I am grateful for the opportunity to offer the Scottish Government's initial views on the issues raised by the Committee's call for evidence on post-legislative scrutiny.

I note and agree with the Committee’s starting point that post-legislative scrutiny is widely accepted as an important scrutiny function of the Parliament, that the Parliament could further develop its approach in this area, and that the Parliament’s committees have a key role to play.

The Committee identifies a number of key issues it wishes to explore, and I have provided for each some initial thoughts. I would, however, wish to give further consideration to the matter over the course of the Committee’s inquiry (particularly resource implications), and I would also wish to consider carefully other evidence which the Committee receives before reaching a final position on behalf of the Scottish Government.

I hope the Committee will find my initial observations in the annex to this letter helpful. I would be happy to provide the Committee with further views in due course.

JOE FITZPATRICK
MINISTER FOR PARLIAMENTARY BUSINESS
SCOTTISH GOVERNMENT
30 JANUARY 2013
**(a) what is the most appropriate format for post-legislative scrutiny in the parliament and, in particular, its committees?**

Given that the Parliament’s committees are (usually) responsible for conducting Stage 1 scrutiny of Bills, for considering relevant subordinate legislation and for scrutinising government activity in specific policy areas, those committees would seem best placed to carry out any post-legislative scrutiny which was required on behalf of the wider parliament.

The Scottish Government considers that the Parliament may find it helpful to develop general guidance which committees could use when approaching post-legislative scrutiny but would not recommend that the Parliament seek to adopt a one-size-fits-all approach.

The Scottish Government recommends that the Parliament consider adopting a scaleable approach to post-legislative scrutiny, enabling detailed and thorough investigation into the implementation of a significant piece of legislation where that is considered necessary, and a much lighter touch for other legislation. The Scottish Government considers that there will also be instances where no formal post-legislative scrutiny is required, and that the Parliament’s approach should be flexible enough to take account of that.

There are two other key issues which the Scottish Government expects the Committee will want to consider. The first is how the Parliament can best identify which legislation should be subject to post-legislative scrutiny, and the level of scrutiny it should be subject to. There may be opportunities, for example, in the Stage 1 reports which are produced by lead committees to identify a Bill which may merit post-legislative scrutiny. Committee legacy reports provide a similar opportunity for committees to indentify Bills which they would recommend their successors explore. The second issue the Committee will want to consider is the product and outcomes it hopes to see from post-legislative scrutiny. It will be important to be clear at the outset what is hoped to be achieved by conducting post-legislative scrutiny, what actions the Parliament would wish to see result and that the post-legislative scrutiny being conducted is proportionate and an efficient use of resources.

In light of the points made above, the Committee may wish to consider whether there would be merit in piloting different ways of conducting post-legislative scrutiny to inform the Parliament’s overall approach to the matter.

**(b) what are some of the barriers to undertaking post-legislative scrutiny and how can they be overcome?**

The Scottish Government anticipates that one of the barriers for undertaking post-legislative scrutiny is likely to be resource and time implications, and the need for
committees to balance post-legislative scrutiny activities against their wider workloads.

For its part, the Scottish Government would wish to consider carefully the resource implications for it of any proposals for changes to the way in which post-legislative scrutiny is conducted and any anticipated Government role in that.

The Scottish Government is not aware of any current procedural or Standing Orders barriers to post-legislative scrutiny.

(c) are there examples of good practice in carrying out post-legislative scrutiny inside and outside the parliament which could be shared?

The Scottish Government is aware of individual committees of the Parliament conducting post-legislative scrutiny. The Scottish Government is also aware of approaches which have been taken further afield. The Scottish Government understands, for example, that the model which has been adopted by the UK is for the UK Government to prepare a summary of the implementation of an Act and for the relevant parliamentary committee to then consider whether any further post-legislative scrutiny is required.

(d) what information and support is required by MSPs in order to carry out effective post-legislative scrutiny?

The Scottish Government considers that the information and support required by MSPs will be driven to a large extent by the nature of the post-legislative scrutiny undertaken.

In the case of a detailed inquiry into complex legislation, committees may wish to consider conducting research and/or the appointment of an adviser. In other cases, committees may be content to rely on available documentation and any evidence it receives. The Scottish Government considers that account should also be taken of existing external activity, such as the work of the Scottish Law Commission, academics and groups such as the Regulatory Reform Group.

(e) what type of legislation should be the subject of post-legislative scrutiny?

The Scottish Government expects that the Parliament will wish to focus predominately on primary legislation, but take into account any subordinate legislation made under any Act on which it conducts post-legislative scrutiny.

(f) when should post-legislative scrutiny be carried out following the passage of legislation?

The Scottish Government again suggests that in determining if and when post-legislative scrutiny should be carried out, flexibility will be important. In some instances, following emergency legislation for example, a committee may wish to undertake post-legislative scrutiny relatively quickly. In other cases, there may a significant time lapse before significant progress is made in implementation. It may
also be the case that committees would wish to consider whether legislation passed earlier in the lifetime of the Parliament should be subject to post-legislative scrutiny.

\textit{(g) are changes needed to Standing Orders or other parliamentary procedures to facilitate improved post-legislative scrutiny?}

The Scottish Government is not aware of any specific barriers in Standing Orders or other parliamentary procedures which inhibit post-legislative scrutiny. Consistent with the views already expressed, the Scottish Government would recommend that the Parliament’s approach to post-legislative scrutiny should be flexible and it would not recommend, for example, that specific duties be placed on committees to carry out post-legislative scrutiny.