Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Climate Change (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

3. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily.

4. During the Stage 2 proceedings, new powers were introduced and a number of the delegated powers were modified. These changes give Parliament a greater role in scrutinising some of the subordinate legislation made under the Bill and respond positively to the comments made by the Parliamentary Committees which scrutinised the Bill. Outlined below are descriptions of the relevant powers which have been added or modified and explanations of and as to why the additions, amendments or alterations have been made and are considered appropriate.
PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

PART 1 – EMISSIONS REDUCTION TARGETS

Section 2A(1) – Modifying the interim target

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<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<td>Power exercisable by:</td>
<td>order made by statutory instrument</td>
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Provision

5. Section 2A was inserted into the Bill during Stage 2. Subsection (1) allows the Scottish Ministers to modify by order the percentage figure mentioned in section 2(1) of the Bill. The percentage figure in section 2(1) of the Bill is 34%, known as “the interim target”. The interim target is expressed in terms of “at least 34%”. The Scottish Ministers are only given the power to modify this figure to substitute a higher percentage figure. There is a requirement in section 2A(2), with details explained in subsections (3) to (6), that if the European Union (EU) brings a Community instrument into force which contains a commitment to reduce greenhouse gas emissions by at least 30% compared to 1990 levels by 2020, the Scottish Ministers must, lay an order before the Scottish Parliament to increase the 34% figure in section 2(1) to at least 42%. Subsection (4) provides that the period within which a draft order in terms of subsection (1) is to be laid is 3 months beginning from the day on which the appropriate Community instrument comes into force. Subsection (5) provides that if the order is not laid before the expiry of that period, then it must be laid as soon as reasonably practicable thereafter.

Reason for taking power

6. On the receipt of particular advice from the relevant or advisory body, or if there have been significant changes to the basis on which the interim target was set, it may be considered necessary to modify the level of the interim target. The power in section 2A(1) allows for this to happen. Section 2A(2) contains a requirement that the Scottish Ministers must lay an order to modify the interim target to make it “at least 42%” if an “appropriate Community instrument” comes into force. This recognises that action at the European Union level has an important influence on certain elements of Scotland’s greenhouse gas emissions. Approximately 40% of Scotland’s greenhouse gas emissions are generated by the “traded sector”, i.e. installations which operate within the EU Emissions Trading Scheme. If the quantity of emissions allowed within that scheme is reduced there is potential for increased emissions savings in Scotland.

Choice of procedure

7. As subsection (1) allows an important percentage set in primary legislation to be modified, it is considered appropriate that affirmative resolution should apply.
Section 6 - Modifying annual targets

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

8. Section 6 allows the Scottish Ministers to modify various parts of sections 3 and 4 by order. Subsection (1)(a) enables the Scottish Ministers to modify the percentage figure by which annual targets must reduce year-on-year from 2020. Subsection (2) restricts this power so that the percentage may be modified only if the Scottish Ministers consider that it is no longer necessary to set the targets by reference to that percentage. Subsection (5) further states that the percentage may not be changed to a figure less than zero.

9. Subsection (1)(b) allows the Scottish Ministers to modify an annual target once it has been set by order under section 4. Subsection (3) restricts this power so that an annual target may be changed only as a result of significant changes to the basis on which the annual target was first set.

10. 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 subsection (1)(d) allows modification of the criteria to which the Scottish Ministers must have regard when setting annual targets. Subsection (4) sets out that the Scottish Ministers may only exercise these powers if they consider it appropriate to do so.

11. Subsections (1A) and (1B) were inserted at Stage 2. Subsection (1A) requires the Scottish Ministers, at the same time as laying a draft instrument under any paragraph of subsection (1), to lay before the Scottish Parliament a report explaining why the modification is being proposed. Subsection (1B) requires that Ministers make a statement to the Parliament on this subject as soon as reasonably practicable after the laying the report mentioned in subsection (1A).

12. Subsection (6) allows the Scottish Ministers to exercise the power to modify annual targets set by order only before the beginning of the year to which the target relates. This power may not be used to allow the target to exceed that set for the previous year.

13. Paragraph (a) of subsection (3) was inserted at Stage 2, which in turn moved the content of what is now paragraph (b) from the body of subsection (3) into a separate paragraph. This subsection now specifies that the Scottish Ministers may make an order under subsection (1)(b) only if they consider that it is appropriate to do so as a result of a modification to the interim

14. Section 7 requires that all of the powers specified in section 6 may only be exercised once the Scottish Ministers have requested advice from the relevant body defined in section 5(5). Subsection (2) was amended at Stage 2 so that, rather than publish a statement, as was the case in the original clause, the Scottish Ministers must lay a report before the Scottish Parliament if the order differs from the recommendation of the relevant body. Section 7(3) was amended in its
entirety at Stage 2. It now requires that Ministers make a statement to the Parliament on relating to the report made under subsection (2) as soon as reasonably practicable after the laying that report mentioned in subsection (2).

Reason for taking power

15. The annual targets will be set in advance and are based on a range of criteria. Between the date when an annual target is set and the year to which it relates, circumstances may change significantly which require a re-evaluation of the annual target level. Subsections (1)(a) and (1)(b) allow this re-evaluation to occur. Over time, it may become apparent that annual targets need to be set further, or not as far, in advance. Subsection (1)(c) allows the date by which the annual targets are set to be changed. It is not possible to foresee the full range of criteria which need to be taken into account up until 2050. Additional criteria may become as important as the current list. Subsection (1)(d) allows the criteria to change.

Choice of procedure

16. As subsection (1)(a) allows an important percentage set in primary legislation to be modified, it is considered appropriate that affirmative resolution should apply. Subsection (1)(b) allows a change to a previous instrument subject to affirmative resolution, it is therefore considered appropriate that affirmative resolution should apply. As subsections (1)(c) and (1)(d) allow a change in primary legislation, it is considered appropriate that affirmative resolution should apply.

Section 7A – Achievement of annual targets: domestic effort target

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument

Provision

17. Section 7A was inserted into the Bill at Stage 2. Subsection (1) requires that the Scottish Ministers must ensure that reductions in net Scottish emissions account for at least 80% of the reduction in the net Scottish emissions account in any target year. Subsection (3) provides that the Scottish Ministers may, by order, modify the percentage figure in subsection (1) but only to substitute a higher figure.

Reason for taking power

18. Concerns were expressed by a range of stakeholders that, as introduced, the Climate Change (Scotland) Bill did not place a restriction on the amount of carbon units which could be used to credit the net Scottish emissions account – effectively offsetting quantities of Scottish emissions. As such, it was argued, the Scottish Ministers would, in theory, be able to use carbon units to achieve all of the emissions reductions required by the 2050, interim and annual targets set under the provisions in the Bill. Section 7A seeks to address this concern by requiring that the Scottish Ministers ensure that at least 80% of the reduction in the net Scottish emissions account in any target year is achieved by reductions in net Scottish emissions and not the use of carbon units to credit that account. It may be considered appropriate in the future to seek to ensure that an even greater proportion of the reduction in the net Scottish emissions account in
any year should be achieved by reductions in net Scottish emissions. The power in subsection (3) therefore allows for the domestic effort target to be increased by order.

19. Subsection (4) requires the Scottish Ministers to request advice from the relevant body before making an order. Subsection (5) requires that if the order makes provisions different from those recommended by the relevant body, then the Scottish Ministers must publish a statement setting out the reasons why.

Choice of procedure

20. Subsection (1) sets an important percentage figure in primary legislation. As subsection (3) allows this percentage to be modified to substitute a higher figure, it is considered appropriate that affirmative resolution should apply.

Section 12 - The net Scottish emissions account

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** regulations made by statutory instrument  
**Parliamentary procedure:** On the first occasion, affirmative resolution of the Scottish Parliament. The second and subsequent regulations will be subject to negative resolution provided the amendments made are simply technical in nature. More detail is provided below.

Provision

21. Subsection (2) of section 12 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. Subsections (1A), (1B) and (1C) were inserted at Stage 2. Subsection (1A) specifies that the net amount of carbon units which may be credited to the net Scottish emissions account for a target year must not exceed the allowable amount. The terms “allowable amount” and “net amount of carbon units” are defined in subsections (1B) and (1C) respectively.

Reason for taking power

22. Certain businesses in Scotland participate in the European Union Emissions Trading Scheme. It is possible that firms in Scotland may participate in other such trading schemes in the future. If the net Scottish emissions account is to take account of the units traded within such schemes, it will be necessary to define the terms by which this occurs. This power will also enable the Scottish Ministers to create regulations covering the use of carbon units purchased or sold by Ministers themselves outside of specific trading schemes – for example, units generated by the Clean Development and Joint Implementation Mechanisms established under the Kyoto Protocol.

Choice of procedure

23. The initial regulations will set out how and in what circumstances carbon units are credited to and debited from the net Scottish emissions account which will be a key component of the operation of that account. Affirmative resolution procedure is therefore considered
appropriate for the initial regulations. Subsequent regulations will likely involve technical amendments which are unlikely to be significant and, therefore, will usually merit negative resolution procedure. If, however, the second or subsequent regulations make provision to alter the amount by which a carbon unit reduces or increases the net Scottish emissions account, affirmative resolution will be required because of the significant effect this could have on the account.

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

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

24. International aviation and international shipping emissions are generally not directly emitted in a specific country. Subsections (1) and (2) allow the Scottish Ministers to specify by order how certain emissions from international aviation and international shipping are to be regarded as “Scottish emissions”. Subsections (2A) and (2B) were inserted at Stage 2. Subsection (2A) requires that the first order under subsection (1) must be laid before the Scottish Parliament no later than 1 June 2010. Subsection (2B) provides that, if the deadline in subsection (2A) is missed, the Scottish Ministers must lay the draft order as soon as reasonably practicable afterwards. Subsection (3) requires the Scottish Ministers to seek advice from the relevant body defined in section 5(5) prior to making an order. Subsection (4) requires the Scottish Ministers to publish a statement if the advice of the relevant body is not followed.

Reason for taking power

25. 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 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.

Choice of procedure

26. As this is an issue of high interest and could significantly alter the calculation of “Scottish emissions”, and thereby the calculation of the net Scottish emissions account and future annual targets, affirmative resolution procedure is considered appropriate.
Section 18A – Limits on use of carbon units

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

27. Section 18A was inserted into the Bill at Stage 2. Subsection (1) specifies that the Scottish Ministers must by order set limits on the net amount of carbon units which may be credited to net Scottish emissions accounts during specified periods which are set out in subsection (2). Subsection (2) also contains dates by which the limits on carbon units must be set.

28. Subsection (A1) places a specific restriction on the Scottish Ministers that they may only credit to the net Scottish emissions account for a year in the period 2013-2017 carbon units purchased by them up to a limit of 20% of the reduction in the amount of the net Scottish emissions account planned for that year.

29. Subsection (3) contains a definition of “net amount of carbon units”. Subsection (4) provides that an order under subsection (1) may provide that specified carbon units do not count towards the limit. Subsection (5) provides that if any of the deadlines listed in subsection (2) are missed, the Scottish Ministers must set the relevant limit as soon as reasonably practicable afterwards.

Reason for taking power

30. Concerns were expressed by a range of stakeholders during Stage 1 of the Bill that, as introduced, the Climate Change (Scotland) Bill did not place a restriction on the amount of carbon units which could be used to credit the net Scottish emissions account – effectively offsetting quantities of Scottish emissions. As such, it was argued, the Scottish Ministers would, in theory, be able to use carbon units to achieve all of the emissions reductions required by the 2050, interim and annual targets set under the provisions in the Bill. Section 18A seeks to address this concern by requiring that the Scottish Ministers set limits on the net amount of carbon units which may be credited to net Scottish emissions accounts during specified periods up to and including the year 2050.

Choice of procedure

31. The amount of carbon units which may be credited to net Scottish emissions accounts for any given target year is an important factor in determining the plans and policies which may be implemented to achieve the annual targets. Affirmative resolution procedure is therefore considered appropriate for setting limits on the amounts of carbon units in this section of the Bill.
Section 18B – Modifying limits on use of carbon units

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

32. Section 18B was inserted into the Bill at Stage 2. Subsection (1)(a) provides that the Scottish Ministers may by order modify a limit on the use of carbon units set by virtue of section 18A(1). Subsection (1)(b) provides that the Scottish Ministers may by order modify any date mentioned in section 18A(2).

33. Subsection (1)(c) provides that the Scottish Ministers may make an order under subsection (1)(a) only if they consider that it is appropriate to do so as a result of a modification of the interim target or another significant change to the basis on which the limit on use of carbon units was set. Subsection (1)(d) sets out that the Scottish Ministers may exercise the power to make an order under subsection (1)(b) only if they consider it appropriate to do so. Subsection (4) provides that an order under subsection (1)(a) may provide that specified carbon units do not count towards the limit.

Reason for taking power

34. There may be circumstances in which limits on carbon units have been set but are subsequently considered to be inappropriate. An example of this would be if the interim target is increased. This would probably have the knock-on effect of requiring certain annual targets to be increased. As a result, the limits set on the use of carbon units for the periods covering those target years may no longer be appropriate. It is therefore necessary for the Scottish Ministers to have the flexibility to modify limits which have been set on the use of carbon units.

35. Scottish emissions are a component part of the UK carbon account, in respect of which the UK Climate Change Act 2008 creates duties on the Secretary of State to reduce. The periods listed in section 18A(2), for which limits on the use of carbon units must be set, are intended to cover the same periods that are covered by the carbon units set under the UK Climate Change Act 2008. This is in recognition of the fact that it may be necessary and appropriate for the Scottish Ministers, when setting limits on the use of carbon units in relation to the Scottish annual targets, to take account of any limit on carbon units that the Secretary of State sets with regard to the UK carbon budgets. Direct compatibility with the UK carbon budgets may not always be necessary or desirable. The power in subsection (1)(b) allows sufficient flexibility for Scotland to move out of synch with the UK carbon accounting cycle should it be decided in the future that this would be desirable.

Choice of procedure

36. The amount of carbon units which may be credited to net Scottish emissions account for any given target year and the periods for which limits on those units may be set at any given time, are important factors in determining the plans and policies which may be implemented to achieve the annual targets. Affirmative resolution procedure is therefore considered appropriate
for modifying the limits on the amounts of carbon units and the dates associated with those limits.

Section 18C – Advice before setting or modifying limits on use of carbon units

37. Section 18C was inserted into the Bill at Stage 2. It does not contain an enabling power but it does contain conditions which must be adhered to by the Scottish Ministers before they seek to exercise their powers under sections 18A(1) and section 18B(1)(a).

38. Subsection (1) requires that the Scottish Ministers must, before laying a draft of a statutory instrument under section 18A(1) or section 18B(1)(a), request advice from the relevant body.

39. If orders under either of those two sections make provision different from that recommended by the relevant body, section 18C(2) requires that the Scottish Ministers must publish a statement setting out the reasons why. Subsection (3) provides that this statement may be published in such manner as the Scottish Ministers consider appropriate.

PART 2 – ADVISORY FUNCTIONS

Section 23(4) – Reporting on progress towards targets

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

40. Section 23(2) enables the Scottish Ministers to specify the first year for which the advisory body must prepare reports on the progress being made towards the targets established under the Bill. Section 23(4) specifies when the advisory body must lay this report before the Scottish Parliament but also enables the Scottish Ministers to amend this deadline. Section 23(4) was amended at Stage 2 to enable the Scottish Ministers to specify earlier dates as well as later dates, which had been the condition in this subsection when the Bill was introduced to the Scottish Parliament.

Reason for taking power

41. The power to amend the reporting deadline date is intended to provide flexibility should there be a change to the time, for whatever reason, of the availability of the information (such as the disaggregated Scottish emissions data, for example) upon which the advisory body is required to comment.

Choice of procedure

42. Affirmative resolution procedure demonstrates the significance of the reporting and scrutiny framework established by this Bill.
Section 24(2) – Scottish Ministers’ response to reports on progress

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

43. Section 24(1) requires that the Scottish Ministers respond to the report prepared by the advisory body under section 23. Section 24(2) specifies the date by which this response is to be laid in the Scottish Parliament but also enables the Scottish Ministers to amend this deadline. Section 24(2) was amended at Stage 2 to enable the Scottish Ministers to specify by order earlier dates as well as later dates, which had been the condition in this subsection when the Bill was introduced to the Scottish Parliament.

Reason for taking power

44. The power enabling the Scottish Ministers to amend the response deadline is intended to provide flexibility should the advisory body’s report under section 23 be delayed or be made available earlier than currently expected. In the latter set of circumstances, this would prevent the Scottish Ministers from having a much longer period than intended in the Bill at introduction within which they may respond to the advisory body’s section 23 report.

Choice of procedure

45. Affirmative resolution procedure demonstrates the significance of the reporting and scrutiny framework established by this Bill.

PART 4 – DUTIES OF PUBLIC BODIES RELATING TO CLIMATE CHANGE

Section 36 - Duties of public bodies relating to climate change

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

46. Section 36 enables the Scottish Ministers to impose duties relating to climate change, by order, on bodies or persons exercising functions of a public nature, referred to as “public bodies” for the purposes of this Bill. Subsection (3) allows the regulations to impose different duties on different public bodies. Subsections (4) and (5) state that the Scottish Ministers must consult with such associations of local authorities and such other persons as they consider appropriate before imposing a duty. Subsection (6) states that the Scottish Ministers must co-operate with the relevant public bodies to help them comply with duties imposed under this section.

47. Subsections (A1) and (A2) were inserted into Section 36 at Stage 2. Subsection (A1) imposes, on the face of the Bill, three climate change duties on public bodies. Subsection (A2) provides that in this Part of the Bill a “public body” means a Scottish public authority within the meaning of section 3(1)(a) of the Freedom of Information (Scotland) Act 2002. The effect of
subsection (A1) is to change the enabling power in section 36(1) to be a power to make further provision relating to the imposition on public bodies of duties relating to climate change. Section 36(1) was therefore amended at Stage 2 to insert the word “further” before the word “provision” in recognition of this.

Reason for taking power

48. Section 36 allows for flexibility in the future to help ensure bodies with functions of a public nature take action on climate change, including reducing emissions or adapting to the effects of climate change.

Choice of procedure

49. As this provision could place a burden on bodies or persons exercising functions of a public nature, affirmative resolution procedure is considered appropriate.

Section 38 – Reporting on climate change duties

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

50. Section 38 enables the Scottish Ministers, by order, to require relevant public bodies to report on how they are complying with climate change duties created under section 36. It also enables the Scottish Ministers to set out what reports must include what format they must take and the time by which they must be submitted.

51. At Stage 2, paragraph (aa) was inserted into subsection (1). This paragraph makes clear that the Scottish Ministers may by order make provision requiring any relevant public body found, following an investigation under section 40 of the Bill, to be failing to comply with its climate change duties, to prepare a report on the actions it is taking to secure future compliance with those duties.

52. An amendment was made to paragraph (b) of subsection (1) to insert the condition that any provision made by an order made under subsection (1) as to the information that reports made by relevant public bodies must contain must be subject to subsection (1A). Subsection (1A) would have been created by amendment 209 to the Climate Change (Scotland) Bill which was lodged at Stage 2. This amendment was not ultimately moved at Stage 2, therefore the subsection (1A) mentioned in section 38(1)(b) does not exist.

Reason for taking power

53. The power to require public bodies to report on compliance with climate change duties is intended to ensure that such duties are carried out in an open and transparent fashion.
Choice of procedure

54. Requiring public bodies to report upon climate change duties which they are required to carry out is not considered as significant a burden as the requirement to perform such duties in the first place. Negative resolution procedure is therefore considered appropriate.

PART 5 – OTHER CLIMATE CHANGE PROVISIONS

CHAPTER 1 - ADAPTATION

Section 46 - Variation of permitted times for making muirburn

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

55. Section 46 inserts a new section 23A into the Hill Farming Act 1946 (“the 1946 Act”). Subsection (1) of new section 23A of the 1946 Act provides the Scottish Ministers with an order-making power to substitute for the dates specified in section 23(1), (2) or (3) of the 1946 Act, such other dates before which, and after which, it is lawful to make muirburn in any year.

56. Subsection (1) of section 23A was amended at Stage 2 to clarify that the order making power may be exercised to modify the dates specified in section 23(1), (2) or (3) of the 1946 Act repeatedly.

57. The original subsection (2) of section 23A was deleted by an amendment at Stage 2, and equivalent text was inserted instead into subsection (1). This text clarifies that any of the dates specified in section 23(1) to (3) of the 1946 Act may be substituted for the dates specified in an order made under section 23A(1) of the 1946 Act.

58. Subsection (3) provides that the Scottish Ministers may make an order under section 23A(1) of the 1946 Act only if they consider it necessary or expedient to do so in relation to climate change.

59. A new subsection (3A) was inserted at Stage 2 after subsection (3). The new subsection clarifies the extent of the Scottish Ministers’ power to modify section 23 of the 1946 Act such that the order-making power may not be exercised so as to reduce the length of the muirburn season below that currently provided for under section 23 of the 1946 Act. The amendment has the effect of maintaining the present length of the muirburn season.

Reason for taking power

60. The permitted times for making muirburn in Scotland have not changed since the 1946 Act came into force. Climate change in Scotland has altered our seasonal weather patterns. Future climate change scenarios suggest that annual temperatures will rise, winters may become wetter and summers generally drier. These climatic changes have impacted, and are likely to continue to impact, on the ability to successfully undertake muirburn. Where effective muirburn
cannot be carried out, there is an increased risk of wildfire from dry or dead vegetation, which can result in the loss of valuable habitats and carbon stored in peat underlying the lands upon which this vegetation is found. The power to vary the dates of the permitted muirburn season will enable muirburn, and those engaged in that activity, to adapt to the effects of climate change by permitting the activity at times of the year which reflect optimal climatic conditions.

**Choice of procedure**

61. Subsection (5) of new section 23A of the 1946 Act provides that order made under new section 23A(1) of the 1946 Act is subject to affirmative Parliamentary procedure. This allows for greater Parliamentary scrutiny of a draft order which proposes modification of the muirburn season. And as such an order modifies the text of section 23 of the 1946 Act, it is considered appropriate that affirmative, rather than negative, resolution procedure should apply.

**CHAPTER 2 - FORESTRY**

**Section 47 - Power to modify functions of Forestry Commissioners**

*Power conferred on:* Scottish Ministers  
*Power exercisable by:* order made by statutory instrument  
*Parliamentary procedure:* affirmative resolution of the Scottish Parliament

**Provision**

62. Section 47 confers on the Scottish Ministers the power to modify the functions of the Forestry Commissioners in or as regards Scotland. Subsection (2) provides that this power may be exercised by the Scottish Ministers only where they consider it to be necessary or expedient to do so to comply with their duties under sections 1, 2 or 3(1)(b) of the Bill, or otherwise in relation to climate change. Subsection (3) provides that an order under this section could enable the Forestry Commissioners to form or participate in corporate bodies or trusts. Subsection (4), which was deleted at Stage 2, contained provisions that would have allowed the Forestry Commissioners to delegate their functions to other persons.

**Reason for taking power**

63. The Forestry Commissioners have the general duty to promote the interests of forestry, the development of afforestation and the production and supply of timber and other forest products. In addition, the Forestry Commissioners have the function of managing land comprising the national forest estate. These functions have benefits in relation to the development of programmes, such as afforestation, which will assist with mitigation of climate change. The effects of climate change will continue to develop in the future. This power will ensure that the Forestry Commissioners can establish, participate in, or facilitate programmes to mitigate climate change without being prevented from doing so because of the limits set out in their current functions and duties which do not allow for them to form or participate in corporate bodies or trusts. The power will allow for flexibility to ensure that the Forestry Commissioners functions and duties can continue to be modified in future to meet the challenges posed by the continuing effects of climate change. Another amendment introduced at Stage 2 provides that any corporate body or trust formed under the powers provided for by Subsection (3) is subject to the biodiversity duty set out in section 1 of the Nature Conservation (Scotland) Act 2004.
Choice of procedure

64. The affirmative resolution procedure is considered appropriate because of the breadth of the power and the fact that it may involve modification of primary legislation.

CHAPTER 3 – ENERGY EFFICIENCY

Section 50 – Non-domestic buildings: assessment of energy performance and emissions

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument

Provision

65. Section 50 requires that the Scottish Ministers make regulations relating to the assessment of the energy performance of and the emission of greenhouse gases from non-domestic buildings. Subsection (1) was amended at Stage 2 to state that the Scottish Ministers “must” make regulations under this section rather than simply that they “may make such regulations, which was the provision in this subsection when the Bill was originally introduced to the Scottish Parliament. Subsection (1)(b) provides that the regulations may extend not only to the greenhouse gases emitted by non-domestic buildings themselves but also to greenhouse gases otherwise associated with such buildings and with the activities carried out in these buildings.

66. At Stage 2 a new subsection was inserted after subsection (1). This new subsection together with the amendment above contains provision that the Scottish Ministers must by regulations require the implementation of recommendations made under subsection (1). The wording of subsection (1) itself has also been slightly amended to enable this new subsection to be introduced.

67. Subsection (2) lists certain things which the regulations may, in particular, provide about. A small amendment was made to paragraph (f) at Stage 2 to clarify that the activities referred to in that paragraph which may be the subject of greenhouse gas assessment are specifically those carried out in buildings. Subsection (2)(h) provides that the regulations made under subsection (1) may make provision about the issuing of certificates following such assessments, including the form, manner and content of such certificates. At Stage 2 four new paragraphs were inserted after subsection (2)(h) to enable regulations to include provision for the form of recommendations contained in such certificates, the manner and periods which persons will be permitted to comply with those recommendations, the setting up of a register for certificates and the disclosure of information in the register.

68. Subsection (3) states that the enforcement authority provided for in the regulations is to be a local authority or such other person or body as the Scottish Ministers consider appropriate. Subsection (4) enables the enforcement authority to levy charges to recover the reasonable costs incurred in exercising its functions under the regulations.
Reason for taking power

69. The aim of the provisions for improving the energy performance of existing non-domestic buildings is to raise the contribution that the existing non-domestic stock can make to mitigating climate change. Buildings account for over 40% of emissions and there is scope to reduce these levels. They are to be subject to an assessment of the emissions of greenhouse gases and energy performance, an enhanced form of energy performance certificate (EPC). The enabling powers in section 50 will allow the creation of the framework necessary for this.

Choice of procedure

70. As this provision may be used to create regulations which could place a significant burden on the owners of non-domestic buildings, affirmative resolution procedure is considered appropriate. When the Bill was introduced to the Scottish Parliament, regulations made to make provision relating to the recovery of costs by the enforcement authority were subject to negative resolution procedure as it was considered that such regulations would be needed to keep such provisions up to date and would involve technical amendments which were unlikely to be significant. However, during Stage 1, the Economy, Energy and Tourism Committee considered that amendments of this kind were of sufficient significance to also merit affirmative resolution procedure. An amendment to section 64 to this effect was made to the Bill at Stage 2.

Section 50A - Living accommodation: assessment of energy performance and emissions

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

71. Section 50, as amended at Stage 2, enables the Scottish Ministers to make regulations relating to the assessment and improvement of the energy performance of and the emission of greenhouse gases from non-domestic buildings, and to require the implementation of recommendations made as part of that assessment.

72. At Stage 2 section 50A was inserted into the Bill, giving the Scottish Ministers powers broadly equivalent to those in section 50 as it was before stage 2, but in relation to living accommodation rather than non-domestic buildings. Subsection (1) of the new section differs from subsection (1) of section 50 by specifying living accommodation and also by referring only to emissions produced by the living accommodation, omitting reference to emissions otherwise associated with the building or activities carried out in the building. It also gives the Scottish Ministers powers to make regulations about improving the energy performance and emissions of living accommodation. Subsection (2) lists certain things which the regulations made under subsection (1) may, in particular, provide about. Subsection (3) states that the enforcement authority provided for in the regulations is to be a person or body that the Scottish Ministers consider appropriate. In this respect, it differs from section 50(3) by making no specific reference, in the case of living accommodation, to the possibility that the local authority could be the enforcement authority. Subsection (4) enables the enforcement authority to levy charges to recover the reasonable costs incurred in exercising its functions under the regulations.
Reason for taking power

73. The aim of the provisions for improving the energy performance of existing domestic buildings is to raise the contribution that the existing domestic stock can make to mitigating climate change. Buildings account for over 40% of emissions and there is scope to reduce these levels. They are to be subject to an assessment of the emissions of greenhouse gases and energy performance, which would be an enhanced and more precise, and therefore fairer, form of energy performance certificate (EPC). The enabling powers in section 50 will allow the creation of the framework necessary for this and for the improvement of energy performance and emissions.

Choice of procedure

74. As this provision may be used to create regulations which could place a significant burden on the owners of domestic buildings, affirmative resolution procedure is considered appropriate.

Section 50B - Council tax reductions to promote energy efficiency

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

75. Section 50B was inserted into the Bill at Stage 2. This section requires that the Scottish Ministers make regulations that would facilitate local authorities to reduce the amount of council tax a person is liable to pay in the following financial year if that person makes an energy efficiency improvement or installs technologies reliant on renewable energy or heat in a domestic dwelling in the current financial year.

76. Subsection (1) places a duty on the Scottish Ministers to make regulations under section 80 of the Local Government Finance Act 1992 to provide that, in respect of a person who satisfies certain conditions set out in paragraphs (a) and (b) of the subsection, the first of which relates to energy efficiency improvements being made to a dwelling, the amount of council tax that the person is to be liable for in the next financial year shall be reduced in accordance with section 50C which was also added to the Bill at Stage 2.

77. Subsection (2) requires that the regulations that the Scottish Ministers must make under subsection (1) must also make similar provision about reducing the council tax which is liable following the installation of technologies reliant on renewable energy or heat in a dwelling.

78. Subsection (3) provides that, subject to subsection (4) any reductions made under either subsection (1) and (2) are without prejudice to reductions made under the other subsection. Subsection (3) also provides that any reduction made under subsection (1) is without prejudice to any further reduction made by virtue of that subsection.

79. Subsection (4) provides that the regulations made by virtue of subsection (1) may specify a maximum number of reductions, or a maximum total reduction, in the amount of council tax payable in respect of any one dwelling in any one financial year.
80. Subsection (5) provides that the regulations made under subsection (1) must make provision regarding the sort of evidence that a local authority is to accept as demonstrating that an energy efficiency improvement has been made to a dwelling and/ or that a dwelling meets a reasonable standard of energy efficiency.

81. Subsection (6) requires that a draft of a statutory instrument containing the first regulations under subsection (1) must be laid before the Scottish Parliament no later than 31 December 2009.

82. Subsection (7) contains definitions of several of the terms used in other parts of 50B and subsection (8) provides that the Scottish Ministers may by regulations, amend subsection (7) to add to the list of measures in the definition of “energy efficiency improvement”.

Reason for taking power

83. Under the UK Carbon Emissions Reduction Target scheme, payments are made by energy generators to incentivise householders to make improvements to the energy efficiency of their dwellings and/ or install renewable energy or heat technologies in those dwellings. In England and Wales this money can be made available via local authorities by directly or indirectly reducing the level of council tax payable in respect of particular properties. Section 50B makes provisions for similar incentivisation schemes to be operated in Scotland.

Choice of procedure

84. Given that regulations made under section 50B concern varying council tax payable on certain dwellings in specific circumstances and that this has implications for local authorities in Scotland regarding the administration and funding provision of these payments, it is considered that affirmative resolution procedure affords an appropriate level of parliamentary scrutiny.

Section 50D - Review of provisions made by virtue of or under sections 50C and (Amounts of reductions in non-domestic rates)

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

85. Reference is made in subsections (1) and (3) of section 50D to section 25B of the Local Government (Scotland) Act 1966. Reference is also made in the title of section 50D and in subsections (2) and (3) to section (Amounts of reductions in non-domestic rates). These two sections would have been created by amendments 260 and 262 to the Climate Change (Scotland) Bill which were lodged at Stage 2. These amendments related to non-domestic rates but were not ultimately moved at Stage 2, therefore the two new sections detailed in this paragraph and mentioned in section 50D do not exist. This Supplementary Delegated Powers Memorandum provides information only on the powers that are actually available to the Scottish Ministers.

86. Section 50D requires annual reports to be made by the Scottish Ministers regarding the effectiveness of specific financial incentives towards promoting energy efficiency improvements
and technologies reliant on renewable sources of energy or heat, and powers to vary these amounts, and alter the criteria involved.

87. Subsection (1) provides that the Scottish Ministers must, as soon as reasonably practicable after 31 March 2012, and annually thereafter, lay a report before the Scottish Parliament on the operation of regulations made by virtue of section 50B of the Bill, including an assessment of whether reductions which have been made in council tax have contributed effectively towards promoting energy efficiency improvements and technologies reliant on renewable sources of energy or heat.

88. Subsection (2) provides the Scottish Ministers with the power to vary, in specified circumstances, the amount of reduction which may be made to council tax for the purpose of promoting energy efficiency improvements and technologies reliant on renewable sources of energy or heat.

89. Subsection (3) provides the Scottish Ministers with the power to vary, in specified circumstances, the specified mechanisms for calculating the amount of reduction which may be made to council tax for the purpose of promoting energy efficiency improvements and technologies reliant on renewable sources of energy or heat.

Reason for taking power

90. The provision in section 50D is necessary to ensure that the effectiveness of the specified financial incentives towards promoting energy efficiency improvements and technologies reliant on renewable sources of energy or heat is kept under review. The regulation making powers in subsections (2) and (3) are necessary to enable Ministers to take appropriate remedial action should any of the reports made under subsection (1) identify that any of the amounts of reductions in council tax mentioned in that subsection should be increased or otherwise varied or that different mechanisms for calculating those amounts be prescribed.

Choice of procedure

91. Given that regulations made under subsections (2) and (3) of section 50D concern varying council tax payable on certain buildings in specific circumstances and that this has implications for local authorities in Scotland regarding the administration of these payments, it is considered that affirmative resolution procedure affords an appropriate level of parliamentary scrutiny.
Section 51A – Air source heat pumps and micro wind turbines in domestic properties: permitted development rights

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

92. Subsection (1) of section 51A places a duty on the Scottish Ministers to bring forward an amendment to the Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2009. Subsection (2) specifies items that the amendment under subsection (1) must contain.

93. Subsection (3) requires that an order making the amendment required in subsection (1) be brought forward no later than six months after the commencement date of this section. The order will be made under section 30 of the Town and Country Planning (Scotland) Act 1997.

94. Subsection (4) contains provision about certain consultation criteria that the Scottish Ministers must comply with before making the amendment under subsection (1).

95. Subsection (5) contains the definition of the term “microgeneration” for the purposes of section 51A.

Reason for taking power

96. Section 51A would place a duty on the Scottish Ministers to take specific action that would provide for the circumstances in which permitted development rights would be granted for the installation, alteration or replacement of air source heat pump and wind turbine microgeneration equipment in domestic properties.

Choice of procedure

97. Orders made under section 30 of the Town and Country Planning (Scotland) Act 1997 are subject to negative resolution procedure.

Section 51B – Microgeneration in non-domestic buildings: permitted development rights

Power conferred on: Scottish Ministers
Power exercisable by: order or regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

98. Subsection (1) of section 51B places a duty on the Scottish Ministers to bring forward an order or regulations under section 30 of the Town and Country Planning (Scotland) Act 1997.

99. Subsection (2) specifies that the order or regulations made under subsection (1) must make provision specifying the circumstances in which the installation, alteration or replacement
of microgeneration within the curtilage of a non-domestic building is considered to be a permitted development within the meaning of sections 30 and 31 of the 1997 Act.

100. Subsection (3) requires that the order or regulations made to satisfy the duty in subsection (1) be brought forward no later than 12 months after the commencement date of this section.

101. Subsection (4) contains provision about certain consultation criteria that the Scottish Ministers must comply with before making the amendment under subsection (1).

102. Subsection (5) contains the definition of the terms “microgeneration” and “non-domestic building” for the purposes of section 51B.

**Reason for taking power**

103. Section 51B would place a duty on the Scottish Ministers to take specific action that would provide for the circumstances in which permitted development rights would be granted for the installation, alteration or replacement of microgeneration equipment in non-domestic buildings.

**Choice of procedure**

104. Orders made under section 30 of the Town and Country Planning (Scotland) Act 1997 are subject to negative resolution procedure.

**CHAPTER 3A – THE SCOTTISH CIVIL ESTATE**

**Section 51E – Scottish civil estate: supplementary**

Power conferred on: Scottish Ministers  
Power exercisable by: order made by statutory instrument  
Parliamentary procedure: affirmative resolution of the Scottish Parliament

**Provision**

105. Sections 51C (Energy performance of new buildings procured for the Scottish civil estate) and 51D (Report on the Scottish civil estate) were inserted into the Bill at Stage 2. Section 51E contains a delegated power related to these two subsections.

106. Section 51E(1) sets out what buildings are to be considered as being part of the civil estate in Scotland for the purposes of sections 51C and 51D.

107. Section 51E(2) contains an order making power to allow specific descriptions of buildings to be included within the scope of sections 51C and 51D if the generic description in subsection (1) is considered not to apply to them. Subsection (2) also provides that descriptions or uses of buildings may be excluded from or included in the scope of sections 51C and 51D.
Reason for taking power

108. The wording of subsection (1) of section 51E is drafted so that sections 51C and 51D will cover the buildings used for Scottish central government administration. It may in the future be considered appropriate that subsection (1) should not extend to specific descriptions or uses of buildings or, conversely, that it does not cover particular buildings or uses that it should. The order making power in subsection (2) allows for the scope of subsection (1) to be varied by order to respond to such circumstances.

Choice of procedure

109. Members of the Scottish Parliament are likely to have an interest in which buildings fall within the scope of section 51E and which are therefore covered by sections 51C regarding the procurement or construction of such buildings and section 51D regarding reporting on the efficiency and contribution to sustainability of those buildings. It is considered that affirmative resolution affords the sufficient level of parliamentary scrutiny should the Scottish Ministers seek to use an order under section 51E(2) to alter the scope of section 51E(1).

CHAPTER 4 – WASTE REDUCTION AND RECYCLING

Section 52 - Waste prevention and management plans

| Power conferred on: | Scottish Ministers |
| Power exercisable by: | regulations made by statutory instrument |
| Parliamentary procedure: | super-affirmative resolution of the Scottish Parliament (negative procedure for regulations dealing only with charging by enforcement authority) |

Provision

110. Section 52 enables the Scottish Ministers, by regulations, to place a duty on specified persons to prepare waste prevention and management plans. The Scottish Ministers would prescribe in regulations the persons required to prepare a plan (or plans), as well as the matters to be included in a plan. It is intended that the plans can be required for a range of different matters. For example, the regulations might require a plan for an individual construction project. Alternatively, they might require a plan for waste generated by a business on an on-going, day-to-day basis (e.g. office waste). It is intended that these regulations would deal with measures to prevent as well as manage waste.

111. Should the preparation of waste prevention and management plans be made compulsory by regulations under this section of the Bill, a regime will need to be established to ensure that plans are drawn up, that they are sufficiently rigorous, and that they are followed. A body will need to be established, or nominated, to do this. Subsection (2)(e) to (h) and section 60 of the Bill grants powers enabling such a regime to be set up and to establish or nominate a body to operate the regime.

Reason for taking power

112. Minimisation of waste, better use of resources, and careful management of such waste as does arise all impact on climate change. They are also important for other environmental goals,
such as landfill reduction and preservation of amenity. Avoidance of waste can also generate savings for businesses. In view of this range of gains, many businesses already plan for prevention and management of waste. Powers would be taken to ensure that performance across the economy met best standards, and that up-to-date approaches and techniques be adopted.

113. The range of activities encompassed by the plans, and the kind of waste with which they will need to deal, will be strongly influenced by economic activities and market conditions prevailing in future. All of these may change over time. Taking these powers allows a flexible response to prevailing conditions.

Choice of procedure

114. Regulations will provide the detail of any scheme which is to be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to create new offences. The exception would be regulations dealing only with charges by the monitoring and enforcement body (see section 60(4)) which, in terms of section 64(5) and (7)(e), would be made by negative resolution.

Section 53 - Information on waste

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: super-affirmative resolution of the Scottish Parliament

Provision

115. Subsection 53(1) enables the Scottish Ministers, by regulations, to require specified persons to provide information to SEPA about the waste that they produce. In terms of an amendment introduced at Stage 2, the first regulations must be made under this section within a year of Royal Assent. Subsection (2) lists certain things which the regulations may, in particular, provide about, including the enforcement of duties imposed by the regulations and related offences for failing to comply with the requirements of the regulations.

Reason for taking power

116. It will be difficult to move to a zero waste society without much better information about the circumstances in which waste arises and its management, treatment and disposal in Scotland. Good, reliable waste data informs policy-makers when they are developing new ways of reducing and managing waste. It informs the private sector when it is seeking to invest in waste infrastructure as part of the move away from landfill, and also when looking to minimise waste, and thus costs. Such information would also help to meet the obligations of the Scottish Ministers under the Waste Statistics Regulation (2150/2002/EC)\(^1\). This establishes a framework for the production of Community statistics on the generation, recovery and disposal of waste. It requires Member States and the European Commission to produce Community statistics on the generation, recovery and disposal of waste. SEPA already collates waste statistics which are

\(^1\) OJ No L 332, 9.12.2002, p1
used to meet Scotland’s obligations under the EU Regulation. However, statistics on commercial and industrial waste are based on surveys for which the return rate is low.

117. Taking powers would enable the kind of statistics collected to be determined by developing needs. As an example, and without prejudicing any eventual use of the power, in future it may become possible and desirable to keep statistics relating to the greenhouse-gas-generating potential of waste.

Choice of procedure

118. Regulations will provide the detail of any scheme which is to be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to create new offences.

Section 54 - Recyclable waste: facilities for deposit etc.

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<tr>
<th>Power conferred on:</th>
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<tr>
<td>Parliamentary procedure:</td>
<td>super-affirmative resolution of the Scottish Parliament</td>
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<td>(negative procedure for regulations dealing only with charging by enforcement authority)</td>
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Provision

119. 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. It is possible that, for example, supermarkets could be required to provide recycling facilities at or near tills for packaging which customers could use. Offices could be required to provide receptacles in which employees could recycle their own paper, as well as that of the workplace. This would not be a complete innovation: such facilities are already available in places. In practice, the Scottish Ministers would only prescribe types of waste if there was capacity to recycle that waste and a market for the resulting recyclate.

120. Regulations may also be used to require persons with the correct environmental authorisation to collect waste deposited in such facilities and to ensure so far as reasonably practicable that such waste is recycled. Charges payable to such authorised persons may be specified.

121. A monitoring and enforcement regime may be established to ensure that the facilities are provided, and used and operated correctly. Subsection (2)(f) to (i) and section 60 of the Bill grants powers enabling such a regime to be set up and to establish or nominate a body to operate the regime.

Reason for taking power

122. Improved provision of recycling facilities reduces the use of landfill and can also help to mitigate climate change. To improve recycling rates the producers of waste have to be given
better opportunities to recycle, rather than dispose of the waste they produce; and waste has to be separated and kept uncontaminated to make recycling easier, or even physically possible. The provision of receptacles at convenient places, and which keep waste streams separate, achieves both these conditions.

123. The kinds of waste for which receptacles are provided are likely to change over time as recycling markets change or new products are developed. This will in turn affect judgements about the persons who should be required to provide and enabled to use these facilities. For this reason requirements are likely to need to be modified; and this power will permit this to be done.

Choice of procedure

124. Regulations will provide the detail of any scheme which is to be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to create new offences. The exception would be regulations dealing only with charges by the monitoring and enforcement body which, in terms of section 64(5) and (7)(e), would be made by negative resolution.

Section 55 - Recyclable waste: facilities for deposit at events etc.

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: super-affirmative resolution of the Scottish Parliament
(negative procedure for regulations dealing only with charging by enforcement authority)

Provision

125. Whereas section 54 is most likely to be used to require the provision of receptacles at more-or-less permanent locations, section 55 enables the Scottish Ministers to make regulations which confer power on local authorities to issue notices requiring receptacles to be provided for a broad range of types of waste at various events. The receptacles would be needed only for the duration of the event. This would not be a complete innovation: such facilities have already been made available at particular events. In practice, the Scottish Ministers would only prescribe types of waste if there was capacity to recycle that waste and a market for the resulting recyclate.

126. Those who hold sporting or cultural events could be placed under a duty to provide receptacles in which those attending could leave a range of waste – relevant examples could be plastic cups and programmes. The materials so collected could then be recycled. Regulations may also be used to enable local authorities to require persons with the correct environmental authorisation to collect such waste and to ensure so far as reasonably practicable that waste deposited in such facilities is recycled. Regulations may specify charges payable to such authorised persons.

127. A monitoring and enforcement regime may be established to ensure that facilities are provided, used and operated correctly. Subsections (2)(k) to (n) and section 60 of the Bill grant
powers enabling such a regime to be set up and to establish or nominate a body to operate the regime.

Reason for taking power

128. As with the kind of receptacles in permanent locations envisaged by section 54, the aim here is to encourage recycling and thus the more efficient use of resources. The conditions for higher recycling rates are to be established by maximising collection and by keeping different types of waste separate for easy recycling. An additional benefit which may be achieved by the provision of recycling facilities at events is a reduction in littering.

129. The kinds of waste for which receptacles are provided are likely to change over time as recycling markets change or new products are developed. This may in turn affect judgements about which events should be potentially subject to notices. For this reason, requirements are likely to need to be modified; and this power will permit this to be done.

Choice of procedure

130. Regulations will provide the detail of any scheme which is to be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be particularly desirable given that regulations are likely to create new offences. The exception would be regulations dealing only with charges by the monitoring and enforcement body which, in terms of section 64(5) and (7)(e), would be made by negative resolution.

Section 56 - Procurement of recyclate

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: super-affirmative resolution of the Scottish Parliament
(negative procedure for regulations dealing only with charging by enforcement authority)

Provision

131. Section 56 gives the Scottish Ministers powers to require specified persons to ensure that particular things procured or constructed by them contain or include a certain proportion of recyclate.

132. Arrangements would be required to ensure that these obligations were observed. A body would have to be set up or nominated to do this. Section 56(3)(f), subject to section 60, contains provisions allowing such a regime to be developed.

Reason for taking power

133. A great deal of recyclate is already procured by a wide range of businesses and public bodies, which promotes resource efficiency, reduces the use of landfill and helps mitigate climate change. It is likely, however, that markets for recyclate, and with them economic activity in the waste processing sector, could be increased if such procurement were made
compulsory. It would also help to counter the effects of what may be perceived as a stigma attached to recycled products.

134. The kind of recycled materials which should be procured would, however, depend on market conditions prevailing at the time, as would the type of organisation at which the powers would be aimed. Care would also have to be taken, for example, that any materials stipulated should be sufficiently widely available and readily traded to avoid market distortions. Powers therefore need to be flexible enough to allow modification, as envisaged in this section.

Choice of procedure

135. Regulations will provide the detail of any scheme which is to be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to create new offences. The exception would be regulations dealing only with charges by the monitoring and enforcement body which, in terms of section 64(5) and (7)(e), would be made by negative resolution.

Section 57 – Targets for reduction of packaging etc.

Power conferred on: Scottish Ministers  
Power exercisable by: regulations made by statutory instrument  
Parliamentary procedure: super-affirmative resolution of the Scottish Parliament (negative procedure for regulations dealing only with charging by enforcement authority)

Provision

136. 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. Without prejudicing detailed provisions, it would allow Ministers to obtain information about a baseline volume of packaging on the market in Scotland and then set targets on retailers, for example, to reduce that amount year on year. The reduction might be expressed in ways other than absolute amounts: for example, targets could be set with reference to the relationship between volume of packaging put on the market by a retailer and its turnover. The forms of packaging for which targets might be set would be a matter for the regulations and could, obviously, be altered by further regulations.

137. A monitoring and enforcement regime may be established to ensure that information is properly collated and targets met. Subsection (2)(e) to (h) and section 60 of the Bill grants powers enabling such a regime to be set up and to establish or nominate a body to operate the regime.

Reason for taking power

138. There is already legislation regarding packaging, in the form of the Packaging (Essential Requirements) Regulations 2003 and the Producer Responsibility Obligations (Packaging

2 SI 2003/1941
Waste) Regulations 2007\(^3\). These respectively set out the required specifications of packaging, and place responsibility on producers to recycle a proportion of waste packaging put on the market by them. Neither of these sets of regulations actually requires that the overall amount of packaging used should be reduced. The proposal in this Bill would complement existing legislation. Baseline information about packaging in circulation is needed before targets can be set, and the system is likely to require future revision in light of changing market conditions.

**Choice of procedure**

139. Regulations will provide the detail of any targets, to whom they apply, and how they should be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to create new offences. The exception would be regulations dealing only with charges by the monitoring and enforcement body which, in terms of section 64(5) and (7)(e), would be made by negative resolution.

**Section 58 – Deposit and return schemes**

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<tr>
<td>Parliamentary procedure:</td>
<td>super-affirmative resolution of the Scottish Parliament other than where the regulations only make provision relating to one or more of: charging by the enforcement authority, amount of deposits, form and content of notices or registration fees, in which case the procedure is negative resolution of the Scottish Parliament</td>
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**Provision**

140. Section 58 allows the Scottish Ministers to establish deposit and return schemes, which are defined in terms of attaching a returnable element, called a “deposit” to the sale price of an article, which would be payable to the person returning the packaging associated with that item, the item itself, or both the item and the packaging. The section allows the items and/or packaging which would be included in the scheme, and the persons involved, as well as the amount of any deposit, to be defined in regulations. The section as drafted dealt originally only with packaging. Amendments were made at Stage 2 at various places in the section to refer to the articles, the returnable packaging, and to both articles and packaging, allowing any scheme to deal with consumer articles as well as, or even without, their respective packaging.

141. The section also allows for a non-returnable element being included in the price, to defray the expenses of any scheme. This amendment was inserted in section 58(7) at stage 2.

142. The section would permit a range of schemes to be developed, within that basic structure. At its simplest a scheme could merely require Scottish producers to establish their own deposit and return schemes. At the other end of the scale it could require the establishment of a “clearing house” system similar to that operating in Denmark and Norway, whereby relevant items are identified by the clearing house against payment of a fee by whomever puts them on

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\(^3\) SI 2007/871
the market. These fees are used to refund those who return the materials. The clearing-house can also take responsibility for recycling the materials collected: this is allowed for by the section.

143. A monitoring and enforcement regime may be established to ensure that materials subject to the requirements have a deposit attached to the sale price of the relevant items and this is properly refunded to those returning them. Monitoring and enforcement powers would be required. Subsection (7)(i) to (l) and section 60 of the Bill grants powers enabling such a regime to be set up and to establish or nominate a body to operate the regime. Section 58(5) contains provision allowing a clearing house of the type described above to carry out these functions. The clearing house, called a “scheme administrator” in an amendment introduced at Stage 2, is dealt with in more detail in the succeeding sections which were similarly introduced at that Stage.

Reason for taking power

144. While the 2007 Regulations described above do require the recycling of certain amounts of packaging this tends to be “back of store”. A deposit and return scheme could increase the return and the recycling of packaging which reaches consumers’ hands. Furthermore, the 2007 Regulations do not affect the consumer items themselves, which might also reasonably be subject to a scheme. For example, a deposit and return scheme could be used to encourage the collection and proper management of waste low-energy light bulbs.

145. Section 58(6) provides that Ministers may only make regulations where they consider this to be necessary or expedient in order to promote or secure an increase in the recycling of materials. Furthermore, by attaching a monetary value to items and packaging it could discourage the careless discarding of these materials – littering and fly-tipping – and reduce the concomitant amenity, and health and safety, problems.

146. A scheme could also encourage manufacturers to develop reusable forms of consumer items and packaging. Those who operate existing deposit and return schemes do so to encourage reuse of materials and thus keep their own costs down. It is likely that the types of product which are suitable for deposit and return schemes will develop along with markets and technology. The level of detail required to establish properly functioning schemes is likely to be best left to subordinate legislation.

Choice of procedure

147. Regulations will provide the detail of any deposit and return schemes. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to be complex and, in particular, to create new offences. The exceptions would be regulations dealing only with charges by the monitoring and enforcement body, the amount of the deposits, form and content of information notices for customers, and registration fees which, in terms of section 64(5) and (7)(d) and (e), would be made by negative resolution.
Section 58A - Deposit and return schemes: designation of scheme administrator

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

148. This section was inserted at Stage 2. Any scheme administrator to which section 58(5) applies needs to be designated by the Scottish Ministers. Subsection (1) of this section allows the Scottish Ministers to do so. It may be either an existing or a new body. Subsection (2) also allows the Scottish Ministers to confer, remove or otherwise vary the scheme administrator’s functions, where the scheme administrator is an existing body. Amongst these functions it mentions in particular, at subsection (3), borrowing and charging in respect of the exercise of its functions. This is necessary to ensure that the scheme administrator’s costs can be covered.

149. Subsection (4) also obliges a scheme administrator to comply with directions the Scottish Ministers may give it. This is common among existing bodies enforcing environmental law, such as SEPA.

Reason for taking power

150. The kind of functions envisaged for a scheme administrator – running a clearing-house type of deposit-and-return scheme – are different in nature from the functions of existing bodies in Scotland, and are unlikely all to be available in existing legislation. Not only is it necessary to be able to give a body, whether new or existing, those functions, but it is also necessary to take powers to ensure that Scottish Ministers are able to give any body the necessary functions at all.

Choice of procedure

151. An order would provide the detail of to whom the functions of a scheme administrator may be given, and the details of those functions. This would be made by affirmative procedure.

Section 58B - Power to establish scheme administrator

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

152. This section was inserted at Stage 2. It allows the Scottish Ministers to set up a new body to undertake the functions of a scheme administrator. The detail of the Ministers’ powers in respect of the administrator’s status, constitution, members and employees, functions and accounting is set out in subsection (5). Any such body will be a body corporate. It will have the powers necessary or expedient to carry out the functions of running a clearing-house deposit and return scheme. In particular it may carry out such quasi-commercial functions as entering into contracts, borrowing and charging.
Reason for taking power

153. It is not unlikely that a new body would have to be created to exercise the functions of a scheme administrator, since they are unlike those of any existing body. Detailed powers are therefore necessary to create and establish parameters for a new body, and delineate its functions.

Choice of procedure

154. An order would provide the detail of powers regarding the establishment of a new body to act as scheme administrator. This would be made by affirmative procedure.

Section 59 - Charges for supply of carrier bags

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>super-affirmative resolution of the Scottish Parliament (negative procedure for regulations dealing only with charging by enforcement authority)</td>
</tr>
</tbody>
</table>

Provision

155. Section 59 will enable the Scottish Ministers to require suppliers of goods to charge for carrier bags. This may be done by reference to the type of goods sold, the type of supplier, turnover or other factors. The regulations would also define the carrier bags to which the charge applied and specify either the amount to be charged for each bag, or provide for how that amount is to be determined. The regulations would also be able to specify how the net proceeds are to be used, for example to ensure (if necessary) that the proceeds are applied to environmental causes which operate in Scotland.

156. Records will need to be kept about matters such as the number, type and tonnage of carrier bags for which a seller has imposed the charge. Section 59(2)(g) to (l), subject to section 60, enable the Scottish Ministers to appoint a body or bodies to monitor the accuracy of these records, and also to enforce the regulations, including ensuring that the proceeds were actually spent on the required good causes and to impose sanctions for failure to comply with the regulations.

Reason for taking power

157. Voluntary action has already significantly reduced the issue of carrier bags. However, reducing carrier bag use to a minimum may well require the imposition of a charge. Exactly what bags should be subject to such a charge, however, is likely not only to be a matter of detailed exposition, but also to be subject to variables, depending on – for example – life cycle analyses of various kinds of bag at any given time. Changes in the plastic reprocessing market, for example, could significantly affect the assessment of the environmental costs of plastic bags. Consumer shopping habits may change, and be reflected in the pattern of bag use associated with supermarkets on the one hand and boutiques on the other. It is therefore necessary for the power to set charges to be capable of modifying a range of details.
Choice of procedure

158. Regulations will provide the detail of any scheme which is to be enforced. At Stage 2 it was considered appropriate, for proper Parliamentary scrutiny, that super-affirmative procedure be adopted. This was thought to be desirable given that regulations are likely to create new offences. The exception would be regulations dealing only with charges by the enforcement body, which, in terms of section 64(5) and (7)(e), would be made by negative resolution.
This document relates to the Climate Change (Scotland) Bill as amended at Stage 2
(SP Bill 17B)

CLIMATE CHANGE (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM