Following the constructive session before the Committee on 20 June, I thought that I would make some additional comments: one general observation, one further suggestion and three points of clarification.

1. It must be remembered when thinking about judging legislation against its objective that, in many cases, a single statute can have several different objectives, some of them only fairly loosely connected, whether presented in separate Parts of the Act or not. This adds to the complexity of undertaking any post-legislative scrutiny.

2. In terms of encouraging a more systematic approach to identifying the legislation to be examined, without sacrificing flexibility, one possibility might be for each Committee when drawing up its work plan for a session to be presented with a list of all the statutes passed a set number of years previously (say, 7 years). This might prompt consideration of whether any sort of review or inquiry is desirable for issues which might otherwise be overlooked, whilst still leaving the choice of projects unrestricted.

3. The reference I made to an error in an Act is to s.14(2) of the Climate Change (Scotland) Act 2012, where there is a cross-reference to another section but which one is not specified.

4. The example I gave of reporting in the event of a power to make regulations not being exercised is s.30 of the Wildlife and Natural Environment (Scotland) Act 2011 (adding ss.17A and 17B to the Deer (Scotland) Act 1996). This is actually even more interesting and relevant than I had remembered, since it specifies that it is SNH that must carry out the review if by April 2014 there are no regulations introducing a scheme to register persons competent to shoot deer. It thus shows the Parliament directing that a review be undertaken by a statutory body, not the Ministers or the Parliament itself.

5. In relation to the lack of progress on consolidation, despite strong prompting from significant sources, the wildlife law example we discussed is a strong one. This issue was raised and acknowledged by Ministers during the passing of the Nature Conservation (Scotland) Act 2004 (stage 1 report, paras 16-18; see below) and again during the passing of the Wildlife and Natural Environment (Scotland) Act 2011 (stage 1 report, paras 171-181; see below). Yet the law remains in the same unsatisfactory state.

Prof. Colin T. Reid,
Professor of Environmental Law,
University of Dundee
**Nature Conservation (Scotland) Act 2004 – Stage 1 Report**  
Environment and Rural Development Committee, 7th Report, 2003

**The Need for Comprehensive Legislation**

16. The Committee is also aware of concerns regarding the fragmented state of nature conservation legislation in Scotland. The UK Environmental Law Association (UKELA) noted that while the Bill completely restates the law in relation to areas such as SSSIs, other important habitat protection measures remain scattered throughout numerous other enactments. It was also noted that the detailed amendments to the Wildlife and Countryside Act 1981 left the law ‘in a state that makes it all but unusable’.

17. In evidence to the Committee the Minister conceded that the elements of the Bill originate from a number of different statutes going back some years in age. However, he believed that policy issues needed to be dealt with prior to any consolidation taking place. He acknowledged the need to actively consider whether consolidation of the law relating to nature conservation was necessary.

18. The Committee recognises the fragmented state of current nature conservation legislation in Scotland. The Committee believes that it is important that the current law is understood by all people who are affected by it, and recommends that the Scottish Executive should develop clear and accessible guidance on existing nature conservation law, and make this publicly available.

**Wildlife and Natural Environment (Scotland) Act 2011 – Stage 1 Report**  
Rural Affairs and Environment Committee, 8th Report, 2010

**Is the legislation becoming too muddled?**

171. A recurring theme in evidence to the Committee was how complex, and potentially confusing, legislation in this area was becoming, and that this Bill added to rather than reduced this confusion. There were calls for a consolidation of the law in this area. Traditionally, consolidation of Acts involves bringing together relevant existing statutes into one single act, in order to simplify the statute book without making significant changes to the law. In the Scottish Parliament, such consolidation Acts are subject to an expedited Parliamentary procedure, although options to change the law under this procedure are extremely limited.

172. Professor Reid emphasised how difficult the law had become to follow at the Committee on 6 October, describing the current statute in this area as “atrocious” and “not fit for use”. He argued that consolidating the legislation was essential. He also added that he was mystified as to why many thought such a consolidation would be complicated, adding that it had been avoided because it “does not win you votes” and was potentially resource intensive and, therefore, a low priority for administrations. He concluded that—

“[…] having clearer legislation is so important to ensuring public access and understanding. It helps you explain what the law is, which helps you ensure that it is understood and enforced.”
173. This point was emphasised by Sheriff Drummond, Chair of the legislation, regulation and guidance subgroup of the Scottish Government’s Partnership for Action against Wildlife Crime (PAW), when he gave evidence to the Committee—

“...I am slightly concerned about the direction that the law is beginning to take [...] The law is becoming fragmented, so it is getting difficult to find and to see the direction in which it is going. If it is difficult for people such as myself and academics such as Professor Colin Reid to find the law, I only ask the committee to have sympathy for the operators who are trying to apply it on the ground [...] I know that Professor Colin Reid strongly expressed the view that codification is necessary, but I fear that we might be getting past the stage at which codification is a realistic possibility.”

174. Sheriff Drummond subsequently altered his position on this slightly, stating that he now considered that consolidation might be possible.

175. Professor Reid outlined to the Committee what tools were available to assist with a consolidation of the law—

“...there are commercially run electronic databases that give you at least a very good starting point for producing a more or less clean text of an act as amended [...] many of the people who are working with the legislation day to day have their own electronic updates. Previously, they literally cut and pasted versions to work with.”

176. The Minister told the Committee that she felt there was a good argument for consolidating the law in this area, and that she had sympathy for lawyers and others involved in understanding, interpreting and applying the law. She added that it might be desirable to consolidate a part of the law that the Bill covers, such as wildlife crime. However, the Minister also had some words of caution for the Committee—

“The issue is difficult. Wildlife crime is not the only area of legislation that I have come across, even in the two years in which I have been a minister, in which I can see that a consolidation bill might be the right way to go in theory, but in practice might be harder to achieve than we imagine.”

177. It was also said by some that an overreliance on guidance and codes of practice was developing, which could lead to challenges being made to their quasi-legal status, and questions of transparency and accountability. Professor Reid also emphasised the need for all the resulting regulations and guidance to be accessible and accountable—

“There is an issue with codes of practice. The more important they become to how people understand the law and how they apply it, the more you have to consider whether they are being scrutinised properly. There is a huge difference between what is in the law, on which legal rights and prosecutions are based, and simple guidance. However, when that boundary gets blurred because the law is expressed so vaguely that, in practice, the guidance becomes more important, you need to think about how that guidance is presented, whether there is accountability for it and whether it can be accessed appropriately.”
178. This point was also raised by the Parliament’s Subordinate Legislation Committee, which considered that the Scottish Government had not given adequate justification for the lack of parliamentary scrutiny proposed in respect of the code for INNS, and that further thought should be given to the scrutiny of the code on deer management.

179. The Minister expressed sympathy for the position of the Subordinate Legislation Committee. However, the Government considered it important that the approval process for codes of practice and other relevant guidance was kept sufficiently flexible to allow changes to be made swiftly so that they could retain relevance and respond to changing situations and demands as they occurred. The Minister added that the Scottish Government considered it important that any parliamentary procedure, in terms of scrutiny and approval, did not compromise that principle.41

180. The Committee considers that the case for consolidating the law in this area was very well made in evidence to it, particularly as even legal experts were of the view that the law was complex and difficult to follow. The Committee therefore recommends that, following the passage of this Bill, serious consideration should be given to consolidating the current range of legislation.

181. The Committee also notes comments made to it on how difficult the task of consolidating the law in this area may, or may not, be. The Committee was encouraged by comments made by Professor Colin Reid that, given the availability of legal databases and other tools, consolidation needn’t necessarily be an overly burdensome task. The Committee considers that the fact that consolidation might be difficult should not stand in the way of viewing this as a priority.

182. The Committee notes the discussions which took place on what the appropriate levels of parliamentary scrutiny, if any, should be, for the codes of practice provided for by the Bill. The Committee considers that the codes established by the Bill should be subject to Parliamentary scrutiny, given that the INNS code helps establish liability for offences created by the Bill, and the deer code details circumstances which could lead to SNH intervening in the use of a person’s property. The Committee notes the precedent for other codes of practice, such as those concerning the welfare of cats and dogs, to be subject to Parliamentary scrutiny. The Committee therefore recommends that the codes of practice relating to both deer management, and INNS, should be subject to parliamentary procedure and that the Scottish Government gives serious consideration to using the affirmative procedure for the INNS code.