Response to Follow-up Questions from the Education and Culture Committee on 15 January 2013

Tuition fees cap (Section 4 of the Bill)
In setting an upper limit on tuition fees, would Scottish Ministers intend to take into account matters such as (a) any wider support packages established by an HEI for the students in question and (b) the longer duration of some Scottish degree courses?

Proposed new section 9C(3)(b) of the 2005 Act provides that, in setting the same, the Scottish Ministers must seek to ensure that the upper limit is no higher than the maximum annual tuition fee level set by legislation for a course of higher education provided elsewhere in the UK. The upper limit will be the same for all universities irrespective of the individual support packages in place. This provides protection for students from the Rest of the United Kingdom (RUK), ensuring they have access to tuition fee loan support for the entirety of their tuition fee costs.

Within the boundary of the fees cap, it will be for the individual universities to set their own tuition fees for students from the RUK at a level which the universities consider will enable them to continue to attract RUK students. As we have seen under the current voluntary arrangement, the individual universities will utilise a proportion of the tuition fees received to provide bursary and support packages to help those RUK students most in need of financial assistance. The universities themselves will also make their own decisions about offering advanced entry into the 2nd year of degree programmes for those students with particular qualifications, as they have done since 2012-13.

Regional strategic bodies (section 10)
With reference to new section 23L, to be inserted by section 10, please clarify the possible circumstances in which one regional strategic body would transfer “such staff, property, rights, liabilities or obligations as it may specify for certain purposes” to another regional strategic body or to a regional college. Would there be any safeguards around what was transferred, other than the consultation requirements set out?

Under new section 23L(3) of the 2005 Act, a regional strategic body would be able to make an arrangement to transfer any of its staff, property, rights or obligations to any of its colleges, any regional college or another regional strategic body. New section 23L(3) constrains its use. Such a transfer would have to be for either of the following purposes:

a) For the purpose of transferring responsibility for providing any particular service

b) For any other purpose relating to the functions of the regional strategic body or any of its colleges.

Such an arrangement could only be made following consultation with persons specified in new section 23L(5).
General employment law would apply in relation to any transfer of staff. In appropriate circumstances that would include the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the TUPE Regulations). The TUPE Regulations protect employees’ terms and conditions of employment when an undertaking is transferred.

The Explanatory Notes cite one example (paragraph 82) when such an arrangement might be made – “Where a regional strategic body was delivering shared services (such as finance and human resource management) to its colleges and one of those colleges was to be designated a regional college, a regional strategic body may wish to transfer staff etc. to the college to enable the college to deliver such services for itself”.

In such a scenario - where one of the colleges in an existing region was to be designated as a regional college of a new region (and the regional strategic body itself would remain in existence) - a transfer arrangement might also include the transfer of some staff etc. associated with the regional strategic body’s regional planning function, as the regional college would be responsible for its own regional planning.

Another possible circumstance is: a regional strategic body may seek to transfer staff, property etc. to a regional college or a regional strategic body in order to facilitate the delivery of shared services across regions. For example, if Glasgow regional board was delivering IT support to its colleges and it came to an agreement with the regional college in the West region that the college would deliver this service across both regions, the Bill would enable IT support staff in Glasgow to be transferred to the regional college.

Policy Memorandum

(a) The ‘consultation’ section of the PM (paragraphs 13–16) does not specifically mention all six provisions of the Bill so please confirm which areas were consulted on.

The pre-legislative consultation paper, Putting Learners at the Centre provided the context for all six topics covered in the Bill. The responses to this consultation shaped the development of our proposals and was supplemented by additional input as the process continued. For example, the independent reviews of FE and HE governance referred to in the policy memorandum informed our decisions on HE and FE Governance. The other provisions on college regionalisation have been further shaped by the joint SG/SFC consultation on regionalisation and ongoing discussions with sector representatives.

The proposals on data sharing were developed with stakeholders and delivery partners, within the existing frameworks which already facilitate these data sharing arrangements. In a similar vein, the widening access proposal drew on further input through the SFC’s ongoing discussions with the sector on these issues. The proposals for the review of further and higher education were also discussed in more detail with the SFC.
The issues surrounding tuition fees were consulted upon and debated fully as part of the process to lay the secondary legislation required in late 2011.

(b) Paragraph 58 of the PM states that the Scottish Government considered whether the provisions on widening access and the tuition fees cap raised any ECHR issues. Please clarify what the exact concerns were and the basis on which the Scottish Government is content that they have been overcome.

In view of the restrictions on both the legislative competence of the Scottish Parliament and the devolved competence of Scottish Ministers provided for in the Scotland Act 1998, the Scottish Government requires to satisfy itself that its policy proposals are compatible with the Convention rights. Paragraph 58 of the Policy Memorandum reflects the fact that the Scottish Government has done so in relation to the Bill’s provisions on the tuition fees cap and widening access.

Paragraph 58 of the policy Memorandum acknowledges the relevance of Article 2 of Protocol 1 to the European Convention on Human Rights (right to education, which includes a right to educational establishments) when read with Article 14 of the Convention (prohibition of discrimination in the enjoyment of rights and freedoms set forth in the Convention) in relation to the Bill provisions on widening access and the tuition fees cap.

The Scottish Government is satisfied that its policies on widening access and the tuition fees cap – which the Bill makes provision in relation to - pursue legitimate aims.

(c) How will the potential for negative impacts mentioned in the EQIA be mitigated?

Widening Access
It is recognised that entry to Higher Education is always competitive and some applicants do not secure a place. If the widening access agreements are successful in bringing more non-traditional entrants into HE and the funded places available at HEIs in Scotland did not increase, then there would be some displacement of prospective students. However, there are a number of factors involved in this including the success of the agreements themselves and what other off-setting measures could be put in place to make provision more flexible or add places to the system.

Scottish Government has made clear its intentions to increase the number of funded places available over the spending review period and within current financial plans and the first announcement to this effect, putting an additional 2,000 places into the system including over 1,700 contributing directly to widening access and articulation, was made by the Cabinet Secretary on 18 December. This will be monitored by the Scottish Government going forward

Tuition Fees
This aspect of the Bill would not impact on those subject to regulated fees. Analysis suggested that of the group of students not subject to regulated fees - the cap would benefit students coming to Scotland from the rest of the UK. These students were more likely to share the protected characteristics of: English national origin, Welsh
national origin, Northern Irish national origin, Scottish national origin; are female; or have a recorded disability. This policy would not benefit, but would not change the current situation for, students coming from non-EU countries to study in Scotland. These students are more likely to be young students (under 18); older students (over 25 years); male students; students of a non-ethnic origin; and students of a non-UK nationality.

Review of Higher Education Governance
Professor Ferdinand von Prondzynski’s review of Higher Education Governance mentions a code of good governance in two separate recommendations – as part of the much broader recommendation 2.30 and in the separate recommendation 7.4. Please confirm which of these recommendations, if either, the Bill would give effect to. This will help the Committee to understand better the context for the ongoing discussions on the proposed Scottish Code of Good Governance.

Recommendation 7.4, the drafting of a code specific to Scotland, is being taken forward by the Chairs of Court group at the request of the Cabinet Secretary. We envisage that this code will ultimately form the benchmark for good governance and that, in setting a condition of grant under proposed new section 9A of the Further and Higher Education (Scotland) Act 2005 (which section 2 of the Bill seeks to insert), Ministers would refer to it as containing the “principles of good governance or management which appear to the Scottish Ministers to constitute good practice in relation to higher education institutions”. But we have chosen not to reference it directly in the provision, primarily to allow flexibility in future should the sector choose a new standard for governance.

Recommendation 2.3 in Prof von Prondzynski’s report recommends a ‘single statute’ for Scotland’s higher education sector which, among other things, would set out the key principles of governance and management for the sector. Our intention is to work with the sector and the SFC to implement as much of the report as possible, without legislation, before we set out proposals for future legislation.

Other matters of clarification

Board appointments
Col Baird in his remarks to the Committee (Column 1764, Education and Culture Committee, 15 January 2013) mentioned a working group report on UHI. The report and the Cabinet Secretary for Education and Lifelong Learning’s reply is at http://www.scotland.gov.uk/Topics/Education/UniversitiesColleges/16640/UHIGovernanceWG

Further to Col Baird’s remarks at column 1759:

“Col Baird: The regional strategic bodies will be able to make appointments to the boards of incorporated colleges. The appointments they make will effectively be the chair and all the ordinary members of the college board, such as the members who are not the staff member or the student member.”
I would like to clarify a point in relation to appointments to the board of management of an incorporated college which is not a regional college. As well as the regional strategic body having the power to appoint the chair and ordinary members (see proposed new paragraph 3A(2)(a) and (d) of Schedule 2 to the 1992 Act) the board of management of the college would have the power to appoint the college principal to the board (see proposed new paragraph 3A(2)(e) and (3) of Schedule 2 to the 1992 Act). [Section 6(1) of the Bill seeks to insert new paragraphs 3, 3A, 3B and 3C into Schedule 2 to the 1992 Act].

Public Standards
Danielle Hennessy was asked (column 1765) whether anyone could refer a complaint concerning ethical standards. Anyone with cause to complain would be able to make a complaint to the Public Standards Commissioner for Scotland. Further information about the complaints process is at http://www.publicstandardscommissioner.org.uk/make-a-complaint/overview/

Power to Review
We would like to offer some clarification in relation to the remarks of Michael Cross in response to a question by Liam McArthur MSP (at Column 1768 of the Official Report, Education and Culture Committee, Tuesday 15 January 2013) on section 14 of the Bill:

“Liam McArthur: The bill also talks about the Scottish ministers setting preconditions for the funding council in conducting a review. Can you shed any light on what the preconditions are likely to be?

Michael Cross: I think that they would draw on the matters that are outlined in proposed new section 14A(2). However, that would, I think, necessarily be addressed on a case-by-case basis. As the provision is framed, the funding council will make a proposal for a review to the Scottish ministers, who will then consider that. The review cannot happen without the consent of the Scottish ministers. At that point, the ministers will take stock of the funding council’s proposal and suggest an additional condition that will apply to its work”.

Section 14 of the Bill seeks to insert a new section 14A into the Further and Higher Education (Scotland) Act 2005. Proposed new section 14A(1) of the 2005 Act would provide that the Scottish Further and Higher Education Funding Council (“SFC”) may, with the consent of the Scottish Ministers, review the extent to which fundable further education and fundable higher education is being provided by post-16 education bodies in a coherent manner.

Section 14A(3) would provide that when seeking the consent of the Scottish Ministers to conduct a review, the SFC must provide a case for review which both describes the scope of the proposed review and explains why the SFC is satisfied that any pre-conditions to conducting a review which the Scottish Ministers may determine are met in relation to the proposed review. And so the setting of preconditions by Ministers is an act which would necessarily precede the SFC presenting its case for review under proposed new section 14A(3) of the 2005 Act.