier, and importantly without compromising accuracy.

The outcome of this work will also inform decisions around the use of provisional emission estimates in the future.
Recommendation 3
The Committee recommends that the Scottish Government clarifies what emissions data it intends to place in the public domain in order to allow the Parliament and other interested parties to scrutinise its performance in meeting its targets.

The annual 'Greenhouse Gas Inventories for England, Scotland, Wales and Northern Ireland' is the main source of information on greenhouse gas emissions in Scotland. This document is published annually and its reporting is consistent, as far as possible, with international reporting guidelines.

As confirmed to the Committee in March 2009, Scottish Ministers are committed to publishing the formal advice they receive from the UK Committee on Climate Change on annual targets.

Recommendation 4
The Committee recommends that a mechanism for reporting on consumption should be established which is in addition to, but separate from, the framework of targets set out in the Bill.

The Scottish Government recognises the growing importance of the need to consider the greenhouse gases associated with Scotland's consumption [of goods and services] and has noted the Committee's recommendation.

The Scottish Government has established a National Indicator to reduce the overall ecological footprint of Scotland's consumption and production.

The ecological footprint gives an overall measure of the global impact of our everyday choices and offers an estimate of the land and sea area needed to provide all the energy, water, transport, food and materials that we consume.

Research is underway to update Scotland's ecological, and carbon, footprint. Outputs of the current work are expected in 2010.

The complex nature of the calculation of this indicator means there is a substantial lag in providing estimates. Data lag can exceed three years.
<table>
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<tr>
<th>Recommendation 5</th>
<th>Note:</th>
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<td>The Committee recommends that the arrangements for reporting on consumption should be flexible enough to take account of developing international understanding of the methodology for consumption reporting.</td>
<td>Noted.</td>
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<th>Recommendation 6</th>
<th>Note:</th>
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<td>The Committee is attracted to a suggested approach in which data on cumulative emissions should form part of the reporting regime associated with the Bill, but be treated separately from the monitoring of progress on meeting the annual targets. The Committee recommends that the Scottish Government responds to this suggestion ahead of the start of Stage 2 of the Bill.</td>
<td>Noted.</td>
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<th>Recommendation 7</th>
<th>Note:</th>
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<td>The Committee recommends that appropriate provisions are included on the face of the Bill to require a limit on international credits to be set by Ministers subject to the approval of Parliament.</td>
<td>Scottish Ministers will bring forward an amendment at Stage 2 to introduce a requirement for Ministers to set a limit on the use of international credits subject to the approval of Parliament.</td>
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<th>Recommendation 8</th>
<th>Note:</th>
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<td>The Committee therefore recommends that the Scottish Government should be required, in setting out its approach to the meeting of the targets, to define and quantify how each of the four key sectors; land-use, energy generation, energy efficiency and transport are expected to contribute to overall emissions reductions.</td>
<td>The Government's draft Indicative Delivery Plan, to be published in summer 2009, will set out the key sectors for emissions reductions - heat supply and demand, electricity supply and demand, transport, rural land use and waste - and identify where action will have to be taken to meet Scottish targets.</td>
</tr>
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## Aviation and shipping

| Recommendation 9 |  |
|------------------|  |
| The Committee recommends, as a first step, that the Scottish Government considers how the multiplier effect for radiative forcing can be incorporated into the data on aviation emissions, so that additional damage to the atmosphere that occurs when emissions take place at high altitude is taken into account. | Section 14(3) of the Bill requires Scottish Ministers to request expert advice before bringing forward an order to commit to a methodology to calculate Scotland’s share of international aviation and international shipping emissions. Scottish Ministers intend to seek this advice from the UK Committee on Climate Change and anticipate the Committee will offer a view on radiative forcing. This advice will be sought in advance of bringing forward secondary legislation under this section – required by June 2010. |
| The Committee suggests that the Scottish Government requests advice from the UK Committee on Climate Change on how best to measure and incorporate these effects. |  |

| Recommendation 10 |  |
|-------------------|  |
| The Committee requests clarification on the approach which the Scottish Government intends to take in relation to shipping emissions in advance of bringing forward an order under section 14 of the Bill. | The Scottish Government is content to commit to consulting with the Committee on future orders under section 14. |

| Recommendation 11 |  |
|-------------------|  |
| The Committee recommends that there should be separate provisions covering aviation and shipping emissions in the Bill. | Section 14 of the Bill currently offers a flexible approach, permitting separate orders on international aviation emissions and international shipping emissions to be brought forward. |
**The interim target and targets to 2019**

<table>
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<tr>
<th>Recommendation 12</th>
<th>The Scottish Government intends to introduce an amendment to the Bill to introduce a new 2020 target to replace the existing 2030 target.</th>
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<tr>
<td>If the government is now willing to set a challenging interim target for 2020, it must buttress that approach either by specifying percentage annual targets between 2010 and 2020 or by bringing significantly forward the date by which it expects Scotland to be on track with a 3% annual reduction in emissions.</td>
<td>In line with the UK Committee on Climate Change’s first report to the UK Government (December 2008), Scottish Ministers will propose that this target will be set at “at least 34%”.</td>
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<tr>
<td>The Committee recommends that the Scottish Government should introduce more challenging provisions into the Bill for the period 2010 to 2019 in order to promote early action to reduce emissions.</td>
<td>Scottish Ministers also intend to introduce an amendment requiring that the interim target must be “at least 42%” once the EU adopts at least 30% as its target for greenhouse gas emission reduction over the period 1990 to 2020.</td>
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<tr>
<td>The Scottish Government should accompany a challenging interim target for 2020 with either specifying percentage annual targets between 2010 and 2020 or by bringing forward the date by which it expects Scotland to be on track with a 3% annual reduction in emissions.</td>
<td>A new enabling power will accompany the amendments for the new 2020 target to allow the Scottish Ministers to increase the 2020 target.</td>
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<td>As already indicated the Scottish Government will formally seek the advice of its independent advisers, the UK Committee on Climate Change, for recommendations on the annual targets to 2022. These annual targets will be brought forward for agreement by the Scottish Parliament by 1 June 2010.</td>
<td>Scottish Ministers are determined that this new 2020 target will provide a meaningful incentive to take early action to reduce emissions in the short term to 2020.</td>
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<tr>
<td>In setting the 2020 target the Scottish Government has considered the best evidence available, principally the first report of the UK Committee on Climate Change, in addition to internal analysis by experts within the Scottish Government and information on UK carbon budgets to 2022 announced as part of the Chancellor’s Budget Statement.</td>
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<td>Recommendation 13</td>
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<td>The Committee identified it wished further information on the scientific and policy advice on which the Scottish Government is basing these decisions on, the extent to which it has calculated the financial implications of the decisions and a robust appraisal of any impact on jobs.</td>
<td>The Stern Report and the UK Committee on Climate Change’s first Report both clearly set out that the cost of inaction outweighs the costs of tackling climate change. This is explained in the Financial Memorandum for the Bill.</td>
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<tr>
<td>As the Scottish Government takes forward its work on delivery and the development of the Scottish Report on Policies and Proposals, we will be refining our understanding on the costs of delivery and the consequential opportunities for jobs and sustainable economic growth by moving to a low carbon economy.</td>
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## Achieving the targets

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<th>Recommendation 14</th>
<th>The Committee recommends that Ministers bring forward proposals for an engagement strategy as part of their implementation plan for the Bill.</th>
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<td>The Scottish Government will publish a first version of the Indicative Delivery Plan in summer 2009. Officials will be engaging on this with key stakeholders over the summer and these discussions will help take forward the work to develop the Scottish Report on Policies and Proposals. The Scottish Ministers see such engagement as a key aspect of implementing the Bill over the short, medium and long term.</td>
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<tr>
<th>Recommendation 15</th>
<th>The Committee calls on the Scottish Government to ensure that its statutory ‘report on proposals and policies’ provides a comprehensive overview of the potential contribution of all sectors in society to achieving emissions reductions.</th>
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<td>This is the purpose of the Scottish Report on Policies and Proposals - to set out the measures the Scottish Ministers believe are necessary to deliver the annual targets from 2010 - 2022.</td>
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<tr>
<th>Recommendation 16</th>
<th>The Committee requests that the Scottish Government provides a clear timescale for the production of the strategy overview discussion document, and an indication as to its contents, before Stage 2.</th>
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<td></td>
<td>The first version of the Indicative Delivery Plan will be published in summer 2009. It will set out, at a strategic level, the measures required in the key sectors to meet the 2020 target and the transformational measures necessary to meet Scotland’s long term emissions reduction targets. This work will draw on the best available evidence including the first report of the UK Committee on Climate Change.</td>
</tr>
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</table>
Advisory Functions

Recommendation 17

The Committee recommends that the Scottish Government enters into discussions with the UK Committee on Climate Change with a view to conducting a realistic analysis of the nature, level and frequency of the advice it is able to provide and the additional dedicated financial and human resources which might be required.

This Committee therefore further recommends that this information should be made available to the Parliament prior to the beginning of Stage 2. If the UK Committee on Climate Change is not able to provide the necessary commitments in respect of its resources and engagement with Scottish interests, then the Scottish Government should consider what other models might be appropriate.

Scottish Ministers are pleased that the Committee supports its use of the UK Committee on Climate Change in the first instance for expert advice.

The Minister for Transport, Infrastructure and Climate Change confirmed to the Committee by letter on 18 March that Scottish Ministers will take expert advice from the UK Committee on Climate Change prior to bringing forward an order to establish annual targets. Scottish Ministers have confirmed that they will publish this advice.

Scottish Ministers believe it would be premature to seek that advice formally when the Parliament is still in the process of scrutinising the Bill. Meantime officials continue to work closely with the UK Committee to ensure that the necessary work is in place to enable the Committee to give appropriate advice on annual targets when required.

Following Royal Assent, there will be a need to discuss with the UK Committee the advice and support it can provide to the Scottish Government more generally. Section 38 of the Climate Change Act 2008 provides a statutory context for this – placing a duty on the UK Committee to provide advice to the national authorities on request, either in relation to the UK Act, climate change more generally, or to Devolved Administration targets. The UK Committee also has a well-established business planning process, involving a Sponsor Group comprising representatives of UK Government and Devolved Administration representatives. The annual business planning process provides an opportunity for the UK Government and Devolved Administrations to request advice under section 38 of the 2008 Act and is a mechanism for ensuring that the UK Committee can plan and manage its work and resources effectively.

As noted in the Financial Memorandum, Scottish Ministers believe that requesting advice from the CCC is more cost-effective than any other option. Should this position change for any reason, Ministers would of course investigate alternative options for receiving expert advice – for which the Bill makes provision.

The UK Committee’s corporate plan will be published shortly and will reflect Scottish Government requirements. Scottish Ministers are content to provide further information on this before Stage 2.
<table>
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<th>Reporting Duties</th>
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**Recommendation 18**

The Committee notes the requirement in the Bill for Ministers to provide a statement to the Parliament in particular circumstances, such as if an annual emissions target has not been met.

The Committee considers that this provision is welcome, however, it notes that a requirement only to give a statement to the Parliament would not allow full and robust questioning of Ministers.

The Committee considers that a more appropriate option would be that a replacement provision be placed in the Bill requiring Scottish Ministers to make themselves available to attend a public meeting of the parliamentary committee (or committees) with climate change issues within its remit, to give evidence on their reports on meeting annual targets.

Scottish Ministers are committed to open and transparent scrutiny of their actions to deliver the new Scottish climate change targets.

The requirement for Ministers to provide an annual statement for Parliament reflects this and offers the Parliament an opportunity to question Ministers.

It is at the discretion of the Parliament whether it chooses to accept such an offer and the length it assigns to questioning the Minister. Such a statement can also be accompanied by one or more invitations to the relevant lead Minister to give evidence to Parliamentary Committees.

Section 34 of the Bill provides a wide selection of mechanisms by which Parliament can hold Scottish Ministers to account. It includes an offer to meet with all the Conveners of Parliamentary Committees.

These provisions far exceed what has ever been offered to the Scottish Parliament in primary legislation and demonstrate the willingness of Scottish Ministers to extend the boundaries of Parliamentary scrutiny in recognition of the significance and crosscutting nature of climate change.

The Government regrets that the Committee do not appear to have accepted these provisions in the spirit in which they were intended.

The character of the engagement between Government and Parliament should reflect the need for all policy areas to act on Climate Change.

The Committee has an opportunity to amend these provisions at Stage 2 if it wishes.
**Duty on public bodies**

<table>
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<tr>
<th>Recommendation 19</th>
<th>Scottish Ministers believe it is not appropriate to apply rigid and inflexible duties in primary legislation. The Bill contains enabling powers to permit such duties to be applied in the future if the voluntary approach fails.</th>
</tr>
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<tr>
<td>The Committee recommends that the Scottish Government should create a general duty on public bodies to take account of climate change in their activities, although the Committee is of the view that concerted action will be required in order to translate this general duty into meaningful action.</td>
<td>Scottish Ministers are very supportive of the current initiatives being undertaken to reduce greenhouse gas emissions in the public sector. One noteworthy example is the commendable support that CoSLA and Scottish Local Authorities have shown in taking forward Scotland’s Climate Change Declaration. Forcing inflexible and unchangeable duties on such bodies in this Bill threatens to undermine the excellent work already underway in this area.</td>
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<td>If in time additional efforts or focus are required, either widely across the public sector or more specifically in targeted areas, the enabling powers in the Bill allow this to be taken forward in a consultative manner, with the support of Parliament.</td>
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<td></td>
<td>Scottish Ministers maintain that this voluntary response is the better approach rather than applying a duty on public sector bodies now – with the powers available in the Bill able to be called into play if considered necessary at some future date.</td>
</tr>
</tbody>
</table>
Recommendation 20

The Subordinate Legislation Committee recommended that the wide scope of the enabling power in section 36 of the Bill could be mitigated to some extent by the provision of a list of public bodies to whom the power is to apply along with a power to add to the list subject to affirmative procedure.

The Scottish Government has considered this recommendation. It considers that providing a list of public bodies in the way suggested by the Subordinate Legislation Committee would not be in line with the approach adopted in the Freedom of Information (Scotland) Act 2002. The 2002 Act includes a list of this kind because the Act itself places direct duties on the bodies listed. The provisions in the Climate Change (Scotland) Bill do not apply a climate change duty on public bodies but instead create an enabling power under which such duties can be created in secondary legislation.

Including in the Bill a list of public bodies to which a climate change duty might be applied in the future could cause significant confusion for those bodies. It would be highly likely that bodies would need to be included in the list for the sake of completeness but upon which climate change duties may never need to be applied. If multiple duties with differing purposes are created, some bodies may also be subject to different combinations of duties.

The Scottish Government’s preference is to include details of public bodies to which climate change duties apply in the secondary legislation used to create those duties. This approach will be clearer for the bodies involved and will avoid the need to amend the Bill every time a new duty is created under the enabling power in section 36(1).

<table>
<thead>
<tr>
<th>Recommendation 20</th>
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<tbody>
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</tr>
<tr>
<td>Including in the Bill a list of public bodies to which a climate change duty might be applied in the future could cause significant confusion for those bodies. It would be highly likely that bodies would need to be included in the list for the sake of completeness but upon which climate change duties may never need to be applied. If multiple duties with differing purposes are created, some bodies may also be subject to different combinations of duties.</td>
</tr>
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<td>The Scottish Government’s preference is to include details of public bodies to which climate change duties apply in the secondary legislation used to create those duties. This approach will be clearer for the bodies involved and will avoid the need to amend the Bill every time a new duty is created under the enabling power in section 36(1).</td>
</tr>
</tbody>
</table>
### Adaptation

**Recommendation 21**

The Committee supports the adaptation provisions in the Bill and looks forward to considering the first report in this subject published by the Scottish Government on this subject.

The Scottish Government welcomes the Committee's support for the adaptation provisions.

### Muirburn

**Recommendation 22**

On the basis of the comments made by the Rural Affairs and Environment Committee and following the Minister for Environment's stated intention to bring forward an amendment to the muirburn provisions at Stage 2, the Committee is content with these proposals.

The Scottish Government welcomes the Committee's support for the muirburn provisions and for the Government's intended amendment at Stage 2.

Annex A contains a response to the specific comments made by the RAE Committee.
<table>
<thead>
<tr>
<th>Recommendation 23</th>
<th>Recommendation 24</th>
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<tr>
<td>This Committee endorses the recommendations in the report of the Rural Affairs and Environment Committee and notes that the Scottish Government has recently changed its position on one of these recommendations – the leasing proposals. This Committee notes that further clarification may be needed on the implications of the Scottish Government's policy change, particularly the status of the funding for the mitigation of climate change which was mentioned in the Policy Memorandum as resulting from this proposal.</td>
<td>Now that the leasing proposal is no longer being taken forward, the Scottish Government needs to explore other options to achieve the annual 10,000 hectare woodland creation target. The ability to form companies for renewable energy development will provide funding in the medium to long term. FCS is also exploring options for help in the short term, including improving woodland creation measures in the SRDP and further use of the existing 'repositioning' programme (whereby woodland of low public benefit is sold to provide income to buy land which can be planted for greater public benefit). Annex A details responses to the RAE Committee recommendations.</td>
</tr>
</tbody>
</table>

The Committee recommends that in future, where there is a strong possibility that legislative proposals will be substantially altered by the outcome of a consultation, they are only brought to the Parliament once that consultation has been completed and the results properly assessed. | The Committee's recommendation is noted. Scottish Ministers agree that Bill provisions should be fully assessed before they are brought to Parliament. However in this case the leasing proposal arose after the Bill process had begun. The proposal had the potential to realise £200m, so it was certainly worthy of serious and immediate consideration. Gauging public opinion was, of course, essential, and the consultation exercise, analysis of responses, and determination of recommendations were carried out as quickly as possible (in light of the ongoing Bill) but also with due diligence. |

The Committee will wish to note that the Economy, Energy & Tourism Committee recommendations are detailed in Annex B |
**Waste**

<table>
<thead>
<tr>
<th>Recommendation 25</th>
<th>Recommendation 26</th>
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<tr>
<td>This Committee endorses the conclusions of the RAE Committee's report on the Bill and calls on the Scottish Government to respond in full to its recommendations. The RAE Committee notes that there exists opposition to the inclusion of this enabling power within the Bill. This Committee notes that the carrier bag proposal in 2006 was subject to a separate and full bill scrutiny process, rather than being included as a piece of enabling legislation within a wide-ranging bill.</td>
<td>The Scottish Government welcomes the action being taken by retailers not only in respect of charging, but also on other ways of reducing bag use. This action is being taken in the context of changed public attitudes. As the Cabinet Secretary for Rural Affairs &amp; the Environment informed the RAE Committee on 4 February 2009, we &quot;would not expect to use the provisions if we achieved the same objective outwith legislative routes. However, we are not yet at that point and it is important that Parliament and the Government have the wherewithal to achieve our objectives for Scotland.&quot;</td>
</tr>
<tr>
<td>Annex A details responses to the RAE Committee recommendations. The conclusions of the RAE report on the Bill called for the Scottish Government to have regard to a range of factors. The point at which these factors will come into play is that at which any of the powers proposed in the Bill are used to make legislation. At that point the Scottish Government will have regard to these factors to the extent that they are relevant to legislation being put forward.</td>
<td></td>
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<tr>
<td>In the interim many of the issues the Committee identified will be addressed in a consultation on a revised National Waste Management Plan for Scotland, which will be issued later in 2009. This national plan is the proper context to address many of these themes, which are considerably wider in their application than in the Climate Change (Scotland) Bill.</td>
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<td>As regards carrier bags in particular, the scrutiny afforded to this issue in 2006 has informed the development of proposals now. Notably, the current proposals are not restricted to only plastic bags.</td>
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</table>
### Recommendation 27

The Committee recommends that the Scottish Government reflects seriously as to whether its approach in relation to this provision is the correct one. The Committee is not convinced as to the value of this approach, and notes that the timing of the proposal may owe more to the availability of this Bill as a suitable legislative vehicle for introducing enabling powers rather than the powers being urgently required.

The Scottish Government notes that a similar provision is now in force in all other parts of the UK. Indeed, the Environment Minister of the Welsh Assembly Government has instructed her officials to prepare regulations. Such legislation could provide useful lessons. At the very least, it is appropriate that Scotland should have a similar weapon in its armoury at a time when this issue is under active consideration elsewhere in the UK.
### Conclusion 28
The Committee acknowledges the uncertainty over some of the costs associated with the Bill, particularly in relation to the performance of unproven technologies and methods for reducing carbon emissions. The Committee accepts that the Financial Memorandum adequately reflects these margins of uncertainty.

### Conclusion 29
The Committee notes the enabling nature of the Bill, particularly Part 5 and considers that the Financial Memorandum would have been stronger if modelling work had been carried out on the potential financial impact of the measures on businesses and public bodies. The Committee also considers that in a number of areas insufficient policy direction has been provided, which has made it difficult for local authorities and businesses to be able to assess the financial impact of the proposals.

The Scottish Government welcomes the acknowledgement by the Finance Committee that there is uncertainty over some of the costs associated with bringing forward long term targets for reducing carbon emissions and is pleased to note that the Committee accepts that the margins of uncertainty are adequately reflected in the Financial Memorandum.

The Scottish Government notes the Committee's views on the enabling powers in the Bill and the associated financial information provided in the Financial Memorandum.

The Committee will wish to note that the Financial Memorandum will be revised at Stage 2 to take account of changes to the Bill, including the Part 5 forestry and non-domestic building provisions.

Officials are also looking to include any new costing information which has become available since the introduction of the Bill. In particular, the UK Committee on Climate Change's first report in December 2008 and the UK Carbon budgets, announced by the Chancellor in April, are being scrutinised for additional information to help aid the financial information presented on the Bill.
The Committee notes that the Scottish Government is currently undertaking significant pieces of work to finalise some aspects of its policy, namely the Strategic Overview project, an options review on forestry proposals and the consideration of energy efficiency scenarios and considers that this work will provide vital indications of future costs. Given the significant implications of this work, the Committee would have preferred that it had been completed in time for its consideration of the Financial Memorandum to the Bill. As a result, the Committee expects to take an interest in scrutinising the financial impact of the outcomes of this work. The Committee, nonetheless, welcomes the Government's commitment that all substantive regulations will be accompanied by a fully costed regulatory impact assessment.

These points are noted.

Scottish Ministers welcome the Finance Committee's continuing scrutiny of the different policy objectives contained in the Bill and are happy to work with the Committee to provide further information as it becomes available in the future.

As confirmed to the Finance Committee, as the range of enabling powers in the Bill are brought forward for implementation, all secondary legislation instruments presented to Parliament for consideration will be accompanied by costed regulatory impact assessments.

As the Committee will be aware, the Financial Memorandum sets out the current understanding and knowledge on costs. Further detail on the costs of delivering measures to meet the 80% target can be found in the AEA Report "Mitigation against climate Change in Scotland: Identification and Initial Assessment of Policy Options" commissioned by the Scottish Government and published in November 2008. This can be found at:

http://www.scotland.gov.uk/Publications/2008/11/19142102/0

Work is ongoing through the Strategic Overview Project to refine the Scottish Government's understanding of the costs involved in delivering measures to meet the climate change targets. This work will continue as the statutory 'Report on Policies and Proposals' is developed for publication in 2010.
## Conclusion 31

The Committee has given notice that it may seek to track subsequent statutory instruments made under the provisions in the Bill and seek to scrutinise their financial implications.

## Recommendation 32

Given the long-term perspective of the Bill, and the wide range of policy streams that may contribute to its implementation, the Committee recommends that the Scottish Government should consider how it will monitor and control the cumulative costs of implementation.

1. Scottish Ministers welcome the Finance Committee’s continuing engagement with the Bill and its associated future statutory instruments. Scottish Ministers are happy to work with the Committee to provide additional information as it becomes available.

Scottish Ministers acknowledge the Finance Committee’s recommendation and will consider this carefully as delivery plans crystallise and carbon accounting mechanisms develop and mature.
### Transport, Infrastructure and Climate Change Committee

#### Recommendations on the Financial Memorandum

**Recommendation 33**

This Committee endorses the conclusions contained in the report of the Finance Committee and in particular its strong comments regarding the uncertainty of the figures contained in the Financial Memorandum.

The Committee welcomes the intention of the Finance Committee to take an interest in the financial impact of the outcomes of the Scottish Government’s ongoing work on climate change, and the indication that it may scrutinise the financial impact of any subordinate legislation brought forward under the Bill. However, the Committee believes that the financial information provided is totally inadequate given the scope and importance of this piece of legislation and a revised financial memorandum is required before the Bill can be approved.

This Committee recommends that the Scottish Government prepare a revised financial memorandum in advance of Stage 3 consideration of the Bill.

**Scottish Ministers welcome the Committee’s endorsement of the Finance Committee’s recommendations.**

As indicated to the Finance Committee, the Scottish Government is considering ways in which the financial information in the Financial Memorandum can be updated and improved.

The Committees will wish to note that Scottish Government officials are considering new costing information which has become available since the introduction of the Bill. In particular the UK Committee on Climate Change’s first report in December 2008 and the UK Carbon budgets, announced by the Chancellor in April, are being scrutinised for additional information to help aid the financial information presented on the Bill.

Where updated and improved information is available, with Parliament approval, Scottish Ministers will seek to revise the Financial Memorandum to include this new and additional information.

**Recommendation 34**

The Committee recommends that the Scottish Government provides, as a matter of urgency, details on how it intends to assess and present the job implications of plans it brings forward under this Bill. The Committee recommends that these plans must be developed in partnership with employers and trade unions to ensure that potential job losses can be avoided and job opportunities in sustainable industries are maximised.

The Scottish Government has noted this recommendation.

The Energy Efficiency Action Plan will include consideration of skills and training issues associated with the development of energy efficiency, and an assessment of the potential for jobs which will of course contribute to the nation’s economic recovery.
This work is being led by the Energy Efficiency Programme Board, recently established by the Scottish Government.

The Renewable Heat Action Plan “will include consideration of skills and training issues associated with development of the renewable heat market. The wider Renewables Action Plan, which will be published later in 2009, is being structured in the context of the Scottish Government’s commitment to economic recovery, and will include an assessment of the potential for jobs within the renewable energy sector overall, including renewable heat.

This will cover opportunities from the short-term need to up-skill plumbers to install microgeneration, to the likely growth of maintenance jobs on onshore windfarms, to the longer-term potential transfer of skills from the oil and gas sectors across to the emerging marine energy sector. This work is being led by the Renewable Energy Skills Group, chaired by the Scottish Funding Council.”

Scottish Ministers are committed to working in partnership with employers and unions.

In particular under the terms set out in the Memorandum of Understanding, signed in December 2007, the Government will continue to work with the STUC to ensure that all job opportunities are fully maximised and to ensure that any job losses are kept to a minimum.
<table>
<thead>
<tr>
<th>Recommendation 35</th>
<th>Scottish Ministers are happy to respond to the recommendations made by the Subordinate Legislation Committee. Both Committees will wish to note that these recommendations are responded to in Annex C of this document.</th>
</tr>
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<tbody>
<tr>
<td>The Committee notes the Subordinate Legislation Committee's recommendations and recommends that the Scottish Government provides a written response to this Committee and the Subordinate Legislation Committee ahead of the start of Stage 2 which addresses the points raised in the Subordinate Legislation Committee's report.</td>
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## Forestry

<table>
<thead>
<tr>
<th>Recommendation RAE 1</th>
<th>On 13 March the Convener was informed that Ministers do not intend to use the powers provided for in section 47 of the Bill to make an order allowing leases and cutting rights over parts of the national forest estate. Accordingly Scottish Ministers will bring forward an amendment at Stage 2 to remove section 47(4).</th>
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<tr>
<td>The Committee recommends that the Government does not progress this leasing proposal and amends the enabling section in the Bill.</td>
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<tr>
<th>Recommendation RAE 2</th>
<th>Noted. Scottish Ministers can confirm that the leasing proposals are not proceeding.</th>
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<tr>
<td>If the Government proceeds with the leasing proposal in the Bill the Committee considers that it should clarify, before the end of Stage 1, how it envisages the mechanism for allocating funding released towards woodland creation working in practice, and to what extent the leasee will be able to call upon SRDP funds. The Government should also provide further detail on the calculations upon which the proposal's viability has been assessed.</td>
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<tr>
<th>Recommendation RAE 3</th>
<th>Noted. Scottish Ministers can confirm that the leasing proposals are not proceeding.</th>
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<tr>
<td>The Committee recommends that the Government should provide, as part of its reporting duties under Part 3 of the Bill, details to Parliament on which budget lines the funding generated from the leasing of land has been allocated to and for what purpose.</td>
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<td>Recommendation RAE 4</td>
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<tr>
<td>If the Government proceeds with the leasing proposals, the Committee considers that detailed costings showing the economic viability of the remainder of the national forest estate should be provided to Parliament.</td>
<td>Noted. Scottish Ministers can confirm that the leasing proposals are not proceeding.</td>
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<th>Recommendation RAE 5</th>
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<td>The Committee notes and shares the Minister's reservations on a not-for-profit trust. Should the proposal for a trust proceed by way of secondary legislation, the Committee requests that an explanation of potential state aid issues be made available to Parliament, as well as a convincing justification for the inclusion of such a proposal.</td>
<td>On 13 March the Convener of the RAE Committee was informed that, given the decision not to proceed with the leasing option, there is no need for further consideration of transferring the proceeds from a lease, or the landlord's interest in the land, to a not-for profit trust.</td>
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<th>Recommendation RAE 6</th>
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<td>The Committee expressed its concern at the interpretation of the Government's message that there will be no compulsory redundancies. The Committee seeks assurances from the Government that if employees refuse to transfer to the private company leasing the land, that this will not impact on their employment rights and therefore they should not be deemed to have resigned.</td>
<td>Noted. Scottish Ministers can confirm that the leasing proposals are not proceeding.</td>
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<th>Recommendation RAE 7</th>
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<td>The Committee seeks assurances from the Government and the Forestry Commission that there will be no compulsory redundancies and that they will seek to secure that transferred employees' contractual obligations include conditions of service equivalent to those adopted by the Forestry Commission. Finally, the Committee seeks assurances that the Government</td>
<td>Noted. Scottish Ministers can confirm that the leasing proposals are not proceeding.</td>
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</table>
and Forestry Commission will take steps to ensure longer term security for affected staff, improving on the short term security provided by TUPE regulations.

**Recommendation RAE 8**

The Committee appreciates assurances from the Minister on the importance the Scottish Government would place on contract conditions for any private company leasing land. However placing restrictions on the private investor would reduce the attractiveness of the lease and the likely income available from it. If the proposal goes ahead, the Committee believes that Parliament must have the opportunity to view and comment on the draft contract or a summary of its requirements before it is finalised.

Scottish Ministers can confirm that the leasing proposals are not proceeding.

**Recommendation RAE 9**

Should legislating for this policy in this Bill remain the Government’s position, the Committee recommends that the Bill be amended to cap the scope of the powers provided to reflect the specific policy proposal behind these powers. In doing so, the Committee recommends that the Bill be amended to make the distinction between provisions enabling joint ventures and provisions enabling the leasing proposal, as at present the same provision enables both proposals.

Scottish Ministers can confirm that the leasing proposals are not proceeding.

**Recommendation RAE 10**

The Committee specifically recommends that an upper threshold on the length of the land lease should appear on the face of the Bill as should a maximum threshold for the proportion of land to be leased at any one time.

Scottish Ministers can confirm that the leasing proposals are not proceeding.
<table>
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<tr>
<th>Recommendation RAE 11</th>
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<tr>
<td>The Committee recommends that the Scottish Government incorporates provisions to allow for community leasing in future legislation.</td>
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<tr>
<td>Scottish Ministers agree it would be useful for FCS to have the powers to do this. However the Climate Change (Scotland) Bill is not a suitable legislative vehicle for this, as the purpose of a community lease may extend beyond climate change.</td>
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<tr>
<th>Recommendation RAE 12</th>
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<tr>
<td>The Committee acknowledges that joint ventures may not generate the same level of funds as the leasing proposal, or generate funds to the same timescale. However given the notable support for the joint ventures policy the Committee recommends that, in considering alternative approaches to leasing, the Government should explore the full potential of encouraging and supporting the establishment of joint ventures schemes.</td>
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<tr>
<td>While there is considerable potential for renewable energy development on national forest estate, at present FCS can only lease sites to developers because it has no powers to enter joint ventures. Since joint ventures can offer better financial returns, Ministers intend to use the powers provided for in the remaining parts of section 47 to allow the FCS to form companies and enter into joint ventures for renewable energy development.</td>
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### Waste

#### Recommendation RAE 13

The Committee would appreciate further information from the Cabinet Secretary for Rural Affairs as to how food waste will contribute to the targets for recycling and composting and whether energy from food waste will be counted as contributing towards the cap on energy-from-waste.

The Cabinet Secretary for Rural Affairs & the Environment wrote to Maureen Watt MSP, the Convener, on 10 March with this information. His letter is published on the Committee's website in the papers for its meeting of 18 March 2009.

#### Recommendation RAE 14

The Committee recommends to the lead committee that, in taking forward the waste reduction and recycling provisions in an effort to achieve zero waste, the Scottish Government should have regard to the following—

- the urgent need to focus on reducing commercial and industrial waste being sent to landfill;
- the need to address the lack of infrastructure available to implement the policy intentions in the Bill;
- the need to consider issues raised by the Environment and Rural Development Committee in Session 2 on charging by sellers of goods for the supply of carrier bags;
- the opportunity that current international market conditions could present for Scottish market development;
- the need to ensure measures undertaken are in accordance with both the Government's definition of 'recycling' and with the waste hierarchy set out in the Waste Framework Directive;
- the benefits of the Government endorsing one method of measuring 'carbon footprints' and to establish criteria based on this reflecting which practice is more sustainable than another; and

The Scottish Government will take this into account in taking these provisions forward.

In the case of the point on social and economic factors, it also notes that this is not a matter primarily to be addressed through legislation on waste.
The need to take into account any potential negative impact on social and economic factors including in remote and rural areas, of aiming towards ambitious targets to reduce carbon emissions.

The Scottish Government will take these into account in taking these provisions forward.

Recommendation RAE 15

The Committee recommends that the Scottish Government should provide specific costed proposals for such an organisation (i.e. "clearing-house" establishment) to Parliament well in advance of the relevant instrument of subordinate legislation being laid to afford the relevant committee the opportunity to fully scrutinise the proposals.

Should the Scottish Government proceed with proposals for a "clearing house" arrangement we will seek to ensure that costed proposals are available at the stage of formal consultation, which would precede the laying of any Regulations.

Muirburn

Recommendation RAE 16

The Committee appreciates the Minister’s reassurances that the Government will actively consult with all key stakeholders at an early stage in its deliberations on how to use this power.

Scottish Ministers will seek to amend section 46 of the Bill, to make the order-making power subject to affirmative parliamentary procedure. By making this change, this will support active consultation with key stakeholders at an early stage, prior to Parliamentary scrutiny. The Scottish Government has initiated separate discussions with stakeholders covering the other issues raised in the consultation around the Climate Change (Scotland) Bill.
### Conclusions

<table>
<thead>
<tr>
<th>Recommendation RAE 17</th>
<th>Waste</th>
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<tr>
<td>Concerns with the level of detail available in the Bill and accompanying documents for certain proposals; the inclusion of important proposals within subordinate legislation only (which impacts on the potential for full parliamentary scrutiny); and concerns with the timing of some of the consultations for the Bill's provisions;</td>
<td>It is customary for environmental legislation to delegate powers to the Scottish Ministers to make secondary legislation to introduce important aspects of the programme: an example is the Water Environment &amp; Waters Services (Scotland) Act 2003. Inclusion of detailed legislation on the waste provisions would seriously distort the Bill.</td>
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<td>In any event we do not intend to regulate in the current economic situation. This gives sectors producing waste a chance to develop voluntary measures. If these are insufficient, regulation will need to be based on the situation prevailing at the time. They are also likely to need regular updating in the light of market developments etc.</td>
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<td></td>
<td>Forestry</td>
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<td></td>
<td>As noted by the Committee in paragraph 63, the Order making power at section 47 is subject to affirmative resolution procedure. A section 47 Order could only modify a function for a climate change related purpose, and it could not remove forestry functions without a clear climate change justification. Nor could the power be used to remove over arching duties imposed by other legislation, such as the biodiversity duty in the Nature Conservation (Scotland) Act 2004.</td>
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<td></td>
<td>Wherever possible, the Government prefers to complete consultations before introducing legislation. However, it is important that the Government responds to new information and evidence, as it did by introducing the forestry provisions in the light of advice from the AEA Technology Report on options for mitigating climate change in Scotland. Consultation on the forestry provisions closed on 27 January, and a preliminary analysis of responses was provided to</td>
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the Rural Affairs and Environment Committee in advance of its session on 11 February, when it took evidence on forestry.

<table>
<thead>
<tr>
<th>Recommendation RAE 18</th>
<th>Noted.</th>
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<tr>
<td>The negative reception from stakeholder groups that the provisions on leasing Forestry Commission Scotland land to release capital has received and the Committee's recommendations in response to this - including potential amendments to the Bill should the leasing proposal remain on the face of it;</td>
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<thead>
<tr>
<th>Recommendation RAE 19</th>
<th>The Scottish Government is conscious of these challenges and will seek to minimise them through consultation with interested parties.</th>
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<tbody>
<tr>
<td>The likely challenges faced by the Government, local authorities and others in implementing the waste reduction and recycling provisions in an effort to eventually achieve the zero waste target including insufficient infrastructure.</td>
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**Annex B**

**Economy, Energy and Transport Committee Report**

**Summary of Recommendations**

"The TICC Committee notes that the recommendations in the EET Committee’s report are made directly to the Scottish Government, rather than the TICC Committee as lead committee on the Bill. The Committee endorses many of the recommendations contained in the EET Committee’s report."

<table>
<thead>
<tr>
<th>Recommendation EET 1</th>
<th>Energy Efficiency</th>
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<tr>
<td>The Scottish Government should take all the necessary steps to ensure that efforts are made to improve energy efficiency and the take-up of renewable heat and micro-generation technologies, and that the Minister brings forward amendments at stage 2 to maintain and extend the existing legislative provision in respect of living accommodation.</td>
<td>The Scottish Government will ensure that all efforts are made to improve energy efficiency and the take-up of renewable heat and micro-generation technologies.</td>
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<tr>
<th>Renewable Heat</th>
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<tr>
<td>At Stage 2, it is the Scottish Government’s intention to bring forward amendments to outline a range of measures that will be included in the Renewable Heat Action Plan to improve and promote the take-up of renewable heat.</td>
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<tr>
<th>Recommendation EET 2</th>
<th>Energy Efficiency</th>
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<tr>
<td>The Scottish Government should clearly set out how the monitoring and reporting procedures within this Bill will work and clarifies the roles of various bodies in this respect.</td>
<td>The Energy Efficiency Action Plan will outline how the Scottish Government intends to monitor, report and evaluate those actions contained in the plan.</td>
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<th>Renewable Heat</th>
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<td>The Renewable Heat Action Plan will outline how the Scottish Government intends to monitor, report and evaluate those actions contained in the plan.</td>
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<th>Buildings</th>
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<td>It is intended that a national electronic database be established to assist with the monitoring and reporting procedures of the Assessment of the Carbon Energy Performance (ACEPs) of non-domestic buildings emerging from Section 50.</td>
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<tr>
<td>Recommendation EET 3</td>
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<tr>
<td>The Scottish Government should add the setting of targets for its energy efficiency and renewable heat initiatives to the relevant sections of the Bill and brings forward the necessary amendments.</td>
</tr>
<tr>
<td><strong>Recommendation EET 4</strong></td>
</tr>
<tr>
<td>The Scottish Government should investigate and report back to the EET Committee, if possible before Stage 2, on whether some form of rebate through local taxation systems to incentivise the take-up of energy efficiency, renewable heat and/or microgeneration technologies in the domestic and non-domestic sectors should be introduced, drawing on the experience and the success of such schemes in other parts of the UK.</td>
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<tr>
<td>Under current local government legislation, councils in Scotland do not have the same level of discretionary powers to offer council tax discounts as councils in England. To give Scottish councils similar powers would require primary legislation. The decision not to progress with proposals for local income tax in this parliamentary term was made in light of the current economic climate and opinions and comments from a range of sources, including the Scottish Parliament. However, the Government is committed to the abolition of council tax and detailed proposals for an income based local tax will be made in the run up to the next election, in light of the financial circumstances at that time.</td>
</tr>
</tbody>
</table>
Recommendation EET 5

The Scottish Government should make all efforts to ensure that the education and training sector in Scotland is well-prepared and can respond to the growth in employment opportunities by providing the right number of people with the right skills at the right time, and reports back to the Committee on this as soon as possible.

The Scottish Funding Council has set-up a Renewable Core Skills Group, to look at the skills needs for the renewables sector in Scotland. Represented on the Group are: sector skills councils, Skills Development Scotland, higher and Further Education sector, along with Scottish & Southern Energy, Scottish Power and Scottish Renewables.

In addition the Sector Skills Council is doing some research for Scottish Government on...
Recommendation EET 6

The Scottish Government should ensure that energy efficiency projects are in a position to play a full and meaningful part in meeting the statutory targets for 2010 and thereafter.

Current Scottish Government programmes and policies on energy efficiency will contribute to its 2010 statutory target.

The forthcoming Energy Efficiency Action Plan will detail the range of Scottish Government policies and programmes that will continue to deliver significant improvements in the energy efficiency of all sectors. The plan will include details on:

- recent announcements on funding for a major area-based home insulation scheme;
- recent announcements to bring forward proposals for a significant loan scheme; and
- an outline of current financial incentives (such as the Energy Assistance Package, household and community grants for microgeneration; the new area based home insulation scheme; the Central Energy Efficiency Fund for the public Sector; and the Energy Saving Scotland – small business loans).

The plan will also outline how the Scottish Government is working to maximise the impact of UK Government policies and programmes in Scotland, for example the Carbon Emission Reduction Target and the
Recommendation EET 7

The Scottish Government should ensure that a revised financial memorandum be produced and we would expect the costs identified above to be covered within this.

The development of the Energy Efficiency Action Plan itself will have no new costs associated with it, but will be met from existing resources.

The measures contained within the action plan will all have costs attached to them, but as these are measures which are already in place, or have been planned within the current spending review period, these already have funding attributed to them. Any new measure or programme which is not currently funded or has funding agreed will be subject to the usual financial scrutiny as part of the annual budget process or spending review.

The development of the Renewable Heat Action plan itself will have no new costs associated with it, but will be met from existing resources.

The measures contained within the action plan will either be costed from existing budgets or new activity will be subject to the relevant financial assessment.
The Scottish Government should introduce within a reasonable timeframe, an action plan to improve the take-up of renewable heat technologies in Scotland and to work with all the necessary parties to achieve progress in this area, and provides a clear timetable from the Minister for the introduction of the heat plan before Stage 2 of the Bill.

The Scottish Government consulted on a Renewable Energy Framework late last year, October 08 to December 08, which, included a draft Renewable Heat Action Plan. The consultation responses were published on Scottish Government's website on 30 January 2009. The responses will help inform the Renewable Energy Action plan, which will be published over the summer 2009 and will include a Renewable Heat Action Plan.

In summary the timetable for producing a Renewable Heat Action Plan will be summer 2009.

Officials are currently finalising draft regulations, 'The Carbon and Energy Performance of Non-domestic Buildings (Scotland) Regulations 2009'. These mock regulations will be shared with both the EET and TICC Committees.

It must be borne in mind that these are 'mock' regulations which have not been subject to detailed research nor to the scrutiny of a working party nor public consultation. They will however give Committee Members and others involved in Parliamentary debate a 'flavour' for how the enabling powers are to be used.

The costs identified within the current Financial Memorandum are still relevant, having regard to the enabling provisions within Section 50 of the Bill, but we intend to reduce the number of scenarios in an amended version. However to provide further assistance, Scottish Government officials will arrange for illustrative costs to be provided for the 'mock' regulations.
<table>
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<tr>
<th>Recommendation EET 9</th>
<th>Recommendation EET 10</th>
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<tr>
<td>The Scottish Government should ensure that combined heat and power systems, preferably using sustainable energy sources, are a part of its action plans for renewable heat and energy efficiency.</td>
<td>The Committee recommends that all the relevant secondary legislation proposed under sections 48-51 is subject, if they are not already, to affirmative resolution.</td>
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<td>CHP systems will be considered in both the Scottish Government action plans on renewable heat and energy efficiency.</td>
<td>Noted.</td>
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</table>
Independence of the Advisory Body

Recommendation SLC 1

The Explanatory Notes with the Bill (paragraph 33) and the Policy Memorandum (paragraph 31) indicate that Ministers will require to seek expert, independent advice from the advisory body, but that "independent" is capable of having different meanings and does not necessarily refer to a body which is wholly independent of the Scottish Ministers.

In particular, the SLC draws attention to the fact that the Scottish Ministers will be responsible for appointing the members of a Scottish CCC and will be able to issue directions and guidance to the Committee.

The Scottish Government recognises the point that is being made here. The Explanatory Notes and Policy Memorandum seek to capture the spirit of the advice which will be provided by the advisory body.

The UK Committee on Climate Change has already demonstrated that it will advise Government to set very challenging targets. Its advice is transparent. The foundation of its independence is that its advice is based on evidence and analysis.

Should a Scottish Committee on Climate Change be established in the future, or equivalent advisory powers conferred on an existing body, it is intended that the expert advice be provided in a similarly transparent way, based on evidence and analysis rather than political imperative.
### Public bodies upon which a climate change duty may be placed

<table>
<thead>
<tr>
<th>Recommendation SLC 2</th>
<th>The SLC believes that the power under section 36(1) to impose climate change duties on public bodies is extremely wide in its scope, in particular as neither the public bodies which may be subject to climate change duties nor climate change duties themselves are adequately and clearly defined. The Committee recommends that this could be mitigated to some extent by provision of a list of public bodies to which the power is to apply along with a power to add to the list subject to affirmative procedure.</th>
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<tr>
<td>Recommendation SLC 3</td>
<td>This would be a highly unusual course of action. It is intended that this guidance assist in developing consistency of approach across those public bodies to which specific climate change duties apply. It could also include examples of best practice. Laying such guidance before the Scottish Parliament would seem disproportionate in this context. However, Scottish Ministers would be happy to discuss with the relevant Parliamentary Committees enhanced consultation arrangements for the development of section 37 guidance.</td>
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</table>

The Scottish Government response is at recommendation 20 in the main body of this document.
### Forestry

**Recommendation SLC 4**

The SLC believes that powers in section 47 [Forestry] are very wide in scope as there is no restriction in the Bill on what may be done in exercise of the power beyond that it must deliver a climate change purpose.

Before exercising the power in section 47, the Scottish Ministers must satisfy the test that the exercise of the power will assist in reducing emissions or otherwise contribute towards mitigating climate change.

This could, for example, require the national forest estate to be managed in ways that assist with carbon sequestration.

But it **could not**, for example, remove forestry functions without a clear climate change justification - and it is hard to conceive of circumstances where there would be this justification, given the positive role of forestry in relation to climate change mitigation.

### Waste

**Recommendation SLC 5**

The SLC has reported that most of the waste powers (sections 52, 53, 54, 56 and 57) are expressed in very broad terms and that there is nothing on the face of the Bill to restrict their application to purely commercial activity.

It is appropriate that the waste provisions be expressed broadly. The sectors which can contribute most to improved resource use through waste prevention and recycling, and thus help mitigate climate change, will not necessarily remain static over the period between now and 2050.

Recent movement on the markets for recyclate demonstrates this. Any regulations made will need to be able to respond to market conditions, which cannot necessarily be foreseen at this point. It is therefore appropriate that the powers should enable whatever action becomes necessary over time to be taken.
The fact that the regulatory powers are not necessarily restricted to commercial activity is also appropriate. For example, it is at least as worthwhile for a private individual constructing a new ten-bedroomed house to develop a waste prevention and management plan as it would be for a commercial enterprise. Evidence from England is that these plans actually start to save money at a level of project between £250,000 - £300,000. This is a level which will include a great deal of non-commercial activity.

Nevertheless, it is the Scottish Government's intention to avoid creating unnecessary burdens in developing regulations under these powers.
SUBORDINATE LEGISLATION COMMITTEE

17th Meeting, 2009 (Session 3)

Tuesday 19 May 2009

Paper by the Clerk

CLIMATE CHANGE (SCOTLAND) BILL – RESPONSE TO SLC STAGE 1 REPORT

Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Climate Change (Scotland) Bill to the Transport, Infrastructure and Change Committee as lead committee for the Bill, on 4 March 2009.

2. On 5 May 2009, the Cabinet Secretary for Justice, Kenny McAskill MSP wrote to the Convener responding to the Subordinate Legislation Committee’s (SLC) report.

Scottish Government Response

3. Issues raised by the Subordinate Legislation Committee (SLC) can be found at pages 12 and 38 – 41 of the Scottish Government’s response.

Progress of the Bill

4. The Bill passed Stage 1 on 7 May 2009.

Recommendation

Members are invited to note and comment on the Scottish Government’s response to the Committee’s report on the delegated powers provisions in the Climate Change (Scotland) Bill at Stage 1.

Shelagh McKinlay
Clerk to the Committee
The Purity Criteria for Colours, Sweeteners and Miscellaneous Food Additives (Scotland) Regulations 2009 (SSI 2009/167)

On 7 May 2009 the Scottish Government was asked:

“The Committee refers to correspondence with the Food Standards Agency (on behalf of the Scottish Government) in relation to the previous amendment to the Miscellaneous Food Additives Regulations 1995 and the Sweeteners in Food Regulations 1995 by SSI 2007/412. The Scottish Government was asked whether there were plans for consolidation of these regulations. In its response the Food Standards Agency advised that it would keep the matter under review particularly in light of proposals by the European Commission for a package of measures on food improvement agents which would replace the regulation of sweeteners, colours and additives.

Given that the 1995 Additives Regulations have now been amended for the 18th time and the Sweeteners Regulations for the 12th time the Committee requests an update from the Scottish Government as to its intentions for consolidation of these regulations.”

The Scottish Government responds as follows:

The Food Standards Agency is currently working on regulations which will give effect to Regulation 1333/2008 on food additives (O.J. L354 31.12.2008, p. 16)-which came into force in early January 2009 and will apply from 20 January 2010 (although certain specific provisions have application dates of 1 January 2011 and 20 July 2010).

Regulation 1333/2008 will overhaul the current Community regime covering sweeteners, colours and miscellaneous food additives (see Article 33 of Regulation 1333/2008). FSA intend to consult on a set of regulations which will (amongst other things) revoke the current sweeteners, colours and miscellaneous food additives regulations and will make provision for the enforcement of Regulation 1333/2008. There will be a consultation on these regulations which it is hoped will be launched in June.

Against this background the FSA does not intend to consolidate either the 1995 Additives Regulations nor the Sweeteners Regulations.

The Period to Prepare an Adoption Allowances Scheme (Scotland) Order 2009 (SSI 2009/168)

On 8th May the Scottish Government was asked:

1) to explain why the preamble refers to section 71(1), rather than, simply, section 71(1)(a), alone, given that section 71(1)(b) relates to registered adoption agencies, with
which this instrument is not concerned and, moreover, in view of section 71(1)(b) not yet having been commenced for the purpose of making orders; and

2) to indicate the Government’s view on the consequences of article 2 of the instrument referring to ‘these regulations’ instead of ‘this Order’.

The Scottish Government responds as follows:

1) The reference in the preamble to section 71(1) covers the order-making power in section 71(1)(a). The committee refers to “section 71(1)(b) not yet having been commenced for the purpose of making orders”. It is correct that section 71(1)(b) was not included in Commencement Order No. 3 (S.S.I. No. 147) but this was because there is no order-making power contained therein. Section 71(1)(a) provides that adoption agencies that are councils must prepare an adoption allowances scheme within the time period specified in this Order. Section 71(1)(b) provides that adoption agencies that are registered adoption services may prepare an adoption allowances scheme but, given that this is a power rather than a duty, there is no stipulation as to the time period for preparing such a scheme. There is no order-making power in section 71(1) other than that contained in section 71(1)(a) and therefore the reference in the preamble to the power conferred by section 71(1) can only refer to that in section 71(1)(a).

2) We apologise for the drafting error in article 2. This should have read “this Order” rather than “these regulations”. The Statutory Instruments Registrar has agreed that this error can be amended by correction slip. Notwithstanding that, the Government’s view is that the error in article 2 does not have any deleterious consequences for the legal effect or meaning of the Order. This is for three reasons: firstly, ‘Order’ is used correctly in the title, the preamble and article 1, which illustrates that ‘these regulations’ in article 2 is an obvious drafting error; secondly, article 2 is an interpretation provision rather than a substantive provision like article 3 or the citation and commencement provision like article 1; and thirdly, the sense of article 2 remains clear despite the error, in that it is obvious that “the Act” referred to in article 3 is the Adoption and Children (Scotland) Act 2007.

The Swine Vesicular Disease (Scotland) Order 2009 (SSI 2009/173)

On 8 May 2009 the Scottish Government was asked the following questions:

(a) in relation to the controls on notification requirements in article 17(2), whether these are intended to apply to a person who is required by article 16 to give the notification, whether or not he complies with article 16 (so far as 17(1) refers to a person who “gives notification”)?

Is the intended effect of the provision as drafted considered to be sufficiently clear?

(b) in relation to the powers of entry, inspection and other powers of an inspector prescribed by articles 38 and 39, and the restrictions on persons entering or leaving premises in paragraph 7 of Schedule 1, (given that the “premises” may be a dwelling and there are no provisions requiring the grant of a judicial warrant before such powers may be exercised) can an explanation be provided of the grounds on which it is considered that these provisions are compliant with article 8 of the European
Constitution on Human Rights (right of respect for private and family life, home and correspondence)?

(c) in relation to paragraph 4(4) of Schedule 2, what is the effect of this provision as drafted considered to be? Is it considered that there is a drafting error, so far as the words “must be” should be omitted?

The Scottish Government responds as follows:

(a) The controls in article 17(2) are intended to apply to a subset of the persons required to notify suspicion of SVD under article 16, namely a person in possession or charge of a pig or carcase.

They will not apply to any person who should have given notification under article 16, but fails to do so. That person will however have committed an offence under section 73 of the Animal Health Act 1981.

The Scottish Government considers that the effect of these provisions is as intended, and is therefore satisfied that they are sufficiently clear.

(b) It is noted that the provisions on entry do not require an inspector to enter a dwellinghouse. The express terms of the instrument are therefore compatible with Article 8 of the Convention to the extent that it might be engaged, and the Scottish Government is satisfied that the instrument is not ultra vires the powers of the Scottish Ministers in that respect.

The power of entry must however be exercised in a compatible way. That may mean in some cases that the power must not be exercised in respect of a dwellinghouse. The decision on whether or not to take entry will be determined by balancing the public and private interest in the particular case, a task for which the courts are well suited, although not uniquely so.

The Scottish Government will therefore review these provisions the first time this instrument is amended, and will give careful consideration to providing for a warrant procedure along the lines set out in your question.

(c) The Scottish Government agrees that the unnecessary words “must be” have been included in paragraph 4(4) of Schedule 2. It is grateful to the Committee for drawing attention to this drafting error, which will be corrected at the first opportunity.

It is however considered that the nature of the error is clear from the face of the instrument, and therefore that the courts would interpret the paragraph in such a way that the legal effect is as intended, namely that a vehicle that cannot be properly cleansed on one premises must be moved to other suitable premises.
The Products of Animal Origin (Disease Control) (Scotland) Amendment Order 2009 (SSI 2009/174)

On 7 May 2009 the Scottish Government was asked:

(a) In relation to article 2 (and its heading) where the title of the Order being amended refers to "Animals" rather than "Animal", what is the effect of this error considered to be?

(b) In relation to article 12, where the identification requirements for "seropositive pig meat" (3 words) are prescribed, but "seropositive pigmeat" (2 words) is defined for the purposes of the Order in article 3(c), what is the effect of this different drafting considered to be? Is it intended that the requirements in the new paragraph 3A of Schedule 3 of the 2008 Order apply to seropositive pigmeat as that term is defined in article 3(c) of this Order?

The Scottish Government responds as follows:

(a) It is acknowledged that there is a minor error in article 2 in the citation of the instrument being amended. The error, although regrettable, is manifest. The correct instrument is referred to in the footnote to the citation, and this is the first amendment of the principal Order. The intention of the Scottish Ministers in making the instrument is therefore clear both from the instrument, and the statute book. It is considered that the error does not have any legal effect, and that the courts will construe the principal Order so that it is read subject to the amendments in the instrument.

It is also acknowledged that there is an error in the heading of article 2. It is submitted that the typographical error in the heading has no effect, as the heading itself does not have legal effect.

(b) It is acknowledged that there is a typographical error in article 12 in that there is a discrepancy between the reference to "seropositive pig meat" and the term "seropositive pigmeat" which is defined in article 3(c).

It is intended that the requirements in the new paragraph 3A of Schedule 3 of the 2008 Order apply to seropositive pigmeat as that term is defined in article 3(c) of this Order.

It is submitted that the gap between the words "pig" and "meat" could be treated as a printing error and rectified as such.

The Sea Fish (Specified Sea Areas) (Regulation of Nets and Other Fishing Gear) (Scotland) Amendment Order 2009 (SSI 2009/165)

On 7th May 2009, the Scottish Government was asked:

(a) Whether it is intended to apply square mesh panel requirements as set out in new article 4A to "relevant British fishing boats" and "any fishing boat" within the whole of
the area described in new article 3(1C) (east of the Cod Recovery Line within ICES Division VIa) as appears to be the case from new article 3(1A)(b) and (c);

(b) If so, whether it is considered competent to do so given that part of the area east of the Cod Recovery Line within ICES Division VIa is outside the Scottish zone;

(c) What the effect of the failure to restrict the application of new article 3(1A)(b) and (c) to the part of the area east of the Cod Recovery Line which is within the Scottish zone is?

The Scottish Government responds as follows:

(a) It is not intended to apply square mesh panel requirements, as set out in new article 4A, to "relevant British fishing boats" and "any fishing boat" within the whole of the area specified in new article 3(1C) (east of the Cod Recovery Line within ICES Division VIa). New article 3(1A)(b) and (c) was drafted on the misapprehension that the entire area specified in new article 3(1C) (east of the Cod Recovery Line within ICES division VIa) is within the Scottish zone. In fact, a relatively small part of that specified sea area falls outside of the Scottish zone.

(b) In terms of article 3 of the Scotland Act 1998 (Modification of Functions) Order 1999 (S.I 1999/1756), as read with section 53 of the Scotland Act 1998, the Scottish Ministers can only competently legislate in relation to fishing in the Scottish zone or fishing outside that zone by Scottish fishing boats. Accordingly, it is not competent to apply the requirements of new article 4A to non-Scottish fishing boats in that part of the area east of the Cod Recovery Line within ICES Division VIa which is outside the Scottish zone.

(c) It would have been clearer if new article 3(1A)(b) and (c) had expressly restricted the application of new article 4A to that part of the specified area within the Scottish zone. However, the Scottish Government considers that its intention to do so is sufficiently clear and that new article 3(1A)(b) and (c) has this effect in view of the following:-

- the requirements of new article 4A will not, and cannot, be enforced against non-Scottish fishing boats outside the Scottish zone. By virtue of article 6, as amended by article 2(6) of the 2009 Order, the relevant enforcement powers can only be exercised in relation to "relevant British fishing boats" and "any fishing boat" in the Scottish zone. Accordingly, there is no risk of non-Scottish fishing boats being prosecuted for any alleged breach of new article 4A that is committed outside the Scottish zone.

- new article 3(1A)(b) and (c) is, in effect, limited to the Scottish zone having regard to section 101(2) of the Scotland Act 1998. This requires the court to read the provision as narrowly as is required for it to be within competence. The provision is capable of being narrowly construed by any court as applying to "relevant British boats" or "any fishing boat" within that part of ICES Division VIa which is specified in new article 3(1C) and is within the Scottish zone.
The Scottish Government is grateful to the Committee for raising this issue. It will amend new article 3(1A)(b) and (c), to restrict the application of new article 4A (so far as this provision remains applicable) to that part of ICES Division VIa which is specified in new article 3(1C) and is within the Scottish zone. Such an amendment will be made whenever an appropriate opportunity to do so next arises, which will likely be at the end of this year.