The Committee will meet at 9.00 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether to take items 4, 5 and 6 in private.

2. **Post-legislative Scrutiny - Freedom of Information (Scotland) Act 2002:**
   The Committee will take evidence from—
   
   - Professor Kevin Dunion, Honorary Professor in the School of Law and Executive Director of the Centre of Freedom of Information, University of Dundee;
   
   - Dr Karen McCullagh, Lecturer in Law and Course Director, LLM Media Law, Policy and Practice, UEA Law School, University of East Anglia;
   
   - Professor Colin Reid, Professor of Environmental Law, University of Dundee;
   
   - Alistair Sloan, Solicitor, Inkster Solicitors;
   
   - Dr Ben Worthy (by video link), Senior Lecturer in Politics at Birkbeck College, University of London.

3. **Section 23 report - Finances of Scottish universities:** The Committee will take evidence from—
   
   - Caroline Gardner, Auditor General for Scotland;
   
   - Antony Clark, Audit Director, Mark MacPherson, Senior Manager, and Adam Bullough, Audit Manager, Performance Audit and Best Value, Audit Scotland.

4. **Section 23 report - Finances of Scottish universities:** The Committee will
consider the evidence heard at agenda item 3 and take further evidence from—

Caroline Gardner, Auditor General for Scotland;

Antony Clark, Audit Director, Mark MacPherson, Senior Manager, and
Adam Bullough, Audit Manager, Performance Audit and Best Value, Audit
Scotland.

5. **Post-legislative Scrutiny - Freedom of Information (Scotland) Act 2002:**
The Committee will consider the evidence heard at agenda item 2.

6. **Work programme:** The Committee will consider its work programme, including
its future scrutiny of the Auditor General for Scotland's report entitled "The
2018/19 audit of the Scottish Prison Service".

Lucy Scharbert
Clerk to the Public Audit and Post-legislative Scrutiny Committee
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The Scottish Parliament
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The papers for this meeting are as follows—

**Agenda Item 2**
Note by the Clerk
PRIVATE PAPER

**Agenda Item 3**
Note by the Clerk
PRIVATE PAPER

**Agenda Item 6**
PRIVATE PAPER
Post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002

Introduction

1. At its meeting today, the Public Audit and Post-legislative Scrutiny Committee will take evidence from its second panel of witnesses in connection with its post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA).

2. A summary of the key themes based on the written submissions received and the oral evidence heard at the Committee’s meeting on 19 September is attached at Annexe A. It is anticipated that the focus of the evidence session will be on the key themes outlined in the summary—

   • Making a request for information
   • Responding to requests for information
   • Record keeping and proactive publication
   • Review, applications and appeals

3. The written submissions from each of the witnesses in response to the Committee’s call for evidence are attached at Annexe B.

Background

4. FOISA received Royal Assent on 28 May 2002 and came into force on 1 January 2005. In 2017, the Committee shortlisted FOISA as one of the Acts that it wished to consider for post-legislative scrutiny. The Committee took evidence from stakeholders on post-legislative scrutiny of FOISA at its meeting on 22 March 2018. The Committee subsequently took evidence from the Scottish Information Commissioner at its meeting on 10 January 2019 and, following that evidence session, agreed to undertake post-legislative scrutiny of FOISA.

5. The Committee launched a call for evidence on 6 March 2019. All written submissions received in response to the call for evidence can be found here.

6. A SPICe briefing (published in January 2019) was prepared for the Committee and contains background information about FOISA. The Committee also invited SPICe to prepare a briefing on FOI practice in other jurisdictions with a particular focus on proactive publication. That briefing can be found here.

Clerks to the Committee
30 September 2019
Annexe A

Post-legislative Scrutiny: Freedom of Information (Scotland) Act 2002

Key themes for discussion

Introduction

1. The Public Audit and Post-legislative Scrutiny Committee received 58 submissions in response to its call for evidence on post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (FOISA).

2. The written submissions received by the Committee highlighted both positive and negative impacts of FOISA. On the positive impacts, Strathclyde Partnership for Transport stated that “FOISA encourages openness, transparency, and accessibility to information, enabling greater scrutiny and thereby better government (local or national) accountability”. While Highlands and Islands Enterprise considered that FOISA “has provided an impetus for a change in culture, to become more transparent with regards to decision making and the way in which money is spent.”

3. However, respondents were also circumspect. Unite stated that “On paper it would appear that Scotland has one of the most open and free rights to access information held by public bodies than any of the home nations…however the reality is somewhat more protracted, frustrating and less accessible than we would anticipate.” While Alastair Clarke stated that “The Act has broadly established the principle of the right to information and sets a clear standard of openness and accountability.” But “the spirit of the Act has not been upheld in the implementation by those public bodies subject to it.”

4. Dr Ben Worthy noted that—

   “Research around the world has shown that FOI laws do make for greater openness, through both direct and indirect effects on the behaviour of officials. However, exactly how well a law functions very much depends on if or how it is used and the context it is placed in.”

5. Research conducted by Professor Colin Reid suggested that there was a perception that Scottish public authorities do not engage with individuals using information accessed under FOI regimes. He suggested that “this results in a perception of “surface-level” participation: where the authority hears the concerns of the public but does not engage with or act on these concerns.”
Theme 1 - Making a request for information

Issues

6. Written evidence received by the Committee identified the following issues when making information requests:

- the request processes
- confusion over which public body holds information
- confusion over which legislation to apply through (FOISA or Environmental Information (Scotland) Regulations 2004 (EIRS))
- private companies delivering public services not subject to FOI.

The request processes

7. The Coalition of Carers evidence described difficulties when seeking information from multiple local authorities on Scottish Government funding in preparation of the commencement of the Carers Act. The submission stated:

“The process of ascertaining where to send the FOI requests was very time consuming……. Each area had a slightly different process to follow, some simply gave an email address, others required you to complete a pro-forma, others provided a facility on their website.”

8. Evidence from Dr Ben Worthy suggested that there is a lack of awareness of FOI among some groups and that there is a problem with uneven use. His evidence states:

“FOI laws tends to be used by those already engaged in politics, reflecting the broader biases in political participation in terms of gender, education and background. In Scotland, again reflecting trends elsewhere, there is a significant difference across gender with males being twice as likely as females to have made a request. Surveys found two areas of concern amongst young and old: only 25% of secondary school pupils in Scotland know they have freedom of information (FOI) rights. Another poll found uncertainty over FOI rights was highest amongst over 65 year olds, and overall awareness of FOISA was much lower amongst the disabled population.”

9. Submissions from Dr Karen McCullagh, University of East Anglia and the CFoIS both highlighted the need for the legislation to be scrutinised in the context of obligations to the principles of human rights.

Which public authority to contact

10. Written evidence also pointed to confusion in some cases about which body to contact. For example, there was some confusion over whether the local authority, Health Board or Health and Social Care Partnership (HSCP) was responsible for responding to certain requests. This issue was raised by NHS Greater Glasgow and Clyde:
“…dealing with FOI requests submitted to HSCPs is problematic. HSCPs are not public authorities for the purposes of FOISA, but have ‘parent’ organisations which are subject to FOISA (local authorities and NHS Boards). IJBs [Integration Joint Boards] are also subject to FOISA but it is not clear that an FOI submitted to an IJB can be passed to the HSCP to respond to. If the HSCP provides the information then in practice this comes from either the local authority or the NHS Board, or both. In those circumstances, who would handle a subsequent Review?”

11. SOLAR and SOLACE Scotland suggested that it would be helpful if authorities could transfer FOI requests in a similar manner to how authorities can transfer requests under the Environmental Information (Scotland) Regulations 2004 (EIRS). They stated that a “health and social care partnership is, in reality, three separate entities and the feedback we have received from applicants is that they see the HSCP as a single entity and find it frustrating when they are told they need to submit a fresh application to another part of the partnership.”

12. On the other hand, the submission from former MSP Tavish Scott described as “troubling” the coordination of a response to an FOI request sent to all 32 local authorities which had been forwarded to the Scottish Government without the knowledge of the requestor.

**FOISA and EIRs**

13. The submission from Professor Colin Reid and others at Dundee University shared findings from a research project investigating the use of public access to environmental information. Among the results was the finding that FOISA has overshadowed EIRs leading to the public incorrectly using FOISA when seeking environmental information. The divergence of obligations for public authorities causes confusion over rights to information. He outlines the following negative impacts:

- misunderstanding of procedural rights leading to unnecessary reviews
- less emphasis under FOISA to proactively disclose information
- FOISA’s focus on request may detract from efforts to increase proactive disclosure.

14. The submission from Professor Kevin Dunion also commented on FOISA and EIRs.

15. There was a suggestion that confusion between FOISA and EIRs could be remedied by merging the two Acts or by aligning their provisions.

**Certain bodies not covered**

16. A number of submissions highlighted that, in some cases, information was not held by the public authority but by a private contractor undertaking activity on behalf of the authority. Written evidence from the Campaign for Freedom of
Information, journalists and media representatives, Unison and former MSP Tavish Scott all called for an extension of FOISA to cover private companies that are delivering services under contract to public bodies.

17. In his submission, Professor Kevin Dunion discussed provision in section 5 of FOISA which allows for the designation of bodies in certain circumstances. He states that “there has been marked reluctance to make such designation and where consultation has taken place there has been considerable delay before a designation has been made.”

18. This issue was also discussed by witnesses at the evidence session on 19 September. In particular, Stephen Lowe from Unison suggested that corporate structure should not be the criteria used to assess whether or not an organisation should be subject to FOISA. He said:

“The single principle should be that with public money comes public accountability. The principle should not be about the name of the organisation or its corporate structure, the principle should be that we are allowed to follow the money.”

19. The submission from Dr Karen McCullagh provided the following examples from other countries where the scope of FOI legislation is broader:

- **Ireland**: The Minister can prescribe as FOI bodies, in whole or in part, nonpublic bodies that receive significant funding from the Exchequer.

- **Mexico**: The law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake.

- **New Zealand**: it extends to contractors engaged by a public authority in relation to that work and to information held by unincorporated bodies established to assist or perform functions for a public sector agency or local authority.

20. The written submission from Professor Kevin Dunion suggested that consideration should be given to amending the law to have a gateway clause which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA.

21. On 30 August 2019, the Scottish Government launched a consultation on extending the coverage of FOISA. In particular, the consultation invites views about whether the Scottish Government should bring forward a further order under
section 5 of FOISA to extend the application of the Act to organisations providing services on behalf of the public sector, and asks about the type of services or organisations that might be considered for such an extension. The consultation will close on 22 November.

22. A number of **solutions** have been suggested in written and oral evidence to improve the request process, including—

- standardised request processes for all local authorities;
- a central website with FOI contacts for all public authorities;
- improved guidance on making requests for members of the public and young people;
- merging FOISA and EIRs or aligning their provisions;
- allowing transfer of FOI requests between authorities under FOISA in the same way as for EIR requests;
- extending FOISA to cover private companies that are delivering services under contract to public bodies (e.g. construction and maintenance of schools, hospitals and transport infrastructure);
- the inclusion of regional HubCos\(^1\) which oversee infrastructure contracts under the Scottish Futures Trust’s hub programme and of other organisations in receipt of public funds and/or with a role in the delivery of public services such as COSLA, the Improvement Service and third sector organisations.

23. **Possible issues for discussion on Theme 1 - Making a request for information—**

- **witnesses’ views on the FOI request process and who uses it;**

- **whether more education and communication of rights under FOISA is required and, if so, how to do so in the most effective way;**

- **ways in which the FOI request process could be made more consistent and user-friendly;**

- **whether FOISA is compliant with provisions on access to information under human rights legislation;**

- **the differences between FOISA and EIRS and whether they should be merged or their provisions aligned;**

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\(^1\) Under the Scottish Futures Trust, public sector bodies have appointed a private sector development partner to form a joint venture company, known as a hubCo to deliver community infrastructure projects.
allowing transfer of FOI requests between authorities under FOISA in the same way as for EIR requests;

examples from other countries where the scope of FOI legislation is wider than in Scotland and the pros and cons of their approaches;

whether FOISA should be extended to cover all organisations delivering public services or in receipt of public funds;

what criteria could be used to decide whether such organisations should be subject to FOI.

Theme 2 - Responding to requests for information

Issues

24. The written evidence raised a number of issues about the experience of users, including the service and responses users received from public authorities. Public authorities also raised issues about responding to requests. The issues included:

- delays in responding and costs
- public authority resources
- use of FOISA, including vexatious requests
- different clearance processes

Delays in responding and costs

25. A number of submissions commented on the delays experienced in receiving responses. Evidence indicated that delays beyond the statutory 20-day limit were common and raised the following issues:

- officials requesting further information towards the end of the 20-day deadline
- responses provided on or shortly after the 20-day deadline
- impression that authorities use the statutory deadline as a “reminder service”
- authorities treating the 20 days as the time available to respond even if the information could have been provided earlier.

26. The submission from Prof. Kevin Dunion states that failure to respond accounts for a quarter of all appeals to the Scottish Information Commissioner (SIC).

27. In the Committee’s roundtable on 19 September, Claire Cairns from the Coalition of Carers explained that she had submitted separate but identical requests to all 32 local authorities in Scotland. Of these 32 requests, 14 responses were received late whilst an additional three were not received at all.
28. A number of submissions commented on the fees that are charged for requests. Ian Clarke provided examples of requests he had made to Police Scotland and to COPFS which were initially refused on the basis that providing the information would breach the cost threshold. He suggested that there should be a requirement for any request refused on cost grounds to evidence that all methods of searching data systems have been considered. F Mailer considered that all requests up to £450 (or £600 for central government) should be free.

Public authority resources

29. However, the public bodies which responded to the call for evidence often highlighted the resource burden of responding to FOI requests and the increased demand for information. NHS Lanarkshire wrote, for example, that:

"our requests have quadrupled and resources have not. As a result the staff resource to manage the process is not always adequate to meet the increasing demand."

30. Dr Ben Worthy highlighted in his submission that the number of public bodies that it is estimated have dealt with more than 1000 requests per year has increased from 20 in 2013/14 to 32 in 2016/17. Dr Worthy noted the resource pressure and limitations in public bodies, adding that:

“The combination of growing numbers and a general lack of resources for local government (the main recipients of requests) can undermine a law, and there should be greater help for FOI officers on the frontline in times of cuts.”

31. Specific issues raised by public authorities included:

- resources not increasing in line with the rise in requests
- resources needed to respond to FOI requests increasing pressure on delivering front-line services
- increasing demand from commercial, press and media applicants
- commercial applicants profiting from information sought using public resources

32. A number of public bodies also raised concerns with the 20-day response period and thought that it should be extended particularly for more complex requests. These included Strathclyde Partnership for Transport, Police Scotland, Glasgow City Council (in relation to schools) and the Scottish Courts and Tribunals Service which stated that:

“Complying with the 20-working day timeframe can be challenging where public bodies are dealing with complex requests”

33. The Scottish Courts and Tribunals Service said that FOISA should be brought in line with the 40 day extended response time for certain cases in EIRs (Regulation 7) when it comes to timeframes.
34. Written evidence from public authorities also raised concerns over the costs associated with requests. A number of submissions suggested that the charging of fees should be reviewed. Currently this is limited to £600 capped at £15 per hour staff time (so 40 hours work). The UK Act is limited to £600 capped at £25 per hour (so 24 hours work).

Use of FOISA, including vexatious requests
35. Whether FOI was the appropriate route to take to obtain information was also raised in a number of submissions. Glasgow City Council stated that:

"Many freedom of information requests made to Glasgow City Council are made by commercial organisations. These commercial enterprises profit from public effort and oblige public bodies to expend public resources on collating information for their private commercial gain."

36. Public bodies also pointed to FOISA being used to—
   - carry out research;
   - ensure responses to surveys are received;
   - to access medical records.

37. There was some concern that FOI can be used vexatiously. SOLAR and SOLACE stated that:

"authorities occasionally have to deal with highly disgruntled individuals who will pursue any avenue of complaint open to them regardless of the merits of their case, and FOI has created another such route for these individuals, some of whom use FOI as a weapon to punish local authorities for supposed misdeeds."

38. Aberdeen City Council suggested that “vexatious requests could be strengthened to relate to the person and not just to the request” and that there “could be more clarity in the law on what is vexatious and how Local Authorities could apply it effectively”. The Council also said that allowing public bodies to enquire as to the purpose of the request could help them to provide information more effectively.

39. During the Committee’s roundtable on 19 September, users and campaigners of FOI expressed concern about expanding the definition of “vexatious”. Rob Edwards from The Ferret said:

“I would be very worried if, as some of the submissions to the committee have suggested, we widened the vexatious request exemption or made it easier to use, because that would deprive lots of people of their rights and it could mean that things that are of public interest are kept secret.”

Different clearance processes
40. Evidence submitted by journalists and MSPs described experiences of receiving different treatment when submitting requests compared to other requester groups such as:

- an additional layer of clearance because of their identity
- intervention by special advisors
- delays to allow time for a “media handling strategy“

41. In the Committee’s roundtable on 19 September, Nick McGowan Lowe, National Union of Journalists (NUJ) said:

“it is clear from some of the submissions that I have seen from organisations that handle freedom of information requests that a culture seems to be creeping in whereby journalistic requests are seen as annoying flies to be batted away, rather than as being in keeping with the aims of openness and transparency and having public bodies that are accountable.”

42. Written submissions from journalists suggested limiting the rights of Ministers and special advisers to oversee or influence information requests under FOISA, except in prescribed circumstances authorised by senior civil servants.

43. In the Committee’s roundtable on 19 September, Severin Carrell from The Guardian suggested there needed to be “greater emphasis on a neutrality of approach that is blind to the identity of the organisation that has made the application”.

44. Alistair Sloan also suggested in his submission that requests should be anonymised before being passed to the team that would deal with them other than in cases where the requestor’s identity was directly relevant to the request. In his view, failure to do so “may amount to a breach of data protection law.”

**Content of the response**

45. A number of written submissions and witnesses commented on the inadequacy of the content of the response. For example, during the Committee’s roundtable on 19 September, Claire Cairns from the Coalition of Carers suggested that responders to FOI requests in some public authorities were not necessarily involved in the provision of the services that were the subject of the request. This could lead to vague or incomplete responses. In her oral evidence she suggested that “in some areas, the information was incomplete.”

46. In his evidence to the Committee on 19 September, Dr Craig Dalzell from Common Weal suggested that public authorities sometimes “answered the letter of the question rather than the spirit of it, because they have given the bare minimum to deal with the question.”
47. Written submissions and witnesses suggested a number of sometimes contradictory solutions for improving the way in which FOI requests are responded to, including—

- changes to the timescales for responding to requests;
- changes to the fees regulations;
- an explicit requirement for local authorities to formally designate a senior official with responsibility for FOI compliance;
- a statutory requirement to make an annual report on performance to the SIC;
- the creation of “Senior FOI champions” within individual organisations to assist with compliance;
- FOI being seen as a front-line service and training should be provided to staff on how to deal with FOI requests;
- aligning “vexatious” with “manifestly unreasonable” provision under EIR (Article 10(4));
- ensuring that vexatiousness is not defined by the person receiving the request;
- strengthening section 14 of FOISA (vexatious requests) to relate to the person and not just to the request;
- allow public bodies to enquire about the purpose of requests to help provide information more effectively;
- ensuring that all requesters are treated the same – anonymity of requestor.

48. Possible issues for discussion on Theme 2 – Responding to requests for information—

- the issues of delayed responses to FOI requests;
- the resource issues raised by public authorities;
- the use of FOISA by researchers, private companies etc;
- solutions for reducing delays in meeting statutory deadlines;
- how resources can be improved for public authorities to deal with FOI requests;
- confusion over application of the term “vexatious” used in the Act and what changes, if any, should be made to provide a clearer interpretation of vexatious requests;
- the extent to which different user groups are subject to different treatment and clearance processes and what can be done to provide a more neutral approach regardless of the identity of requesters;
• whether steps could be taken to improve the content, scope and accuracy of responses.

Theme 3 - Record keeping and proactive publication

Issues

49. Both written and oral evidence identified a number of issues such as:

- a lack of proper record keeping
- a lack of proactive (and monitoring of proactive) publication
- Publication scheme not fit for purpose

Record keeping

50. Written evidence raised a number of issues specifically linked to record keeping including—

- records of meetings and minutes not being recorded or made available to the public
- records of Ministerial meetings being deleted after 3 months
- use of private communication channels such as private emails, Whatsapp and other messaging services;
- section 61 Code of Practice on Records Management as outdated

51. These issues were also raised during the Committee's roundtable on 19 September. For example, Severin Carrell from The Guardian said:

“we know that meetings have taken place between Government ministers and senior figures in the [Scottish Futures] trust—but off campus, as it were. For example, there have been breakfast meetings at the Contini restaurant on George Street, and other meetings inside Government buildings, which have been recorded in ministerial diaries but for which no agendas have been published and no minutes have been taken.”

52. Stephen Lowe from Unison provided an example of public bodies ceasing to publish records that were ruled by the SIC to be subject to FOISA:

“We were working with a young PhD researcher [...] who was looking at the private water industry and its attempts to get involved in Scotland. He asked for the diary of the water industry commissioner to see who he was having meetings with [...] the information commissioner ruled that the water industry commissioner’s diary should be publicly accessible. The diary showed that there were lots of meetings with private water companies. The water industry commissioner stopped keeping a diary, so, when the next request came in, the answer was, “We don’t keep a diary anymore.”
53. **Professor Kevin Dunion** indicated in his written submission that “Greater emphasis needs to be given to adequately creating and minuting an information trail (drafts, memos, emails, correspondence etc) which shows how decisions have been arrived at.”

54. **Dr Karen McCulla** made a recommendation for a statutory obligation for “a central log of all minutes and notes of meetings involving Scottish Government Ministers [to be] proactively published within two weeks of the meeting,” as proposed by the CFoIS.

55. The **City of Edinburgh Council** stated that the “access regime is underpinned by effective records management and record keeping” and suggested that the section 61 Code of Practice on Records Management issued under FOISA was now out of date because of the Public Records (Scotland) Act 2011. It suggested that references to the Code should be replaced with reference to the 2011 Act to align the two. The submission from **Alistair Sloan, Inksters Solicitors** suggested that the code of practice is aspirational and the SIC has “very limited powers in respect of that code”. He also stated that the code is not enforceable and can be ignored by a public authority.

56. The submission from **Alistair Sloan, Inksters Solicitors** suggested that any legislative changes requiring records to be kept will be substantial and should therefore be dealt with in separate legislation rather than through changes to FOISA.

**Proactive publication and publication schemes**

57. Written evidence raised concerns about proactive publication and the inadequacy of publication schemes. Issues identified included:

- Publication schemes have not led to more proactive publication of information and are resource and cost intensive.
- The Model Publication Scheme being outdated and does not consider how people currently access information digitally.
- Lack of compliance for proactive publication among newer ‘arm’s length/ public bodies.
- Lack of awareness of existing publication schemes among users and responders.
- Publication schemes regarded as ‘onerous’ and a box-ticking exercise in public authorities.

58. **Dr Ben Worthy** noted that “research into the UK FOI found that publication schemes had been neglected because they had been superseded by search engines - users don’t consult them but just Google what they are looking for.”

59. The **Campaign for Freedom of Information** suggested that pro-active publication of information should be monitored and requires regulatory overview to ensure
timely publication. It highlighted that there have been no evaluations of the pro-active publication of information since 2005.

60. **Professor Colin Reid** also suggested that “how information is created and stored does not reflect how the public requests information. Public authorities create and store information in a sectoral manner……However, this approach does not match how users of the right request access to information, which tends to focus on specific locations rather than on sectoral areas.”

61. There were mixed solutions proposed regarding proactive publication. Some submissions suggested publication schemes should be updated or monitored more closely. Others felt that the scheme had failed to promote proactive publication and there should be a move away from this approach. For example, the **Scottish Government** and the **SIC** suggested that a greater emphasis on proactive publication could be underpinned by the Section 60 Code of Practice.

62. **S Yousaf** proposed that FOISA be amended to make it obligatory on public bodies to publish all FOI requests on their websites (with any personal identifiers redacted) with a view to increasing transparency, but also to assist in preventing duplication of requests. A similar point was made by the **Give Them Time Campaign**, which stated that “All councils should follow the example of Moray Council and publish their responses to FoIRs on their websites.”

63. **Aberdeen City Council** suggested that proactive publication could be encouraged further if legislation could include more guidance on the promotion, frequency and approaches to publication. It also indicated that guidance for the publication of FOI requests is less specific than Environmental Information Requests, which is clearer.

64. The written submissions and witnesses suggested a number of further **solutions** for improving record keeping and proactive publication including—

- a clear duty for record keeping
- changes to be made to legislation on record keeping rather than FOISA
- updating the section 61 Code of Practice on Records Management to align with the Public Records (Scotland) Act 2011
- regulatory oversight of proactive publication by the SIC, including improved guidance
- greater emphasis on proactive publication under the section 60 code of practice
- a duty for public authorities to publish all FOI requests and responses on their websites

65. **Possible issues for discussion on Theme 3 – Record keeping and proactive publication**—
• whether there has been a shift to information not being recorded;

• issues around the use of private communication channels, such as texts and private emails etc.

• whether there should be a duty to record under FOISA and, if so, what should be its scope and whether such changes should be made to FOISA rather than public records legislation;

• whether the publication scheme mechanism should be retained, improved or replaced;

• whether all FOI responses should be published;

• how proactive publication could be encouraged and improved.

Theme 4 - Reviews, applications and appeals

66. FOISA contains a three-tier appeal process comprising: an internal review within the public body; an application to the Scottish Information Commissioner and, finally, an appeal to the Court of Session. Written submissions and witnesses raised a range of issues connected with each of these processes.

Internal reviews

67. The Scottish Courts and Tribunals Service stated that applicants sometimes use the internal review process to request new information, rather than seeking to review the original request. Glasgow City Council stated that it would be helpful to have a provision to allow the 20-day clock to be stopped at the internal review stages as it can be during clarification of an FOI request.

68. James McEnaney suggested a two-stage appeal process to deal with cases where the authority fails to respond within 20 days.

Application to SIC

69. Written submissions and witnesses raised a range of issues concerning the application process to the Commissioner. S Kerr expressed some concern about the application process, indicating that while SIC did well in promoting the use of their office for appeal, a lay person “will have reservations in appealing to SIC for a decision, as they are asked to supply in some cases academic arguments to counteract the bodies knowledge of working round the system.”

70. Dr Karen McCullagh emphasised that SIC should be properly resourced.

71. Alistair Sloan noted that the Act only allowed the SIC to give notice by posting or delivering it and suggested that electronic means of delivery should be included.
72. In his submission, **Alistair Sloan** also referred to section 48 of FOISA, which specifies three circumstances where an application to the Commissioner under section 47(1) of FOISA is excluded. He suggests that this section should either be repealed, or at least amended.

73. **Dr Karen McCullagh** also referred to section 52 of FOISA under which the First Minister can issue a certificate overruling the decision of SIC where certain exemptions have been applied, if the First Minister is satisfied on reasonable grounds that the information is of “exceptional sensitivity”. Dr McCullagh recommended that this veto power should be removed.

**Appeals process**

74. Written evidence also raised concerns about the cost of appealing to the Court of Session. **Alistair Sloan** highlighted that appeals made under section 56 of FOISA are prohibitively expensive because they are currently made to the Inner House of Court of Session. He states that appeals cost each party tens of thousands of pounds with the possibility of facing expenses awards of a similar sum. **Celia Pattle** also raised the issue of Court of Session costs.

75. **Alistair Sloan** suggested that appeals be referred to the Upper Tribunal for Scotland, with a right to appeal from the Upper Tribunal to the Court of Session if justified. This approach was also put forward by **Dr Karen McCullagh**. **F Mailer** also considered that a tribunal should be established to consider appeals against the Scottish Information Commissioner.

76. However, the submission from the **Scottish Information Commissioner** (SIC) states that evidence provided to the Burns Commission by the UK Information Commissioner’s Office pointed to the Scottish system as offering an example of how FOIA appeals could become more efficient. The submission from SIC states that “Additional layers of appeal tribunals create more complexity in the system, an extra layer of cost, and it takes longer for the requester and authority to get to the final outcome”.

77. In **oral evidence**, Severin Carrell suggested that requestors should have the right to appeal rulings and judgements made by the SIC. Noting the SIC’s comments in respect of tribunals being costly, unwieldy and time-consuming, he suggested that “the SIC should have the capacity to internally investigate its own decisions.”

78. **Possible issues for discussion on Theme 4 – Reviews, applications and appeals**—

- **issues relating to the 20-day time limit during internal reviews**;

- **the use of settlement by SIC**;
• whether the law should be changed so that SIC decisions can be issued electronically;

• whether section 48 should be amended or repealed in that it excludes an application to the Scottish Information Commissioner;

• whether the ministerial veto should be removed;

• the accessibility of the review, application and appeals process to the general public;

• the cost of appeals and suggested changes to the appeals process.

SPICe and Clerks to the Committee
30 September 2019
PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002

SUBMISSION FROM : PROFESSOR KEVIN DUNION, CENTRE FOR FREEDOM OF INFORMATION , UNIVERSITY OF DUNDEE

Background to Submission

I was the first Scottish Information Commissioner from 2003 to 2012, author of Freedom of Information in Scotland in Practice (Edinburgh University Press 2011) and currently Honorary Professor at the Centre for Freedom of Information, University of Dundee. I have provided expert input to the drafting, implementation and evaluation of the freedom of information laws in several countries including Brazil, Chile, Croatia, Georgia, Albania, and Tunisia. I am a member of the World Bank’s Access to Information Appeals Board.

Q1. What effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had?

The Freedom of Information (Scotland) Act 2002 (FOISA) has had a positive effect. There is a high public awareness of the right to information¹; that right is easy to use, not requiring the law to be formally cited; almost 80,000 requests per annum are logged by public authorities which, by and large, are complying with their obligations; the right to appeal is free and the decisions of the Commissioner are complied with and rarely challenged. As a result, information which would previously have been withheld is now much more commonly in the public domain. For example, information on the salaries, bonuses, and expenses of those in prominent positions of public life is now routinely published. Information on the tendering and awarding of contracts which might previously have been refused on grounds of 'commercial confidentiality' has been required to be disclosed. Over time this has brought about a change in public authority practice. For instance, the revised code of practice issued by Scottish Ministers in 2010 contained extensive guidance on the disclosure of information relating to contracts or procurement processes, indicating not only that the contractor should be informed that information about the contract may be disclosed but also that authorities should consider inserting into contracts a requirement upon the contractor to disclose certain information². Blanket claims to exemption are no longer acceptable. It is notable that some of the most significant disclosures of information in terms of consequence have come from individuals making requests which have a personal significance. It was relatives of patients who had died in the Vale of Leven hospital making FoI requests (with the assistance of their MSP) which uncovered the scale of the patient mortality from hospital-acquired infections and led to a public enquiry. It was a trade union shop steward’s request for the PFI contract for the Royal Infirmary of Edinburgh, which saw it and other similar contracts being published.

¹ The most recent in a series of IPSOS MORI polls, carried out in 2017 for the SIC, showed 85% of respondents had heard of the Freedom of Information Scotland Act 2002
² Scottish Ministers’ Code of Practice 2010, paragraph 4.1.2.
Q2. Have the policy intentions of FOISA been met and are they being delivered?

By and large the policy objectives have been realised.

a) The legal right of access to information has been established by FOISA and strengthened by Freedom of Information (Amendment) (Scotland) Act 2013, However the legal right is not just delivered by FOISA but also through the Environmental Information (Scotland) Regulations 2004 (EIRs). Requests for environmental information must be dealt with under the EIRs, not FOISA alone. The legal superiority of the environmental regulations, as derived from European Directive 2003/4 EC, and the broad interpretation of what constitutes environmental information was perhaps not appreciated when FOISA was being implemented. The consequence is that applicants may be unaware of the differential rights and public authorities unsure as to which regime to apply to a request. As there are some significant distinctions between the two this has consequences e.g. as to which exemptions/ exceptions can apply, the nature of the harm and public interest tests to be satisfied, and indeed the calculation and application of any fees.

b) Sensitive information is protected by FOISA and the EIRs. However, the degree to which information is sensitive has been demonstrated to be less than those in authority often claim. The decisions of the Information Commissioners to order disclosure have not led to any evidence of the claimed harm (although claims continue to be made of a chilling effect on the creation of politically sensitive information in central government.) There is a degree of over-protection in the legislation\(^3\) with the catch-all provisions of s30 ‘Prejudice to the effective conduct of public affairs’ being most commonly used.\(^4\) More generally, FOISA does not meet international principles which requires that all exemptions are subject to a substantial harm and public interest test.\(^5\)

c) The role of the Scottish Information Commissioner is well-established, is fully independent, and the functions of the office are carried out without political pressure or financial straitjacket (as has happened in some other countries).

d) Publication schemes are often regarded as onerous by authorities. Yet, proactive publication is fundamental to the concept of open government.

e) Legislation has provided greater and more timely access to historic records ,with the Freedom of Information (Scotland) Act 2002 (Historical Periods) Order 201

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3 A comparative legal review of the exemptions in UK FoI law, which FOISA broadly mirrors, described them as a “formidable list of broad, repetitive and in many cases simply unnecessary exceptions”. Mendel, T, *Freedom of Information- A Comparative Legal Survey*, UNESCO: Paris 2008, p.125

4 Other than exemptions for personal information, the most commonly cited exemption in Decisions made by the SIC is that at s30(c).\(^7\)

Q.3 Are there any issues in relation to the implementation of and practice?

There are a number of issues relating to implementation and practice. The bodies which are subject to FOISA are listed under Schedule 1, or are publicly owned companies, or those which have been designated under section 5, where bodies a) appear to Scottish Ministers to exercise functions of a public nature; or b) are providing, under a contract made by a Scottish public authority, any service whose provision is a function of that authority." There was a clear expectation that this power of designation would be used regularly so that the right to information kept pace with changes in the delivery of public services. When section 5 was being debated in the Scottish Parliament, the then Justice Minister said, “Provisions allow providers of services to the public to be added to the Bill case-by-case and I reassure the parliament that that power will be exercised.” However there has been marked reluctance to make such designations and where consultation has taken place there has been considerable delay before a designation has been made. For example, a consistent call has been to designate registered social landlords (RSLs). The Scottish government issued a formal consultation in 2010 which would have designated the Glasgow Housing Association, as well as PFI / PPP contractors and local authority sport, leisure and cultural trusts but decided in 2011 that none would be designated. In 2016 a consultation to designate RSLs was carried out, with an expected implementation date of 1 April 2018 which has now been pushed back to November 2019. The situation is somewhat improved by the requirement, under s7A of the amended FOISA, for the Scottish Ministers to make a report to Parliament at least every 2 years on the exercise of their powers under s5.

Whereas FOISA allows Ministers to designate bodies which are exercising public functions directly or under contract, in many other countries the FoI law applies directly in such circumstances. Some go even further by applying the requirement to provide information to bodies in receipt of public funding. Consideration should be given to amending the law to have a gateway clause which brings bodies carrying out public functions or in receipt of significant public funds within the scope of FOISA.

The right to information is only effective of course if information pertinent to a request has been created and retained. Yet authorities’ performance in this respect can be highly variable. A major element of the time taken, and cost of responding to FoI requests is the difficulty of establishing whether the information is held. Furthermore, information which should be expected to be held is not, either because it has not been created or has been disposed of (perhaps in anticipation of an FoI request). Greater emphasis needs to be given to adequately creating and maintaining an information trail (drafts, memos, emails, correspondence etc) which shows how decisions have been arrived at.

Related to this, information within the scope of FOISA may be exchanged other than through records management systems and official email accounts, e.g. by text, personal

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7 In Scotland, the Environmental Information Regulations do have direct application to bodies which have public responsibilities or provide public services relating to the environment, but only if they are under the control of a public body which is subject to FOISA
email accounts, and social media apps. Such a practice makes it difficult for officials to conduct adequate searches for relevant information. If this is being done deliberately to avoid freedom of information, and in particular information is not disclosed when a request is received, greater consideration should be given to using the provisions of section 65 which makes it an offence to block, destroy or conceal a record held by the authority.

Finally, Scotland as with most countries is not immune to authorities failing to respond to requests timeously. The law requires that they “must comply promptly” with a request and “in any event by not later than the twentieth working day” after it has been received. Yet many in authority treat the 20 days as the time available to respond even if the information could have been found and provided earlier.

In many instances, the information is supplied late or not at all. Since FOISA and EIRs have come into effect the Commissioner has issued 3080 decisions, of which 900 concern the failure of authorities to respond to requests in time, and 640 of these decisions are wholly in favour of the applicant. Consistently, failure to respond accounts for a quarter of all appeals to the SIC. In 2014 the SIC issued a Special Report to the Scottish Parliament which found that just five authorities accounted for 50% of failures to respond in the previous year. Even if information is finally disclosed it may have lost its value to the applicant as a result of delay. Journalists have expressed particular grievance in this regard. In some countries (e.g. India), the Commissioner has the power to fine authorities for failing to respond.

Q.4 Could the legislation be strengthened or otherwise improved in any way?

Based upon the points touched upon in this submission, the following amendments to laws are desirable so that the right to information in Scotland meets the standard now apparent in more modern FoI laws internationally.

a) combine FOISA and the EIRs into a single statute – this would remove the confusion over which bodies are covered and which regime applies, or

b) amend FOISA to align it more closely with the more progressive provisions of EIRS e.g. all exemptions to be subject to the public interest test (EIR reg 10 91(b)), are to be read in a restrictive way (EIR reg 10(2)(a)) and with a presumption in favour of disclosure (EIR reg 10(2)(b))

c) amend FOISA and EIRS so that they have direct application to bodies which have public responsibilities or provide public services (not just those under the control of public

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8 Since FOISA and EIRs have come into effect the Commissioners have issued 3080 decisions, of which 900 concern the failure to respond to requests in time, and 640 of these decisions are wholly in favour of the applicant. (Of the 137 FTR decisions concerning Scottish Ministers, 115 were wholly in favour of the applicant.)

9 http://www.itspublicknowledge.info/home/SICReports/OtherReports/20140807SpecialReport.aspx
authorities) or are in receipt of significant public contracts and/or funds, to reflect the changes in the delivery of public services, infrastructure development and operation.

d) Many FoI laws require the authority to formally designate a senior official with responsibility for FoI compliance and also include a statutory requirement to make an annual report on performance to the Commissioner/Ombudsman. Although in practice something similar happens in Scotland (e.g. quarterly statistical reporting by authorities on requests has been established by the Commissioner) an explicit provision in the law would be beneficial.

Q5 Are there any other issues you would like to raise?

An aspect of implementation which attracts little attention is the power of the Commissioner to ‘effect settlement’ when an appeal is received. This is a provision, which in comparable terms appears in many, but by no means all, FoI laws elsewhere. It is often described as ‘mediation’, ‘conciliation’, or ‘early resolution’. The benefit to the applicant is that information sought may be provided more quickly than waiting for a formal determination by the Commissioner. Furthermore, the terms of settlement may provide information by agreement which might not be forthcoming if determination was insisted upon. The benefit to the authority is that the terms of settlement may satisfy its concerns relating to the scope of the request; settlement which results in disclosure is not recorded as a decision against the authority, and in the absence of a decision no precedent is set if a similar request is received. Settlement can also occur where the applicant accepts that information is not held or that an exemption does apply. The benefit to the Commissioner is that experienced staff can make an early evaluation which allows cases to be closed more quickly and uses resources of the Commissioner more efficiently.

Research which I carried out on settlement in Europe and Latin America found that only a small number of Commissioners had explicit procedures to guide staff, authorities and applicants as to when settlement may be conducted. The Investigations handbook of the Scottish Information Commissioner is by far the most detailed as to how cases are selected and how settlement will be pursued, giving confidence that it is attempted appropriately and not simply as a tool of case management to reduce workload.

The significance of settlement is evident in 2017/18 statistics which show that the SIC issued 205 formal Decisions but closed a further 98 cases by resolution. So, even if settlement does not result in a formal Decision for or against an authority, it would be useful to know, statistically, whether settlement has resulted in all, some or none of the information, sought in an appeal, being disclosed.


PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002

SUBMISSION FROM : Dr Karen Mc Cullagh

I am a Lecturer Law at the University of East Anglia (UEA). One stream of my research focuses on freedom of information laws. I have published articles commenting *inter alia* on significant cases e.g. *Evans* (concerning the exercise of ministerial veto power), and responded to UK government consultations on aspects of freedom of information e.g. Tribunal fees, and to the Independent Commission on Freedom of Information.
Executive Summary

- This consultation response addresses question 4: *Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.*

- In 2014, the then Deputy First Minister, Nicola Sturgeon proclaimed: “Scotland has the most robust Freedom of Information regime in the UK.”¹ Whilst a comparative analysis of The Freedom of Information (Scotland) Act 2002 (FOISA) and the Freedom of Information Act 2000 (FOIA) confirmed the accuracy of this statement, it is arguably the wrong benchmark to choose to evaluate the strengths and weaknesses of FOISA because it lacks objective measurement criteria. ²

- A better benchmark, in my view is, the nine normative principles collated by the highly respected non-governmental organisation, ARTICLE 19, from international and regional laws (e.g. UN Declaration on Human Rights (UNHDR) and the European Convention on Human Rights (ECHR) and related judicial pronouncements. These United Nations endorsed principles collectively constitute best practice standards in respect of right to information legislation.³

- The nine normative principles are (1) Maximum disclosure, (2) Obligation to publish, (3) Promotion of open government, (4) Limited scope of exceptions, (5) Processes to facilitate access, (6) Reasonable Costs, (7) Open meetings, (8) Disclosure takes precedence, and (8) Protection for whistleblowers. This consultation response focuses only on the principles that FOISA is least compliant with. I have benchmarked FOISA against the first five principles only because FOISA is fully compliant with the sixth principle and the last three principles are covered by other laws, and beyond the scope of this consultation.

- Benchmarking FOISA against the normative principles reveals that the Scottish legislation does not fully comply with the five of the six normative principles (the exception being the reasonable costs principle – which FOISA fully complies with).

- If Scotland is to have a FOI law that is fit for purpose, these deficiencies should be addressed through implementation of the following seven recommendations.

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Recommendation 1: (maximum disclosure principle) – The scope of the Act should be broadened, particularly in relation to contracted-out public services, as the current rate of designation is both too slow and narrowly focused.

Recommendation 2: (obligation to publish principle) – FOISA should be amended to require publication schemes to be supplemented with disclosure logs to increase the transparency and accountability of public authorities.

Recommendation 3: (promotion of open government principle) – Appropriate levels of funding must be provided to the Scottish Information Commissioner.

Recommendation 4: (Limited scope of exceptions principle) - FOISA should be amended to include a statutory obligation for “a central log of all minutes and notes of meetings involving Scottish Government Ministers [to be] proactively published within two weeks of the meeting,” as proposed by the CFOI Scotland.4

Recommendation 5: (Limited scope of exceptions principle) - The ministerial veto power should be removed.

Recommendation 6: (Processes to facilitate access principle) – FOISA should be revised to include a Tribunal tier of appeal so that costs are reduced for those challenging non-disclosure decisions.

Recommendation 7: (Processes to facilitate access principle) - FOISA should be revised to permit a full merits review by the Inner House of the Court of Session.

4 Campaign for Freedom of Information in Scotland, (2018) A report on how recording discussions and decisions at meetings needs to be improved to ensure the public’s right to know remains robust under The Freedom of Information (Scotland) Act 2002, <https://www.cfoi.org.uk/wp-content/uploads/2018/01/CFOIS-Minute-Taking-Report.pdf>; This report sets out further suggestions which should also be used to inform the consultation and revised FOISA.
4. Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

1. **The maximum disclosure principle:** This principle states that FOI legislation should contain broad definitions of information and public authorities in order to foster a culture of strong information rights.

2. FOISA has complied with this principle to a greater degree since 2013 when the Scottish government amended FOISA to include a new designation power, section 7A, which provides that Ministers are obliged to report to Parliament on their use of the designation power every two years and give reasons for not using the power if it has not done so in the two-year reporting period. Although the designation powers have been used on a regular basis since then, the Act is not keeping pace with changes to the delivery of public functions and, as a result, rights are being eroded.

3. The Scottish government could and should draw inspiration from the broader scope of application of FOISA in other countries, for example:
   
   a. Ireland: The Minister can prescribe as FOI bodies, in whole or in part, non-public bodies that receive significant funding from the Exchequer.\(^5\)

   b. Mexico: The law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake (emphasis added).\(^6\)

   c. New Zealand: it extends to contractors engaged by a public authority in relation to that work\(^7\) and to information held by unincorporated bodies established to assist or perform functions for a public sector agency or local authority.\(^8\)

4. **Recommendation:** – The scope of the Act should be broadened, particularly in relation to contracted-out public services, as the current rate of designation is both too slow and narrowly focused.

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\(^6\) Transparency and Access to Public Information Act 2015

\(^7\) s 2(5) OIA; s 2(6) Local Government Official Information and Meetings Act 1987

\(^8\) s 2(2)–(3) Official Information Act 1982.
5. The **obligation to publish principle**: This principle recommends that public authorities proactively publish key information as well as responding to information requests, to promote a culture of openness and transparency that should improve over time.\(^9\)

6. In compliance with this principle, FOISA requires public authorities to develop, publish and implement a publication scheme, setting out the classes of information they will publish, the manner in which they will publish them, and whether or not they intend to charge for any particular publication.\(^10\)

7. To assist with this, the SIC has produced "model' publication scheme\(^11\) that Scottish public bodies are encouraged but not compelled to adopt - they may develop their own "bespoke' publication scheme.

8. However, publication schemes reflect the technology available at the time of legislative enactment – for example, the UK Government only started releasing information through an online search engine in 2004.\(^12\) Current FOI practice is not exploiting the opportunities presented by technological progress, in the form of low cost, online publishing.

9. The current ease and low cost of making information available online means that FOISA should be amended to oblige public authorities to publish disclosure logs.

10. A disclosure log "lists all previous requests, and you can click on them and find out what the request was and what information was disclosed; it is, as it were, a back record of things that people have asked us."\(^13\)

11. Some, but not all, authorities in England & Wales currently publish disclosure logs, and those public authorities that already publish disclosure logs have reported that it helps them manage requests by directing requestors to information that has already been published on their website.\(^14\)

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\(^9\) The "obligation to publish" principle was updated in 2015 to include a recommendation that information proactively published or released in response to requests should be "made available in open and machine readable formats when applicable, and without restrictions on its further use and publication", but compliance with this aspect of the principle is not the focus of this consultation response since it is dealt with in a separate legislative measure: the Re-use of Public Sector Information Regulations 2015, SI 2015/1415 established a UK-wide (including Scotland) framework for the re-use of public sector information, enforcement of which is overseen by the ICO.

\(^10\) s 23 FOISA.


12. **Recommendation**: – FOISA should be amended to require publication schemes to be supplemented with disclosure logs to increase the transparency and accountability of public authorities.

13. *The promotion of open government principle*: This principle aims to promote a change of culture within government and public bodies so that, over time, they become more transparent. This goal should be achieved through public education measures and through measures that promote public authority compliance with codes of practice on good practice in dealing with requests for information\(^{15}\) and on good practice in keeping, managing, and destroying records.\(^{16}\)

14. This principle recommends: "the law should require that adequate resources and attention are devoted to the question of promoting the goals of the legislation".

15. However, the SIC has suffered significant budget cuts (15\% during the period 2011 to 2014).\(^{17}\) The SIC anticipated further cuts in its 2016-2020 plan.\(^{18}\)

16. Evidently, the SIC will struggle to meet its statutory obligations if it is not properly resourced. Further SIC budgetary cuts will negatively impact upon the SIC’s ability to dedicate resources to promotional and educational activities.

17. **Recommendation**: – Appropriate levels of funding must be provided to the Scottish Information Commissioner.

18. *Limited scope of exceptions principle*: This principle states that no public authorities should be completely excluded from the ambit of the law; that information requested should be supplied unless it falls within the scope of limited exceptions, and that refusal to disclose information should not justified unless it satisfies a strict three-part test: (i) the information relates to a legitimate aim listed in the law; (ii) disclosure would cause substantial harm to that aim; and (iii) the harm to the aim would be greater than the public interest in disclosing the information. This principle also states that information that is withheld should be routinely reviewed to ensure that the exemption still applies, and that exceptions should be limited to no more than 15 years, except in extraordinary circumstances.

19. Increasing transparency and accountability through the disclosure of information underpinning government decisions lies at the heart of FOISA.

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\(^{15}\) s15 FOISA.

\(^{16}\) S60 FOISA.


\(^{18}\) Scottish Information Commissioner, Strategic Plan 2016-20, FOI: realising the benefits and supporting openness, [http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=9410&sID=2746]
20. However, the Scottish government could not develop policies or operate effectively if it did not have "safe space" for discussion, debate, and disagreement as enshrined in the constitutional convention of cabinet responsibility, and in International law.19

21. Accordingly, FOISA contained qualified exemptions regarding the formulation of government policy20 and the disclosure of material that would prejudice the effective conduct of public affairs.21

22. Requests for information regarding policy have been met with stiff resistance, with the Scottish government making extensive claims that disclosure would substantially inhibit free and frank exchanges inside government.

23. FOISA does not contain a duty to make a record. If a record of a meeting is not taken then there is no information to access. A lack of transparency makes it more difficult, if not impossible, to hold public bodies and decision makers to account for their decisions.

24. In recent years, a culture of omitting to record minutes of meetings has arisen. This appears to have been a deliberate attempt to frustrate the operation of FOISA.

25. The Scottish Parliament acknowledged that failing in a motion unanimously passed on 21 June 2017. It further agreed to take steps to address the problem: “That the Parliament condemns the Scottish Government’s poor performance in responding to freedom of information requests; calls for an independent inquiry into the way that it deals with these, and agrees to undertake post-legislative scrutiny of the Freedom of Information Act 2002, and welcomes commitments by the Scottish Government to adopt a policy of pro-actively publishing all material released under FoI to ensure that it is as widely available as possible.”22

26. Recommendation: - FOISA should be amended to include a statutory obligation for “a central log of all minutes and notes of meetings involving Scottish Government Ministers [to be] proactively published within two weeks of the meeting,” as proposed by the CFOI Scotland.23

27. Given that this principle recommends narrow, exhaustive limitations, the inclusion of a ministerial power to issue certificates that override decisions in favour of disclosure on public interest grounds in FOISA is problematic.

19 The Council of Europe Convention on Access to Official Documents (not yet ratified by the United Kingdom) recognizes that the protection of deliberations within or between public authorities concerning the examination of a matter is a legitimate limitation to the right of access to information. The Convention however, states that this is not an absolute exception - it is only applicable when the protected interest may be harmed by its publication, unless there is an overriding public interest in disclosure.

20 s29 FOISA.

21 s30 FOISA.

22 Scottish Parliament, Minutes Of Proceedings, Parliamentary Year 2, No. 16, Session 5, Meeting of the Parliament, 21st June 2017, Available at: <https://www.parliament.scot/S5_BusinessTeam/Chamber_Minutes_20170621.pdf>

23 Campaign for Freedom of Information in Scotland, (2018) A report on how recording discussions and decisions at meetings needs to be improved to ensure the public’s right to know remains robust under The Freedom of Information (Scotland) Act 2002, <https://www.cfoi.org.uk/wp-content/uploads/2018/01/CFOIS-Minute-Taking-Report.pdf>; This report sets out further suggestions which should also be used to inform the consultation and revised FOISA.
28. Under FOISA, the First Minister can (following consultation with the Scottish Ministers) issue a certificate overriding a decision of the Commissioner where certain exemptions have been applied in relation to a decision notice served on the Scottish Administration. The First Minister must be satisfied on reasonable grounds that the information is "of exceptional sensitivity" before a certificate can be applied.

29. On a positive note, no First Minister has ever sought to exercise the veto power, and the Scottish Parliament did not review the ministerial veto power when debating whether to reclassify royal correspondence as "absolute" or signal any intention to do so post-Evans - a sign that the Scottish Government has no intention of strengthening the veto power.

30. Although the Scottish Government has complied with the "spirit" of this principle in never exercising the veto power, it should amend FOISA to remove it in order to fully comply with this principle.

31. **Recommendation:** - The ministerial veto power should be removed from FOISA.

32. **Processes to facilitate access principle:** This principle contains measures concerning the processing of requests and an independent appeal process in recognition of the fact that a recalcitrant public authority could employ strategies such as making the application process difficult, delaying responding, and either having no appeal process to challenge non-disclosure decisions or having an excessively lengthy and expensive appeal process to avoid fulfilling information requests.

33. This principle recommends a three-tier appeal process comprising: an internal review within the public body; appeal to an independent administrative body (e.g. a Tribunal); and a "merits" appeal to the courts. The aim is to provide a fast, cost-effective appeal process.

34. FOISA contains a three-tier appeal process. The first tier comprises a right to ask a public body to conduct an internal review of its decision, which must be conducted and responded to within 20 working days of the request for review. The second tier permits a requester who remains dissatisfied after the mandatory internal review to ask the SIC to "make a decision" which should be issued within four months, or a reasonable time period. FOISA permits the SIC to attempt to informally effect a settlement before reaching a decision, in an effort to provide a speedy, cost-effective

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24 Sections 29, 31(1), 32(1)(b), 34, 36(1) and 41(b).
25 Section 52 (2).
27 Section 21; (thirty days if information held by Keeper and another authority has to carry out review).
28 Appeals should be made to the SIC within six months - although the SIC can accept a late appeal where appropriate to do so (s 49(4)). If the SIC fails to make a decision within four months, or other reasonable period, then an information requester has the right to seek a judicial review by the Court of Session. The SIC must report annually to Scottish Parliament on the number of decisions which take longer than four months - s 46(2).
A right of appeal to a tribunal was considered but rejected during the legislative drafting process of FOISA on the basis that it would: "add an unnecessary layer of bureaucracy and possibly undermine the Commissioner's powers". Decisions would be more likely to be challenged if information requesters and public authorities knew they could be appealed to a tribunal, and public authorities could use it to delay releasing information that loses "currency" over time.

However, one consequence of the lack of Tribunal appeal stage is that appeals are more expensive in Scotland. Also, although FOISA does contain a third level of appeal it may only be made "on a point of law" against a decision by the SIC to the Inner House of the Court of Session, instead of a full "merits" review by a court, as this principle recommends.

**Recommendation:** – FOISA should be revised to include a Tribunal tier of appeal so that costs are reduced for those challenging non-disclosure decisions.

**Recommendation:** - FOISA should be revised to permit a full merits review by the Inner House of the Court of Session.

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29 s 49(4).
31 A further right of appeal to the Supreme Court in London exists (Scotland Act 1998 s 29(2)) for matters outwith the legislative competence of the Scottish Parliament such as cases concerned with human rights issues under the ECHR. The Supreme Court serves as the final court of appeal in such matters. To date just one FOISA case has been considered: South Lanarkshire Council v The Scottish Information Commissioner [2013] UKSC 55.
PUBLIC AUDIT AND POST-LEGISLATIVE SCRUTINY COMMITTEE

POST LEGISLATIVE SCRUTINY - FREEDOM OF INFORMATION (Scotland) ACT 2002

SUBMISSION FROM: Professor Colin Reid (Professor of Environmental Law), Dr Jonathan Mendel (Geography) and Dr Sean Whittaker (Law) from the University of Dundee

Background to this Submission

1. The authors of this submission to the Public Audit and Post-Legislative Scrutiny Committee are academics engaged in the project “Uncovering the Environment: The Use of Public Access to Environmental Information”, funded by the ESRC. The project seeks to identify how the right of access to environmental information is actually being used in Scotland under the Environmental Information (Scotland) Regulations 2004 (EISR) and whether the right is meeting its intended aims. The project concludes in June 2020, but we are willing to provide further information on our initial findings if the Committee would find that useful.

Question 1 - In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?

2. One set of initial findings emerging from the project is that the public has a higher awareness of FOISA than EISR, and that generally FOISA has overshadowed the EISR as the instrument for accessing environmental information. The practical significance of this initial finding is that it leads to the public overlooking the EISR and incorrectly submitting requests for environmental information under FOISA. This finding may be partially explained by the key aims of FOISA (transparency and accountability of public authorities) being a self-encapsulated end-goal, rather than the open-ended goal of promoting participation in environmental decision-making found in the EISR.

3. This overshadowing of the EISR by FOISA has various negative impacts. First, while the overarching design of both regimes is similar, the specific obligations imposed on Scottish public authorities by the two regimes differ in significant ways.¹ This divergence is problematic as it can lead users of the right to become uncertain and confused as to what their substantive rights actually are, dissuading them from submitting requests and from using their right to access information. Further, the confusion between the two regimes may lead to individuals misunderstanding their procedural rights, leading to (potentially) unnecessary internal reviews.

4. Second, under FOISA there is significantly less emphasis on the duty to proactively disclose information than there is under EISR. Indeed, under the EISR public authorities are obliged to proactively disclose environmental information in an active and systemic manner. This contrasts with the more general duty to adopt and maintain a publication scheme

¹ Examples of this include the power to levy fees for disclosing information on request, the exemptions used to withhold information from disclosure and the scope of the public authorities subject to each regime.
under FOISA, which imposes less of an obligation on Scottish public authorities. While the link between proactively disclosing information and reduced numbers of requests has not been definitively proven, the Scottish Information Commissioner has noted that the use of publication schemes has led to fewer requests on the disclosed subject. Consequently, FOISA’s focus on requests for information may detract from efforts to increase proactive disclosure.

**Question 2 - Have the policy intentions of FOISA been met and are they being delivered? If not, please give reasons for your response.**

5. In responding to this question, it is critical to note that the EISR and FOISA prioritise their respective objectives differently. A fundamental component of the EISR is that it aims to promote public participation through informing the general public. This aim is not as pronounced in FOISA, where the promotion of transparency and accountability is the primary objective. However, these aims are not exclusive to their respective information regimes: the two information regimes share similar aims despite their different prioritisation of those aims. This allows the project’s findings on whether the EISR are effective at meeting its aims to be applied to FOISA as well.

6. The initial responses to surveys and interviews conducted so far for the project suggest that Scottish public authorities are perceived by users of the right as secretive, obstructive and not acting in the spirit of the legislation.2 This perception is particularly interesting because Scottish public authorities generally tend to fully or partially disclose information that is subject to a request for disclosure. What this suggests is that FOISA, despite its efforts to promote the disclosure of information, may not have led to the general public perceiving Scottish public authorities as transparent and accountable.

7. Further, the responses to the project’s surveys and interviews also show a perception that Scottish public authorities do not engage with individuals using information accessed under the EISR regime. Generally, this results in a perception of “surface-level” participation: where the authority hears the concerns of the public but does not engage with or act on these concerns. This lack of engagement undermines how FOISA meets its policy objectives because it weakens the connections between access to information and being granted the power to engage with the authority on matters of importance. Consequently, our initial findings do not evidence that either of the main policy intentions of FOISA has been fully met in practice.

**Question 3 - Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?**

8. The initial findings of the project indicate two specific issues which hinder the implementation of FOISA. The first of these is the timescale for Scottish public authorities responding to requests for information. While FOISA obliges public authorities to respond

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2 A caveat to this finding is that data collection for the project is not yet complete and the sample number is still small.
“promptly”, the statistics indicate that authorities often respond only near the end of or past the 20-day time limit. Users of the right are often unhappy about this, contributing to the negative perception of Scottish public authorities. While the project has not yet formally interviewed Scottish public authorities on how they guarantee the right, a lack of resources is highlighted as a common issue in FOI policy meetings. As extending the time limit to respond would create a further divergence with EISR, one potential way to remedy this failing is to increase funding to FOI departments in Scotland.

9. The second issue is that that how information is created and stored does not reflect how the public requests information. Public authorities create and store information in a sectoral manner, with information on issues such as waste, water and air being created and stored separately. One reason for this sectoral approach is because it reflects the structure of the legal obligations imposed on Scottish public authorities. However, this approach does not match how users of the right request access to information, which tends to focus on specific locations rather than on sectoral areas.

10. Such a mismatch is significant as it can lead to lengthy delays, further contributing to the delays in responding to requests. Critically, the issue strikes at the heart of general data management and the use of GIS. Consequently, what is required is either an overhaul of how information is stored or a redesign of the information regime to account for this mismatch.

Question 4 - Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

11. In discussing potential reforms to the parallel FOISA and EISR regimes in Scotland, it is important to highlight the role of the Convention of Access to Information, Public Participation in Decision-Making Procedures and Access to Justice in Environmental Matters (Aarhus Convention). Ratified by the UK in February 2005, the Convention contains a series of procedural obligations which Scottish public authorities are obliged to follow in guaranteeing the right of access to environmental information. However, post-Brexit Scotland will not be legally bound to transpose the stricter obligations on the right of access to environmental information introduced by EU Directive 2003/4/EC which was enacted to give effect to the Aarhus Convention within EU law. This point is significant, as it creates an opportunity for Scotland to implement reforms that would have been difficult to implement while the UK was a member of the EU.

12. One potential reform to FOISA which might be considered is to merge it and the EISR into a single information regime. By merging the two information laws into a unified regime, the issues that arise from the different procedural rights enshrined in FOISA and EISR would be eliminated. Further, Scottish public authorities would not have to determine whether a request falls under FOISA or EISR. This is significant, as the project has

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3 As discussed in Question 2.
identified this need to distinguish between the two regimes as a source of confusion for both users and public authorities.

13. While such a reform would likely be of benefit to the information disclosure system in Scotland, it is not without difficulties. As the international obligations enshrined in the Aarhus Convention are stricter than those in FOISA, any merger of the two regimes would necessitate any request for non-environmental information also to meet the stricter requirements enshrined in the Aarhus Convention. This may generate resistance to the proposed reform, as the stricter obligations would likely result in Scottish public authorities having to disclose more non-environmental information than they currently do under the current FOISA regime. Users of the right to information may also resist this reform, as the restrictive FOISA charging provisions may be discarded for the more costly charging provisions of the EISR.

Question 5 - Are there any other issues you would like to raise in connection with the operation of FOISA?

14. A final issue that we would like to raise is the evolution of technology and its role in the provision of information, both environmental and non-environmental. The project’s initial findings suggest that the internet, email and other online methods have become very significant means by which individuals seek proactively disclosed information and submit requests for information. Not only has technology influenced how users engage with the right, but it has also driven the expectation that users will be able to access the sought-after information immediately.

15. However, neither FOISA nor guidance from the Scottish Information Commissioner engages with how technology changes the way in which individuals interact with the right to information. A more ambitious provision in any new FOI legislation would provide the legal impetus for public authorities and the Scottish Information Commissioner to better engage with new technologies and how they interact with their information systems. By doing this the right would more accurately reflect how society actually engages with and accesses information, enabling individuals to more effectively use their right to access information.

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4 An example of this is the application of the public interest test in withholding information from disclosure. Under FOISA the authority needs to apply the public interest test only when applying certain exemptions, whereas under EISR the authority needs to apply the test whenever it exempts information from disclosure.

5 While also insufficient, the EISR recognise this and highlight the need to make environmental information available “by electronic means”.

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Annexe B
REF NO.PAPLS/S/19/FOIA/03
This is a formal submission to the Public Audit and Post-Legislative Scrutiny Committee of the Scottish Parliament in respect of its post-legislative scrutiny of the Freedom of Information (Scotland) Act 2002 (“FOISA”).

I am a Scottish solicitor practising in the field of information law, which includes FOISA and the Environmental Information (Scotland) Regulations 2004 (“the Scottish EIRs”). I act principally for individuals who have made requests for information to Scottish public authorities; both on a privately paying basis and where funding is sought from the Scottish Legal Aid Board in respect of appeals. I am also the principal author of the ‘information law blog’ (www.infolawblog.com); which is run by the firm of solicitors that I am employed by and deals with all manner of information law matters, including freedom of information.

This submission is made in my capacity as a solicitor employed by Inksters and is drawn from my experience of FOISA as a practising solicitor. This submission does not represent or reflect the view of the Law Society of Scotland (and nor does it intend to). I confirm that I am content for this response to be published together with my name.

I apologise at the outset for the length of this submission, in particular that it is longer than suggested by the Committee; however, there are a number of issues that require a degree of explanation. I have tried to keep matters as concise as possible and would be happy to expand upon any of the matters set out below in more detail, either orally or in writing; should the Committee wish me to do so.

Question 1: In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?

[5] I make no comment in respect of this question.

Question 2: Have the policy intentions of FOISA been met and are they being delivered? If not, please give reasons for your response.

[6] I make no comment in respect of this question.
Question 3: Are there any issues in relation to the implementation of and practice in relation to FOISA? If so, how should they be addressed?

[7] There have been well documented issues in recent years in respect of the handling of FOI requests by certain Scottish public authorities; most notably the Scottish Ministers. I do not propose commenting on these issues in any detail; except in relation to one issue that was raised by the Herald on the 25th May 2018 relating to the anonymisation of FOI requests as they are being dealt with internally. I looked at this issue in a blog post on the ‘Information Law Blog’, in particular whether it was in compliance with data protection law. I concluded that:

“In normal circumstances, public authorities should probably be removing personal data such as a requester’s name, place of work and job title (where included) from a request before sending it out to those who need to perform searches for information or those who, in accordance with the authority’s internal procedures, need to approve responses before they’re issued. Only where the identity of the requester is directly relevant to the response, such as where consideration is being given to refusing the request on the grounds that it is vexatious, should the identity of the requester be disclosed otherwise it may amount to a breach of data protection law.”

[8] I remain of the view set out in the above quote. It is not possible to know whether it is an issue that needs to be addressed more widely or whether it is confined to a single authority; however, it is a matter that should certainly be considered. I am of the view that in order to adequately address this matter, it would not be necessary to make changes to the legislative scheme. It appears that the matter could be adequately addressed within the code of practice issued by the Scottish Ministers under section 60 of FOISA.

[9] FOISA only gives access (subject to exemptions) to recorded information that exists at the time when the request for information is made to the Scottish public authority. There have been a great many complaints, particularly from journalists, about records of meetings etc. not being kept. This means there is no information available for consideration for disclosure under FOISA. I do not consider that this is an appropriate issue to tackle in terms of legislative reform of FOISA. FOISA is a legislative scheme which gives enforceable rights to access recorded information; it is not concerned with the making, creating or keeping of records (except to the limited extent provided for in Section 61). Such issues, if they are to be addressed, would be better considered in

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2 http://infolawblog.com/personal-data-and-foi-to-anonymise-or-not-to-anonymise/
the context of legislation governing the creating, making and keeping of records by Scottish public authorities.

[10] There is a code of practice on record keeping, made by the Scottish Ministers, under section 61 of FOISA. This code of practice is merely aspirational and the Commissioner has very limited powers in respect of that code – his powers being limited to the issuing a practice recommendation (having consulted the Keeper of the Records of Scotland). These are not enforceable by the Commissioner and could, quite lawfully, be ignored by a Scottish public authority (as the section 61 Code of Practice can also be, given its aspirational nature).

[11] Any legislative change to require records to be kept is inevitably going to be fairly detailed and technical. It would seem inappropriate to introduce such significant and substantial legislative reforms into FOISA, which has an entirely different focus. If Parliament were of the view that legislation is required to govern the making and keeping of records by Scottish public authorities then this would, in my view, be better tackled as a separate legislative project.

**Question 4:** Could the legislation be strengthened or otherwise improved in any way? Please specify why and in what way.

[12] Yes. There are a number of areas where the legislation could be strengthened or otherwise improved. In this submission I shall focus on three areas: (1) section 48; (2) appeals under section 56; and (3) section 74.

**Section 48**

[13] Section 48 specifies three circumstances where an application to the Commissioner under section 47(1) of FOISA is excluded. Those are where the request for information was made to a procurator fiscal, the Lord Advocate (to the extent that the information requested is held by him as head of the systems of criminal prosecution and investigation of deaths) and the Commissioner. In my view this section should either be repealed, or at least amended. For the purposes of this part of the response I will use “COPFS” to cover both the Lord Advocate and procurators fiscal.

[14] There is no equivalent provision within the Freedom of Information Act 2000; the UK Information Commissioner can consider complaints under section 50 of that Act (the equivalent to section 47) in respect of requests made to the Crown Prosecution Service, the Public Prosecution Service for Northern Ireland and also her office. In the
case of her office that does, in effect, mean that the ICO may have to consider the same request three times: twice as a public authority and once as the statutory regulator. This may seem cumbersome and an inappropriate use of recourses; however, the inability of the Commissioner to consider applications under section 47(1) in respect of requests made to his office (and also to COPFS) has implications for requesters in terms of appeal rights.

[15] As there is no decision of the Commissioner, there is no right of appeal under section 56 and so the request, in effect, finishes at the conclusion of the internal review stage. The only option would be for the applicant to bring judicial review proceedings against COPFS or the Commissioner in respect of the decision letter issued at the conclusion of their review. However, in my view, this is not an adequate replacement for the more comprehensive review undertaken by the Commissioner’s office when dealing with an application under section 47(1) of FOISA.

[16] There have, to my knowledge, been no petitions for judicial review lodged with the Court of Session against either COPFS or the Commissioner in respect of decisions made by them in response to a requirement for review. That may be because there is a lack of knowledge that such a route exists. For example, I was instructed by a requester in respect of a request that was made to the Commissioner (after the Commissioner had issued a decision letter in response to a requirement for review); in that case I identified that judicial review would be the only route for challenge; however, in that particular case, no judicial review proceedings were ever brought. At the time the requester instructed me, they were unaware that judicial review might be an option.

[17] Another difficulty created by the existence of section 48 is that it sometimes only results in the Scottish public authority having one opportunity to issue a substantive response to a request. This arises where a Scottish public authority has failed to respond to a request and a requirement for review has been lodged by the requester in respect of that failure. In those circumstances, the obligation upon the Scottish public authority is simply to make a decision in respect of the request. If the decision is to issue a refusal notice to the requester, there is no statutory right for the requester to challenge this. A Scottish public authority may in those circumstances accept a second requirement for review; however, this is outside of the statutory scheme and a requester cannot compel the Scottish public authority to do so. The consequence is, unless a person is successful in judicially reviewing the Scottish public authority concerned, a requester might be refused access to information that should have be released.
[18] As the committee may be aware, where a Scottish public authority does not respond to a requirement for review within 20 working days; the requester can (within 6 months) make an application to the Commissioner under section 47(1). In response to such an application the Commissioner can issue an enforceable decision notice requiring a response be issued to the requester. Such an application is also excluded by virtue of section 48. I am not seeking to suggest that either COPFS or the Commissioner would ever not issue a decision letter in response to a requirement for review; but it is a weakness of FOISA that the possibility exists for such a situation to arise.

[19] My preference would be to repeal section 48 in its entirety. This would bring FOISA into line with the UK Act and would also cure all of the defects set out in paragraphs [10] – [18] above. The Scottish Parliament may consider that such a step is not appropriate and as an alternative there are a number of modifications that I respectfully suggest should be made.

[20] An application under section 47(1) should be permitted, as a minimum, where the complaint is that no response has been made to a requirement for review. This would enable to the Commissioner to issue an enforceable decision notice requiring compliance where there has been a delay (for whatever reason) in issuing a response. If further applications to the Commissioner are to continue to be excluded, then, I would suggest that, as a minimum, a requester be entitled to make a further requirement for review where the first such requirement complained that no response had been issued in respect of the request for information.

[21] If it was considered appropriate to continue to exclude the Commissioner from dealing with a section 47(1) application in respect of a request for information made to his office, then I would suggest looking at the appellate mechanisms. For example, it may be appropriate to amend the legislation so that a decision letter in response to a requirement for review is to be treated, for the purposes of section 56, as if it were a decision notice issued under section 49 of FOISA. This would be particularly important if the Parliament were to proceed with amending the appellate structure (as I discuss in paragraphs [26] – [31] below)

[22] Section 48 also has implications for the Scottish EIRs. By virtue of Regulation 17 of the Scottish EIRs, Part 4 of FOISA applies, subject to modifications set out within Regulation 17. Section 48 falls within part 4 of FOISA and therefore is also applicable to information requests which are dealt with under the auspices of the Scottish EIRs.

[24] Article 6 of Directive 2003/4/EC is in the following terms:

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.

[25] I am doubtful as to whether section 48 meets the requirements of Article 6 of Directive 2003/4/EC. While, as noted in paragraph [15] above, it is possible for requesters to judicially review the internal review response (where such a response is made); the scope of judicial review is limited and does not, in my view, provide for the requisite level of review required by Article 6.

**Appeals under section 56**

[26] Section 56 of FOISA provides that appeals may be made, on a point of law, to the Court of Session. Such appeals are heard by a division of the Inner House and therefore the appeals are made directly to Scotland’s highest civil court. I consider that this is inappropriate and that it should be amended.

[27] Litigating in the Inner House of the Court of Session is extremely expensive. I am concerned that meritorious appeals may not be being made by requesters and public authorities (especially smaller authorities) because of this. Each party to an appeal will
incur court fees of in excess of £7,000 in respect of an appeal that results in a one day
hearing on the Summar Roll (on the basis of the table of fees in force as of 1st April
2019). Those fees are only those due to the Scottish Courts and Tribunals Service;
each party will also incur solicitors’ fees and also fees for Counsel. Appeals cost each
party tens of thousands of pounds with the possibility of facing expenses awards of a
similar sum.

[28] Legal Aid is available for individuals who can meet the eligibility criteria, but my
experience has been that obtaining a grant of legal aid from the Scottish Legal Aid
Board for an appeal under section 56 of FOISA is often difficult. This is as a result of
the often nebulous nature of the appeal and the inability of the applicant (as a
consequence of the statutory scheme) to be able to say with any real certainty what the
benefit to them will be.

[29] One of the tests that will often be applied by the Board in determining whether to grant
legal aid is whether a privately paying person of modest means would undertake the
litigation. It is difficult, but certainly not impossible, to say that a privately paying person
of modest means would make an appeal given that: (1) a successful appeal does not
guarantee that the information will ultimately be released (the Court can only reduce
the Commissioner’s decision and remit it to the Commissioner to retake) and (2)
because of the often prohibitive cost of appeals to the Inner House of the Court of
Session.

[30] The Committee may be aware that the appellate structure under the UK Act is rather
different, with appeals going to the First-Tier Tribunal (on both issues of fact and law)
and thereafter (with permission and on a point of law) to the Upper Tribunal, the Court
of Appeal (possibly the Court of Session, but this has never occurred) and thereafter
the Supreme Court. This appellate structure has been criticised as being too
cumbersome by some; however, it has resulted in much more litigation under the UK
Act.

[31] Not many appeals under the UK Act get beyond the First-Tier Tribunal and even fewer
beyond the Upper Tribunal. While decisions of the First-Tier Tribunal do not constitute
binding precedents (see, for example, the comments of Upper Tribunal Judge Jacobs
in LO v Information Commissioner [2019] UKUT 34 (AAC) at paragraph 17); the
decisions of the Upper Tribunal do and therefore the UK legislation has been subject to
a much greater level of judicial scrutiny. Therefore, the scope and meaning of the law is
being authoritatively determined. By contrast, this does not happen often in Scotland
and as such there is little judicial comment on the scope and meaning of the provisions in FOISA.

[32] There is a lot of overlap between the UK and Scottish Acts and it can therefore be appropriate for the Commissioner to take cognisance of decisions of the Upper Tribunal and English courts in respect of the UK Act; however, the Commissioner is not bound by such decisions (see Beggs v Scottish Information Commissioner 2018 CSIH 80; per Lord Brodie at paragraph 30). In my view, the appellate structure may be hampering the development of the law in this area and leaves the Commissioner in the difficult position of having to reach conclusions about the interpretation of the law, which are not binding, and with limited guidance from the courts.

[33] I respectfully suggest that the appellate structure is not fit for purpose and that it should be amended to, at the very least, allow for appeals on a point of law (as of right) to the Upper Tribunal for Scotland. Thereafter, there should be a right of appeal from the Upper Tribunal to the Court of Session (with the permission of the Upper Tribunal; which failing, the Court of Session) where the proposed appeal would raise some important point of principle or practice, or there is some other compelling reason for the Court of Session to hear the appeal. Finally, there should be a right of appeal to the Supreme Court in terms of section 40 of the Court of Session Act 1988, as amended.

[34] It is perhaps worth mentioning that in their publication “The Public’s Right to Know: Principles on Freedom of Information Legislation”\(^3\), Article 19 state:

> “Both the applicant and the public body should be able to appeal to the courts against decisions of the administrative body. Such appeals should include full power to review the case on its merits and not be limited to the question of whether the administrative body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of expression issues is promoted.”

This would suggest that the appeals process that applies to requests made under the Freedom of Information Act 2000 is the most appropriate.

[35] For a long time, section 56 has not complied with the requirements of Article 6 of Directive 2003/4/EC (see paragraph [21] above); however, the recent introduction of protective expenses orders by virtue of Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018 will go some way to assisting with compliance in this area; however, I do not consider that these changes go far enough.

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\(^3\) https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf
enough. There may very well be protection against significant adverse awards of expenses in appeals against decisions of the Commissioner in respect of requests under the Scottish EIRs; prospective appellants still need to fund the cost of litigating in the Inner House of the Court of Session (although legal aid is available for those who meet the eligibility tests in the Legal Aid (Scotland) Act 1986 – however, protective expenses orders do not effect them as the provisions of section 18 of the Legal Aid (Scotland) Act 1986 provide a right to seek modification of expenses).

Section 74

[36]  Section 74 provides that the Commissioner can only give a notice, including a decision notice, by delivering it or posting it. FOISA does not permit such notices to be transmitted electronically. Methods of communication have moved on significantly since 2002 and it therefore seems appropriate to consider whether FOISA should be amended so as to allow notices, including decision notices, to be given by transmitting them by electronic means. It seems proper to allow the Commissioner to give a notice electronically to an applicant where the application for a decision was itself received by electronic means; or otherwise where the requester had provided consent to have the decision notice given to them by electronic means.

Alistair Sloan
Inksters Solicitors
April 2019
Submission from: Dr. Ben Worthy, Birkbeck College, University of London

The Scottish FOISA has high levels of use, good rates of disclosure and strong public support. It has been undermined by game-playing at senior political levels and there are signs of patchy compliance, especially with Arm’s Length Bodies, and less pro-active disclosure than hoped.

1. In your view, what effects has the Freedom of Information (Scotland) Act 2002 (FOISA) had, both positive and negative?1

Positives

1.1 There are a series of positive effects from the FOISA. It is often argued that FOI laws bring greater transparency and accountability to public bodies, as well as improved public trust. Research around the world has shown that FOI laws do make for greater openness, through both direct and indirect effects on the behaviour of officials. However, exactly how well a law functions very much depends on if or how it is used and the context it is placed in.

1.2 FOI laws are intended to bring about greater openness reactively and proactively. They are reactive in making bodies respond to requests and proactive in encouraging the publishing of information in anticipation of interest. On the reactive side, one positive sign of a well-functioning regime is if it is being used and requests are being made. The volume of requests can vary immensely, even when weighted to different populations, from almost none in Switzerland to large numbers in the UK. Scotland has relatively high levels.

Table 1: Snapshots of FOI request numbers in single years2

<table>
<thead>
<tr>
<th>Country</th>
<th>Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scotland</td>
<td>77,528</td>
</tr>
<tr>
<td>UK (central government)</td>
<td>49,961</td>
</tr>
<tr>
<td>UK (local government)</td>
<td>467,000</td>
</tr>
<tr>
<td>Germany</td>
<td>2000</td>
</tr>
<tr>
<td>Switzerland</td>
<td>249</td>
</tr>
<tr>
<td>Kosovo</td>
<td>1999</td>
</tr>
<tr>
<td>Montenegro</td>
<td>1782</td>
</tr>
</tbody>
</table>

1.3 Greater openness: In terms of whether information is forthcoming, around 75% of all requests made in Scotland, or 3 in every 4 requests, are fully or partially released3. As a comparison, just under 50 % of FOI requests to UK central government in 2018 were fully or partially released, a trend that is causing concern4. Other positive signs are that public bodies in Scotland appear

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1 This evidence is based on a series of studies of FOISA in Scotland (Burt and Taylor 2007; 2010; Mc Cullagh 2017; Dunjon 2011: Johns 2009) as well as data and research from the Office of the Scottish Information Commissioner. It also incorporates broader research on FOI, including work by myself and others on the UK and other regimes across Europe.


mostly compliant and supportive of the law, and a study by the SIC in 2014 found that failure to respond to requests was limited to a small group of five public authorities.\(^5\)

In terms of \textbf{what sort of information is opened up}, a sample of news stories based on FOISA requests gives a sense of the wide variety of areas and institutions opened up by the law, from health policy to graduation fees, across many bodies, from the Scottish NHS to universities.

\textbf{Table 2: Selected news stories based on FOI}

- ‘HMP Perth one of the most targeted prisons in Scotland for drone contraband’ (Courier March 6 2019)
- 'Lack of consistency' warning over funding for new Carers Act (BBC, 12 March 2019)
- ‘Edinburgh homeless forced into B&Bs due to social housing shortage’ (Common Space 5\textsuperscript{th} March 2019)
- ‘Scottish Government received just two complaints about Gaelic road signs’ (Press and Journal January 21, 2019)
- ‘Scottish Students paying for graduation ceremonies’ (BBC Scotland 8 January 2019)

1.4. The proactive aspect of any law is harder to measure, and is one area that is often neglected by users and public bodies. In Scotland, all public bodies have a publication scheme listing the information that is proactively published. Research into the UK FOI found that publication schemes had been neglected because they had been superseded by search engines-users don’t consult them but just Google what they are looking for. The SIC’s model publication scheme made it easier, in many cases, to secure internal approval for the publication of information\(^6\). However, a mystery shop exercise in 2018 found that, although the vast majority of authorities publish some information, there was unevenness in terms of how much and what areas were covered. There was a fear that pro-active disclosure was motivated by a ‘box ticking’ mentality rather than whole-hearted commitment\(^7\).

1.5 \textbf{Open cultures}: Experiments using requests in England, replicated in the Netherlands and elsewhere since, found that FOI works better than informal routes to open up bodies, and can be a force for encouraging publication beyond what the law asks\(^8\). There was a sense that FOISA has made for more open ‘organisational cultures’ within Scottish public bodies and has also improved records management, driving a ‘more professional’ approach to the recording of information\(^9\).

1.6 As with other FOI laws, Scottish FOISA use is also local and most requests go to local bodies, as the table below shows\(^10\). The real value of FOI, as one Scottish Information Commissioner put it, is to be found in the pages of local newspapers\(^11\). Although it is often national


\(^7\) SIC (2017) \textit{Commissioner’s Special Report - Proactive Publication: time for a rethink?} Edinburgh: SIC.


\(^9\) See Burt and Taylor (2007), 5

\(^{10}\) This matches the UK experience see the recent mySociety report Parsons, A and Rumbul, R (2019) \textit{Freedom of Information in Local Government} \url{https://research.mysociety.org/sites/local-gov-foi/#start}

scandals that grab the headlines, most of the positive impact of FOI use is at the local level, which means it benefits issues of importance to people’s everyday lives. However, it also means some of the benefits are ‘micro-political’ and hard to trace.

Table 3: Top 10 self-reported authorities by number of requests

<table>
<thead>
<tr>
<th>Public authority</th>
<th>Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Edinburgh Council</td>
<td>2,762</td>
</tr>
<tr>
<td>Glasgow City Council</td>
<td>2,692</td>
</tr>
<tr>
<td>Police Service of Scotland</td>
<td>2,475</td>
</tr>
<tr>
<td>Scottish Ministers (including most Government Agencies and Non-Ministerial Officeholders)</td>
<td>2002</td>
</tr>
<tr>
<td>Scottish Fire and Rescue Service</td>
<td>1,997</td>
</tr>
<tr>
<td>Fife Council and Licensing Board</td>
<td>1,750</td>
</tr>
<tr>
<td>Aberdeen City Council</td>
<td>1,487</td>
</tr>
<tr>
<td>South Lanarkshire Council</td>
<td>1,385</td>
</tr>
<tr>
<td>Perth and Kinross Council and Licensing Board</td>
<td>1,300</td>
</tr>
<tr>
<td>Highland Council and Licensing Board</td>
<td>1,295</td>
</tr>
</tbody>
</table>

1.7 The law has strong public support. As of 2017 85% of respondents had heard of the Freedom of Information Scotland Act. More importantly 94% agreed ("strongly" or "tend to") that it is important for the public to be able to access information and 77% would be more likely to trust an authority that publishes a lot of information about its work. Public support has a series of spin off benefits—it is vital in creating compliance and preventing any reversal or negative changes to the law and may have some positive impact on perceptions (in terms of, for example, public trust).

1.8 This again compares well with elsewhere. A global survey in 2015 found fewer than 40% of those surveyed in various countries were aware of their information rights. There appears to be low to very low levels of awareness of laws across many European countries, from Albania to Switzerland, which has a detrimental effect on use and support.

Negatives

1.9 As with all FOI regimes there have been be delays, inconsistency and problems in Scotland. However, one problem in understanding FOI laws is that the operation of any FOI law is as

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12 SIC (2017) Commissioner’s Special Report - Proactive Publication: time for a rethink? Edinburg: SIC.
much about perceptions as realities. Nicola White described the practical operation of FOI is an ‘iceberg effect’, with a minority of high-profile requests attracting attention, making headlines and shaping attitudes, while a hidden stream of more everyday ‘micro-political’ actions are processed without a problem.\textsuperscript{15}

1.10 This has an effect at different levels. One Scottish study spoke of how FOI officers and those in daily contact support the principles but take an approach that ‘stresses the letter rather than the spirit of the law’\textsuperscript{16}. At more senior levels, officials and politicians are often notified of or copied into the 1 or 2\% of particularly troublesome requests, sensitive cases or, worst of all, those involving them. This can give a distorted view and prompt a series of complaints and, sometimes, resistance that can undermine the law (see below).

1.11 \textbf{Resources:} One Scottish study concluded that ‘resource limitations pose great difficulties for delivering the integrated, concerted and timely responses needed for successful FOI’\textsuperscript{17}. While in 2013/14 only 20 Scottish bodies had more than a 1000 requests per year, by 2016/17 it was estimated that 32 bodies would have more than 1000.\textsuperscript{18} The combination of growing numbers and a general lack of resources for local government (the main recipients of requests) can undermine a law, and there should be greater help for FOI officers on the frontline in times of cuts.

1.12 However, the idea that FOISA requests are a ‘burden’ is questionable. First, because it is difficult to calculate with any accuracy how much a request ‘costs’, and studies have come to wildly varying estimates\textsuperscript{19}.

Table 4: estimated cost of individual requests FOI in Pounds

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>U.K</td>
<td>293</td>
</tr>
<tr>
<td>Scotland</td>
<td>189</td>
</tr>
<tr>
<td>Ireland</td>
<td>364</td>
</tr>
<tr>
<td>Canada</td>
<td>637</td>
</tr>
<tr>
<td>Australia</td>
<td>748</td>
</tr>
<tr>
<td>U.S.</td>
<td>248</td>
</tr>
</tbody>
</table>

1.13 To illustrate from English local government, Cornwall Council calculated that the average cost of responding to an FOI request was £150 while Bexley Council found it to be around £36 with most requests costing around £19\textsuperscript{20}. Secondly, and perhaps more importantly, the supposed ‘burden’ or ‘cost’ must be matched against the vital-but hard to measure-democratic benefits that openness laws create. Putting an imprecise ‘cost’ on the democratic right of transparency is the wrong way of looking at the issue, and is sometimes used as a way to de-legitimise the law.

1.14 \textbf{Perceptions of use and abuse.} Another perceived negative is supposed ‘abuse of the Act’, particularly, it is argued, by journalists. Tony Blair famously claimed that ‘the truth is that the FOI


\textsuperscript{18} SIC (2017) Commissioner’s Special Report - Proactive Publication: time for a rethink? Edinburgh: SIC.


Act isn’t used, for the most part, by ‘the people’. It’s used by journalists’. Journalists do use FOI laws and their requests can make headlines, attract attention and cause nervousness. However, research into the UK FOI law found only a small percentage use it regularly and do, on the whole, behave responsibly with it\(^{21}\). There is little evidence of any wholesale abuse.

1.15 In 2019 MSP Alex Neil claimed FOISA was ‘abused by a handful of people’ and that ‘less than 50 per cent of FOI requests made in 2017/18 came from individual members of the public’\(^{22}\). From what information exists across Europe, this is the general trend, as the public are normally the largest group but not often the majority\(^{23}\). It is not known who is using the law in Scotland. Probably, as with regimes across Europe, they comprise a mixture of members of the public, businesses, NGOs and journalists, some of whom attract more attention than others.

1.16 However one clear problem is **uneven use**. FOI laws tends to be used by those already engaged in politics, reflecting the broader biases in political participation in terms of gender, education and background\(^{24}\). In Scotland, again reflecting trends elsewhere, there is a significant difference across gender with males being twice as likely as females to have made a request. Surveys found two areas of concern amongst young and old: only 25% of secondary school pupils in Scotland know they have freedom of information (FOI) rights. Another poll found uncertainty over FOI rights was highest amongst over 65 year olds, and overall awareness of FOISA was much lower amongst the disabled population\(^{25}\).

1.17 **Behaviour change and the ‘Chilling effect’** In the early 1980s, claims had abounded that FOI had a negative effect on decision-making, creating a ‘chilling effect’ whereby decisions were either not recorded and kept off paper or obscured in some way. Establishing that such an effect is real is very difficult, as it involves proving a negative, asking officials or politicians to admit unprofessional conduct, and disentangling the effects of FOI from all the influences that make or don’t make a record.

1.18 In UK central government there was concern about it, with isolated instances but no general trend and at local government level similarly there appear to be a few exceptional cases but no systematic effect\(^{26}\). At the level of officials in both Scotland and England there was some concern at informal recording but also some evidence of a positive professionalising effect on records\(^{27}\). However, events in 2018 in Scotland and Northern Ireland point to avoidance taking place at higher levels of government\(^{28}\).

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\(^{23}\) See Worthy (forthcoming) ‘FOI in Europe’


1.19 Tracing specific cases in Scotland is hard. There was some recent evidence of non-recording in Scotland when, in November 2017, the Ferret unearthed evidence that the Scottish Environment Protection Agency asked for ‘verbal’ updates instead of written documents, mentioning FOI as a reason\(^{29}\). The SIC’s investigation of the Scottish government in 2018 also flagged up concerns over the quality of the paper trail in certain areas.

1.20 **Political management, manipulation and avoidance.** A number of FOI regimes developed techniques to manage certain requests, often involving media and communications strategies designed to mitigate fallout. While this can be sometimes legitimate, it can also mean bending rules, overt political manipulation or crossing the key principle that laws ignore requester identity.

1.21 In Scotland, there appears to be growing resistance and avoidance at the top. In 2018, a report by the Scottish Information Commissioner concluded that the government had sought to create a ‘two-tier’ system delaying journalists or politically sensitive requests\(^{30}\). Though the system didn’t change what was eventually disclosed, there was a ‘noticeable difference in time taken and exemptions’ were ‘pushed to their limit’. The SIC report concluded that this was not only against the spirit of FOI legislation but impacted on the trust between the Scottish Government and users. Other signs of unhappiness were seen in successive government’s reluctance to extend the Act (see below), despite repeated warnings that not doing so would weaken the law. \(^{31}\)

1.22 Again, this is a common theme across other countries. Other avoidance techniques in FOI regimes involve using private email, something done by Michael Gove and, allegedly, key members of the Trump team in the US\(^{32}\). Authorities elsewhere have gone further and used systematic ‘silent noncompliance and blunt adversarialism’ to deter requests or even use it as an ‘early warning system’ for trouble\(^{33}\). Not only is this against the principles of FOI, it de-legitimises it and sends out poor signals to others about whether to comply with the law.

2. **Have the policy intentions of FOISA been met and are they being delivered?**

2.1 FOISA has clearly establish a legal right of access to information, anchored by use and wider public support for the law. The SIC has been recognised as a strong, powerful commissioner, having made a series of important decisions, such as over patient mortality data. One important practical achievement has been few delays\(^{34}\).

2.2 The law covers ‘more than 10,000 public authorities’ and has extended over time, as its creators intended. The Act has been extended to leisure trusts (2014), private prisons and grant aided and special schools (2016) and registered social landlords (ongoing)\(^{35}\). The extensions clearly have public support with ‘at least two thirds of the Scottish population favour extending


Scotland's FOI laws to cover bodies such as housing associations, leisure trusts, PPP/PFI projects and private prisons.\(^{36}\)

2.3 However, one 2015 study found that ‘some of the newer [Arm’s Length Bodies]’ covered by the law were ‘failing to comply with their newly assumed statutory obligations’ with poor take up of proactive obligations and publication schemes. This has created various ‘quagmires’ and a ‘postcode lottery’ of compliance.\(^{37}\)

2.4 There have been fewer attempts to change the law in a retrograde way in Scotland than elsewhere. It was estimated that there was an attempt to weaken the UK law once every 18 months since 2005, including mooted fees, excluding parliament from the ambit of the Act or removing the Monarch and Heir from the law. Countries as diverse as Denmark and Japan FOI laws have re-drawn legislation to weaken access rights. In Scotland public support for the law has helped protect it.

3. Are there any issues in relation to the implementation of and practice in relation to FOISA?

3.1 **FOISA is local.** It is at the local, micro-political level where FOISA has become a valuable tool but is also vulnerable. As the data below shows, requests to local councils and other bodies are rising each year, and is the place where officers need most support.

<table>
<thead>
<tr>
<th></th>
<th>FOISA requests</th>
<th>EIR requests</th>
<th>Total requests received</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013/14</td>
<td>32021</td>
<td>5321</td>
<td>37342</td>
</tr>
<tr>
<td>2014/15</td>
<td>36235</td>
<td>5555</td>
<td>41790</td>
</tr>
<tr>
<td>2015/16</td>
<td>37102</td>
<td>5546</td>
<td>42648</td>
</tr>
<tr>
<td>2016/17</td>
<td>40526</td>
<td>5871</td>
<td>46397</td>
</tr>
<tr>
<td>2017/18</td>
<td>42750</td>
<td>6453</td>
<td>49203</td>
</tr>
<tr>
<td>Q1 of 2018/19</td>
<td>10843</td>
<td>1466</td>
<td>12309</td>
</tr>
</tbody>
</table>

3.2 **Leadership is key.** Senior politicians help by speaking positively about the law and promoting FOI and openness generally\(^{38}\). This means helping practically with resources and facilitation for support networks and, as one report recommended ‘Scottish local authorities FOI Officers’ Network [should] be more strongly developed, particularly in their capabilities to support learning.

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\(^{38}\) Data courtesy of the SIC.

and communication of good practice\textsuperscript{40}. Senior FOI champions should also be created within individual organisations to assist with compliance. Such promotion and support also means encouraging diversity and, where possible, shifting the imbalance in use around gender and age.

3.3 **FOI is part of a wider, changing, landscape.** FOI shouldn’t be viewed in isolation but as part of a whole range of mechanisms and laws that now promote openness, from open data to procurement legislation and the Equality Act of 2010. All of these are evolving and changing, functioning together as a system of openness and scrutiny. The different areas could be made to work more closely. The link between Records Management practices and FOI is one vital area, and Rosemary Agnew’s urge that information be created to be released, discoverable and uniform is an important principle.\textsuperscript{41} Similarly, open data publication can promote proactive disclosure and may, in some cases, even reduce request numbers\textsuperscript{42}.


\textsuperscript{41} SIC (2017) *Commissioner’s Special Report - Proactive Publication: time for a rethink?* Edinburg: SIC.

Public Audit and Post-legislative Scrutiny Committee

22nd Meeting, 2019 (Session 5), Thursday 3 October 2019

Section 23 report – Finances of Scottish universities

Introduction

1. At its meeting today, the Public Audit and Post-legislative Scrutiny Committee will take evidence from the Auditor General for Scotland on her report entitled Finances of Scottish universities.

2. The Auditor General has prepared a briefing on the key messages and this is attached at Annexe A. A copy of the report is attached at Annexe B.

Clerks to the Committee
30 September 2019
1. The Auditor General’s report on the finances of Scottish universities was published on 19 September 2019. It assesses the financial position of the university sector between 2014-15 and 2017-18, the financial opportunities and challenges facing the sector, and how the Scottish Government, Scottish Funding Council and universities are working together to develop sustainable plans for the sector.

2. Key messages and recommendations from the report are:

- Scotland’s universities make an important contribution to both the Scottish economy and wider society. The sector is diverse – universities differ in size, student profile, location and the research and subjects they specialise in. Universities are autonomous bodies and generate income from a variety of sources; they are all competing with institutions in the UK and the rest of the world for students, staff and research funding. In 2017-18, the sector overall was in good financial health, but this masks significant variation. At an aggregate level, the operating position remained broadly stable between 2014-15 and 2017-18.

- In 2017-18, the total income for the Scottish university sector was £3.8 billion (£3.7 billion in 2014-15), of which £1.1 billion was provided by the Scottish Government via the SFC (£1.2 billion in 2014-15). SFC funding to the sector reduced by seven per cent (£91 million) in real terms between 2014-15 and 2017-18, with tuition fees replacing SFC grants as the single largest source of income in 2017-18. Modern universities are the most reliant on Scottish Government funding, and SFC grants accounted for 56 per cent of their total income in 2017-18.

- The Scottish university sector faces several financial pressures and uncertainties, and their ability to respond to these varies. All universities face increased contributions to their pension schemes, which the sector estimates could be as high as £23 million per year. As at July 2018, universities estimated it would cost £937 million to address estate maintenance requirements (£139 million of this is urgent backlog maintenance requirements (condition D to B)). Withdrawal from the European Union could have significant implications for universities’ funding, students and workforces. In 2017-18, the Scottish Government provided around £97 million to
universities for teaching EU students and Scottish universities received EU research funding totalling £114 million (3 per cent of total income). Under a UK Government guarantee, in the event of EU withdrawal with no deal, the Scottish Government estimates that at least half of the £114 million EU funding would be protected. A loss of students in key subject areas (for example, biological sciences, engineering and technologies and subjects allied to medicine) could make it harder for universities to achieve Scottish Government priorities. EU withdrawal could also result in skills shortages in teaching and research. Universities cite their ability to collaborate with European partners as a significant contributory factor in attracting research staff and maintaining a strong reputation for research.

- Outcome agreements are a key accountability mechanism, setting out what universities plan to deliver in return for SFC funding. The SFC’s annual summary of progress and ambitions report provides a high-level overview of sector and individual university performance, including how universities have performed against measures they have agreed with the SFC. However, in 2017-18 many universities did not have agreed targets for some measures relating to teaching and research, making it difficult to determine whether universities are delivering all that Scottish ministers expect of them. The report recommends that the SFC improve the process by which it sets targets and reports on university performance against Scottish Government priorities, and that the Scottish Government to work with the SFC to better articulate how it expected universities to contribute to national outcomes.

- The Scottish Government and the SFC have a good understanding of the issues affecting both the sector and individual universities. The report recommends that the Scottish Government should specify the contribution it expects universities to make to National Performance Framework outcomes. The SFC has not yet set out proposals to secure the delivery of the Scottish Government priorities, and the report recommends that it builds on its commitments in its recent Strategic Framework and set out more specific proposals on mitigating risks to the delivery of Scottish Government priorities.
Audit Scotland is a statutory body set up in April 2000 under the Public Finance and Accountability (Scotland) Act 2000. We help the Auditor General for Scotland and the Accounts Commission check that organisations spending public money use it properly, efficiently and effectively.

Auditor General for Scotland

The Auditor General’s role is to:
- appoint auditors to Scotland’s central government and NHS bodies
- examine how public bodies spend public money
- help them to manage their finances to the highest standards
- check whether they achieve value for money.

The Auditor General is independent and reports to the Scottish Parliament on the performance of:
- directorates of the Scottish Government
- government agencies, eg the Scottish Prison Service, Historic Environment Scotland
- NHS bodies
- further education colleges
- Scottish Water
- NDPBs and others, eg Scottish Police Authority, Scottish Fire and Rescue Service.

You can find out more about the work of the Auditor General on our website: www.audit-scotland.gov.uk/about-us/auditor-general

Audit Scotland is a statutory body set up in April 2000 under the Public Finance and Accountability (Scotland) Act 2000. We help the Auditor General for Scotland and the Accounts Commission check that organisations spending public money use it properly, efficiently and effectively.
Key facts

- Number of universities: 19
- Total Scottish Government funding to universities, via the Student Awards Agency Scotland, for Scottish and EU student tuition fees in 2017-18: £213 million
- Total Scottish Funding Council funding allocated to universities in 2017-18: £1.1 billion
- Total income of the university sector in 2017-18: £3.8 billion
- Number of students in 2017-18 (headcount): 230,940
Summary

Key messages

1 The Scottish university sector is diverse. While the aggregated underlying financial position in 2017-18 shows the sector overall to be in good financial health, it masks significant variation. Surpluses are concentrated in three of the four ancient universities.

2 Scottish Funding Council (SFC) funding to the sector reduced by seven per cent, in real terms, between 2014-15 and 2017-18. Tuition fees replaced SFC grants as the single largest source of income for the sector in 2017-18. Despite reductions in SFC funding, ancient and chartered universities have generally increased their income, mainly from non-EU tuition fees. Increases in income from non-government sources have generally been smaller at modern universities.

3 In addition to the reduction in SFC funding, the sector faces several other financial pressures and uncertainties, including pension costs, estates costs and EU withdrawal. Generally, the ancient universities are better placed to respond to these pressures, because of their ability to generate income from other sources and the balances in their reserves, but they face strong competition from other universities in the UK and the rest of the world.

4 The Scottish Government’s priorities for the sector are reflected in outcome agreements between the SFC and universities. The outcome agreements also contain measures to assess progress towards delivery of Scottish Government priorities. But, in 2017-18, many universities did not have agreed targets for some measures relating to teaching and research and, in some cases, as few as two universities met their targets.

5 The SFC has recovered funding where universities have delivered less than the agreed volume of teaching activity. But there is no evidence of a direct link between funding and university performance against other agreed targets, such as those for student retention and for recruitment to courses in Science, Technology, Engineering and Mathematics (STEM).

6 The Scottish Government and the SFC have a good understanding of the issues affecting both the sector and individual universities, though there is scope for the SFC to improve its monitoring and reporting on universities’ finances. The SFC has not set out specific actions to mitigate risks to the sector’s ability to deliver the Scottish Government’s priorities.
Recommendations

The SFC should:

- specify targets for all outcome agreement measures for each university, where possible and appropriate (paragraphs 65–70)

- further develop its annual progress and ambitions report to include individual university performance against outcome agreement measures, together with the action taken where a target was not achieved (paragraphs 73–75)

- improve its approach to analysing universities’ financial health and sustainability by:
  - reviewing universities’ long-term financial strategies (paragraph 80)
  - specifying the criteria and examples in its internal guidance that would lead to increased engagement with individual universities (paragraph 81)

- publish a more detailed summary of its financial analysis, similar to that published by the Office for Students in England (paragraphs 83–84)

- build on the commitments in its recent Strategic Framework and set out more specific proposals on mitigating risks to the delivery of Scottish Government priorities (paragraph 88).

The Scottish Government should:

- agree with the SFC the National Performance Framework (NPF) outcomes to which it expects universities to contribute. Where appropriate, it should also specify the contribution universities should make. The SFC should reflect any changes in its outcome agreement process (paragraphs 60–62).

- routinely monitor and publish details of its total investment in the sector, beyond the funding that it provides to the SFC, and review funding streams to see if there is scope for these to be streamlined (paragraph 25).

Background

1. Universities make an important contribution to both the Scottish economy and wider society. Universities are major employers and students spend money on living costs in the surrounding areas. A report published by Universities Scotland in August 2017 stated that, in 2016-17, universities added an estimated £7.1 billion to the Scottish economy and employed over 43,700 people.¹

2. The Scottish Government, in its five-year financial strategy, published in May 2018, highlighted higher education as one of its six key priorities.² However, the Scottish Government’s medium-term financial strategy, published in May
2019, contains no specific reference to higher education, research or knowledge exchange.\(^3\) Instead, the strategy highlights education more generally as a key priority.

3. This report focuses on higher education institutions, which we refer to collectively as universities throughout the report.\(^4\) The Appendix (page 39) outlines the four university groupings we use (ie ancient, chartered, modern and small and specialist institutions (SSIs)), and the abbreviations we use for each university.

4. The Scottish university sector is diverse. Universities deliver teaching and research, and support knowledge exchange activities. Universities differ in size, student profile, location, and the research and subjects in which they specialise. Ancient and chartered universities tend to undertake more research activity than other universities in Scotland. They also tend to attract more fee-paying students from the rest of the UK (RUK) and outside of the EU (non-EU). Modern universities are generally more teaching intensive, and have a greater proportion of Scottish students. In the 2017-18 academic year, there were 230,940 students studying in Scottish universities.\(^5\) Scottish universities are competing with institutions in the UK and the rest of the world for students, staff and research funding.

5. Universities are autonomous bodies and generate income from a variety of sources. In 2017-18, the total income for the Scottish university sector was £3.8 billion, of which £1.1 billion was provided by the Scottish Government, via the SFC, to support teaching, research and innovation activities. The Scottish Government, via the Student Awards Agency Scotland (SAAS), also provided over £213 million in tuition fees for eligible Scottish and EU students. The SFC determines the number of funded places available for these students, based on the amount of funding available from the Scottish Government. Since 2008, the Scottish Government has paid the tuition fees of eligible Scottish and EU students.\(^6\)

6. The Scottish Government’s high-level strategic priorities for higher education are:

- high-quality learning in a system which is seamlessly connected for the learner
- access to further and higher education for people from the widest range of backgrounds
- quality learning and good governance in universities
- internationally competitive and impactful research
- effective knowledge exchange and innovation between universities and colleges and industry.\(^7\)

7. Alongside delivering core activities such as teaching and research, universities are expected to contribute to other Scottish Government initiatives, such as the Enterprise and Skills Strategic Board’s strategic plan, and policy priorities, such as widening access.\(^8\)

8. Universities also contribute to the 11 long-term outcomes in the new NPF, launched jointly by the Scottish Government and The Convention of Scottish Local Authorities (COSLA) in June 2018.\(^9\) Each of the 11 long-term outcomes has a set of NPF indicators which are used to track progress.
9. The SFC is the national strategic body with responsibility for allocating Scottish Government funding for further and higher education, research and other activities in Scotland’s colleges and universities, in a way that effectively supports delivery of the Scottish Government’s priorities. The SFC is responsible for holding universities to account for the funding it provides. It is also responsible for providing advice to Scottish ministers relating to the provision of higher education and research activities at Scottish universities. The SFC’s funding decisions support the Scottish Government’s strategic priorities.

About the audit

10. Scottish universities are autonomous, charitable bodies. As such, they are responsible for appointing their own external auditors.

11. The Auditor General for Scotland has had powers since 2010 to perform value for money audits in bodies funded by the SFC. In July 2016, Audit Scotland published an Audit of higher education in Scottish universities. The audit assessed how higher education was funded and delivered, how well it contributed to the national strategic priorities and how well equipped the sector was to deal with future financial challenges.

12. This audit builds on some of the key financial aspects of the 2016 audit. It assesses the financial position of the university sector in Scotland between 2014-15 and 2017-18; the financial opportunities and challenges facing the sector; and how the Scottish Government, the SFC and universities are working together to develop sustainable plans for the sector. The report does not look at Scottish Government funding for Scottish and EU student tuition fees, or student loans. The Appendix provides more background information and details of our audit methodology.

13. All financial data is reported in real terms, adjusted using gross domestic product deflators at market prices in March 2019. To differentiate between the different financial year ends for the Scottish Government (March) and universities (July):

- data from university financial statements is reported using the format 2017-18
- data from the Scottish Government’s budget is reported using the format 2017/18.

The SFC’s revenue grants are allocated on an academic year basis. The SFC’s capital grants are allocated on a financial year basis. The format we use for all SFC grants is 2017-18.

14. This report has three parts:

- Part 1 - University finances.
- Part 2 - Financial pressures affecting universities.
- Part 3 - The roles of the Scottish Government, the Scottish Funding Council and universities.
Part 1
University finances

Key messages

1. SFC funding to the sector reduced by seven per cent (£91 million) in real terms, from £1.2 billion in 2014-15 to £1.1 billion in 2017-18. Despite this, total income for the sector increased by three per cent, from £3.7 billion in 2014-15 to £3.8 billion in 2017-18. Income reduced at nine universities, including five modern universities. Tuition fees replaced SFC grants as the single largest source of income for the sector in 2017-18.

2. While the sector overall is in good financial health, this masks significant variation across universities, and many sector-level indicators are disproportionately affected by the financial results of three of the four ancient universities. At an aggregate sector level, the operating position has remained broadly stable over the past four years, but six universities reported deficits every year. Between 2014-15 and 2017-18, the underlying position for the sector improved, but the position was worse for six universities.

3. Modern universities are the most reliant on Scottish Government funding (SFC grants account for 56 per cent of their total income). Increases in income from other sources have generally been smaller at modern universities compared to other groupings.

4. Ancient universities generally reported the strongest financial positions and three of the four routinely generate surpluses. In total, in 2017-18, 32 per cent of their income was derived from tuition fees. However, they face strong competition from universities in the UK and the rest of the world.

The operating position for the sector remained broadly unchanged over the last four years, but six universities reported deficits every year

More than half of all universities were in deficit in 2017-18 and the position was worse than in 2014-15 for most modern and chartered universities. The operating position of a university is its income minus its expenditure – a positive figure is a ‘surplus’ and a negative figure a ‘deficit’. The operating position can be volatile (Appendix), but large and/or recurring deficits can be indicators of concern. At July 2018, the sector had a small deficit of £1 million.
(0.02 per cent of income), compared with a surplus of £28.5 million (0.8 per cent of income) in 2014-15. Excluding £30 million of damage and reconstruction costs relating to fires at Glasgow School of Art (GSA), the sector had a surplus of £29.1 million (0.8 per cent of income) in 2017-18.

16. Ten universities were in deficit compared with eight in 2014-15 (Exhibit 1, page 11). Over the past four years:

- five (Edinburgh, Glasgow, Scotland’s Rural College (SRUC)) St Andrews and Strathclyde reported a surplus each year. Edinburgh, Glasgow and St Andrews had a combined surplus of £68 million in 2017-18

- six (Aberdeen, Dundee, Queen Margaret University (QMU), Robert Gordon University (RGU), Stirling and the University of the West of Scotland (UWS)) reported deficits each year

- four (Glasgow Caledonian University (GCU), GSA, Napier and the University of the Highlands and Islands (UHI) moved from reporting a surplus in 2014-15 to reporting a deficit in 2017-18.

17. GSA reported the largest deficit, relative to its income, of £26.4 million (65 per cent of income) in 2017-18, mainly because of fire-related costs. GSA is awaiting the outcome of an investigation into the fire in 2018 before it can receive insurance payment for the damage caused. The next largest deficits were at QMU and RGU, at £5.4 million (15 per cent of income) and £11.4 million (12 per cent of income) respectively.

Underlying financial performance generally improved

18. One commonly used measure of underlying financial performance is Earnings Before Interest, Tax, Depreciation and Amortisation (EBITDA). EBITDA is the operating position before applying the costs of financing debt and other accounting decisions (Appendix). EBITDA can be a better indicator of the immediate financial health of an organisation than the operating position because it excludes income and costs that are longer-term and fluctuate significantly between years. The measure is often used by universities for their own internal purposes and to provide assurance to banks and other providers of finance that universities will be able to repay loans.

19. At July 2018, EBITDA for the sector was £256 million (seven per cent of income), compared with £140 million (four per cent of income) in 2014-15. Between 2014-15 and 2017-18, the position improved for all universities except six moderns (all except Abertay reported a decline in their position). Reductions were most notable for:

- UHI – reduced from £3.5 million to £0.5 million (by 87 per cent)
- QMU – reduced from £6.7 million to £2.4 million (by 64 per cent)
- RGU – reduced from £10.7 million to £4.5 million (by 58 per cent).
Exhibit 1
Operating position as a percentage of income by university, 2014-15 to 2017-18
More than half of universities were in deficit in 2017-18 and the position was worse for most modern and chartered universities than in 2014-15.

<table>
<thead>
<tr>
<th>University Name</th>
<th>Operating position in 2017-18</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Aberdeen</td>
<td>-£7.5m -3.4%</td>
<td></td>
</tr>
<tr>
<td>University of Glasgow</td>
<td>£17.4m 2.8%</td>
<td>Figures for the University of the Highlands and Islands (UHI) excludes income and expenditure for research undertaken by UHI’s partners.</td>
</tr>
<tr>
<td>University of Edinburgh</td>
<td>£27.4m 2.3%</td>
<td></td>
</tr>
<tr>
<td>University of St Andrews</td>
<td>£23.5m 9.4%</td>
<td></td>
</tr>
<tr>
<td>University of Dundee</td>
<td>-£9.1m -3.7%</td>
<td>Glasgow School of Art’s surplus in 2015-16 is due to insurance income from the fire in 2014. Its deficit in 2017-18 is due to damage and reconstruction costs relating to the fires in 2014 and 2018.</td>
</tr>
<tr>
<td>University of Stirling</td>
<td>-£1m -0.8%</td>
<td></td>
</tr>
<tr>
<td>University of Strathclyde</td>
<td>£0.4m 0.1%</td>
<td></td>
</tr>
<tr>
<td>Heriot-Watt University</td>
<td>£7.4m 3.2%</td>
<td></td>
</tr>
<tr>
<td>Queen Margaret University</td>
<td>£5.4m -14.5%</td>
<td></td>
</tr>
<tr>
<td>Robert Gordon University</td>
<td>-£11.4m -12.2%</td>
<td></td>
</tr>
<tr>
<td>Glasgow Caledonian University</td>
<td>£7.6m -6.3%</td>
<td></td>
</tr>
<tr>
<td>Edinburgh Napier University</td>
<td>-£4.7m -4%</td>
<td></td>
</tr>
<tr>
<td>1 The University of the Highlands and Islands</td>
<td>-£3.8m -3.4%</td>
<td></td>
</tr>
<tr>
<td>University of the West of Scotland</td>
<td>-£3.3m -3%</td>
<td></td>
</tr>
<tr>
<td>Abertay University</td>
<td>£0.7m 0.7%</td>
<td></td>
</tr>
<tr>
<td>2 Glasgow School of Art</td>
<td>-£26.4m -66.1%</td>
<td></td>
</tr>
<tr>
<td>Royal Conservatoire of Scotland</td>
<td>£0.5m 2%</td>
<td></td>
</tr>
<tr>
<td>Scotland’s Rural College</td>
<td>£2.4m 3%</td>
<td></td>
</tr>
</tbody>
</table>

Notes:
1. Figures for the University of the Highlands and Islands (UHI) excludes income and expenditure for research undertaken by UHI’s partners.
2. Glasgow School of Art’s surplus in 2015-16 is due to insurance income from the fire in 2014. Its deficit in 2017-18 is due to damage and reconstruction costs relating to the fires in 2014 and 2018.
3. Small and specialist institutions (SSI)

SFC funding to universities has reduced by seven per cent since 2014-15

20. The Scottish Government provides the SFC with funding for universities, in accordance with a financial year-end of 31 March. The SFC is responsible for determining how this funding should be distributed to universities and provides most funding in accordance with universities’ financial year-end of 31 July. The Scottish Government may announce budget revisions during the year. For these reasons, there is not necessarily direct alignment between annual Scottish Government allocations to the SFC (paragraph 21) and SFC allocations to universities (paragraph 22).

21. Scottish Government funding to the SFC for universities increased by 0.1 per cent in cash terms, from £1.116 billion in 2014/15 to £1.117 billion in 2017/18, but this equated to a real terms reduction of five per cent.\textsuperscript{14} Taken together with a seven per cent reduction between 2010/11 and 2014/15, this represents a real terms reduction in Scottish Government funding of 12 per cent over seven years. Between 2014/15 and 2017/18:

- revenue funding (for example for teaching and research) reduced by six per cent, in real terms, to £1.1 billion
- capital funding (for example, for new buildings and equipment) increased by 45 per cent to £46 million in 2017/18. Capital funding has fluctuated over the period, from £22 million in 2015/16 to £70 million in 2016/17 (Appendix).

The total budget (revenue and capital) in 2018/19 was £1.1 billion in cash terms, representing a further reduction of 0.3 per cent in real terms.

SFC funding has reduced for all but five universities since 2014-15

22. While the Scottish Government’s budget was reduced by five per cent between 2014/15 and 2017/18, SFC funding to the sector reduced by seven per cent, from £1.2 billion in 2014-15 to £1.1 billion in 2017-18.\textsuperscript{15} Alongside the difference in financial year-ends for the Scottish Government and universities (paragraph 20), the difference in the trend can partly be explained by an increase in the amount of Scottish Government funding that the SFC transfers to SAAS, to cover the cost of tuition fees related to additional places for widening access, articulation and undergraduate skills, and for part-time student tuition fees. The funding transfer to SAAS increased from £9 million in 2014-15 to £22 million in 2017-18.\textsuperscript{16} Additionally, since 2013-14, universities are required to transfer 75 per cent of the funding they receive for articulation places to the colleges with which they are partnered; the SFC estimates this was around £9 million in 2017-18.

23. Between 2014-15 and 2017-18, SFC funding reduced at all but five universities and the biggest reductions were at ancient universities (by £61 million or 12 per cent). This was driven by reductions in both teaching and research grants.

24. SFC grants accounted for 30 per cent (£1.1 billion) of the total income (£3.8 billion) for the sector in 2017-18 (Exhibit 2, page 13). Generally, modern universities were more reliant on SFC funding than any other grouping, with 56 per cent of their income coming from the SFC, compared with 22 per cent for ancient universities. In addition, approximately 11 per cent of income (£71 million) at modern universities was from the tuition fees paid by the Scottish Government, via SAAS, compared to three per cent (£69 million) for ancient universities.\textsuperscript{17}
Exhibit 2
Income profile for the university sector in 2017-18
Tuition fees were the single largest source of income for Scottish universities in 2017-18 (32 per cent of total income). Income from SFC grants ranged from 15 per cent at St Andrews to 75 per cent at UHI.¹

Notes:
1. Lighter shading in the pie chart indicates public funding largely sourced from the Scottish or UK governments.
2. ‘Other income’ includes income from services to industry and public bodies, consultancy work and student residences.
3. Figures exclude income for research undertaken by UHI’s partners.
4. ‘Other’ research grants includes income from EU charities and industry as well as other UK sources.

The Scottish Government provides funding for universities through a number of different streams

25. In addition to the core revenue and capital funding provided to the SFC, and Scottish and EU student tuition fees via SAAS (£213 million in 2017-18 (paragraph 5), the Scottish Government provides funding for universities in the form of:

- **Financial transactions:** Since 2016/17 the SFC has offered low interest loans (financial transactions) to support university proposals for spend-to-save projects and the strategic development of estates. Universities compete for financial transactions funding by applying to the SFC. The Scottish Government made £10 million available for financial transactions in 2016/17 and £16.9 million in 2017/18. Funding increased to £40 million in 2018/19 and £55.5 million in 2019/20.

- **Funding from other Scottish Government directorates:** The Scottish Government does not routinely calculate its total funding for universities, beyond what is provided via the SFC and SAAS, but has estimated this to be around £92 million in 2018/19. This is made up of a large number of additional funding streams, sometimes for quite small amounts and from a variety of Scottish Government directorates. Funding was mainly for health, rural and environmental research projects, economic development and training health professionals. The Scottish Government is considering how it reports on and distributes these funds.

Between 2014-15 and 2017-18, total sector income increased by three per cent, driven by increases at three of the four ancient universities

Sector income increased overall but income reduced at nine universities

26. Despite reductions in SFC funding, total sector income increased by three per cent, from £3.7 billion in 2014-15, to £3.8 billion in 2017-18. Income reduced at nine of the 18 universities.

27. Three of the four ancients accounted for most of the overall increase in income:

- Edinburgh – increased from £890 million to £984 million (11 per cent)
- Glasgow – increased from £601 million to £631 million (five per cent)
- St Andrews – increased from £235 million to £251 million (seven per cent).

28. The biggest reductions in income were at:

- RGU – from £107 million to £93 million (12 per cent)
- QMU – from £41 million to £37 million (nine per cent)
- Aberdeen – from £241 million to £219 million (nine per cent).

Income from tuition fees replaced SFC grants as the single largest source of income for the sector in 2017-18

29. Income from tuition fees became the largest single source of income for the sector for the first time in 2017-18 (replacing SFC grants as the main income source). Between 2014-15 and 2017-18, fee income increased by £200 million (22 per cent), to £1.2 billion (32 per cent of total income) (Exhibit 2, page 13). Fee income increased for all but four universities.
The overall increase in fee income was largely driven by an increase of £158 million (31 per cent) at the ancient universities. Of this, £104 million (66 per cent) was from non-EU student fees. Patterns in fee income varied by student domicile (Appendix):

- Income from Scottish and EU student fees increased by £33 million (11 per cent) since 2014-15. This includes both self-funded students and those whose fees are paid for by the Scottish Government, via SAAS.

- Income from RUK students increased by £68 million (66 per cent) since 2014-15. This is largely because of an increase in fees paid by RUK undergraduate students who started their studies from 2012.

- Income from non-EU student fees increased by £143 million (31 per cent) since 2014-15, but this varied by university (Exhibit 3). There is no restriction on the fee universities can charge to non-EU students. For undergraduate courses, annual fees ranged from £11,000 at UWS for a classroom-based course to £49,000 at Edinburgh for a clinical degree.

Exhibit 3
Change in non-EU fee income in real terms between 2014-15 and 2017-18
Non-EU fee income fell for five of the seven modern universities and SRUC.

<table>
<thead>
<tr>
<th>University</th>
<th>Percentage change</th>
<th>Change in non-EU fee income</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Glasgow</td>
<td>56%</td>
<td>£43m</td>
</tr>
<tr>
<td>University of Edinburgh</td>
<td>39%</td>
<td>£47m</td>
</tr>
<tr>
<td>University of St Andrews</td>
<td>23%</td>
<td>£11m</td>
</tr>
<tr>
<td>University of Aberdeen</td>
<td>12%</td>
<td>£3m</td>
</tr>
<tr>
<td>University of Dundee</td>
<td>33%</td>
<td>£6m</td>
</tr>
<tr>
<td>Heriot-Watt University</td>
<td>28%</td>
<td>£18m</td>
</tr>
<tr>
<td>University of Stirling</td>
<td>27%</td>
<td>£3m</td>
</tr>
<tr>
<td>University of Strathclyde</td>
<td>15%</td>
<td>£5m</td>
</tr>
<tr>
<td>University of the West of Scotland</td>
<td>15%</td>
<td>£7m</td>
</tr>
<tr>
<td>Abertay University</td>
<td></td>
<td>327%</td>
</tr>
<tr>
<td>Queen Margaret University</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Glasgow Caledonian University</td>
<td>-21%</td>
<td>-£3.2m</td>
</tr>
<tr>
<td>Edinburgh Napier University</td>
<td>-2%</td>
<td>-£0.4m</td>
</tr>
<tr>
<td>Robert Gordon University</td>
<td></td>
<td></td>
</tr>
<tr>
<td>University of the Highlands and Islands</td>
<td>-24%</td>
<td>-£0.2m</td>
</tr>
<tr>
<td>Glasgow School of Art</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Royal Conservatoire of Scotland</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scotland’s Rural College</td>
<td>51%</td>
<td>-£0.05m</td>
</tr>
</tbody>
</table>

Notes:
1. In its 2017-18 financial statements, the University of the West of Scotland attributes an increase in non-EU fee income to significant recruitment following the opening of its London campus in 2016.
2. Small and specialist institutions

Universities are subsidising research and publicly-funded teaching activity with income from other sources

31. All universities in the UK use the Transparent Approach to Costing (TRAC) as the standard methodology for costing their activities. The sector has expressed concerns about relying solely on TRAC analysis to measure financial sustainability, particularly when looking at university-level data, because the subjectivity of how costs should be allocated could result in TRAC data being inconsistent or misleading (Appendix).

32. In 2016-17, on average, universities recovered 98.6 per cent of the full cost of all activities (97.2 per cent in 2015-16). Funding for both publicly funded teaching and research does not always cover the full costs for delivery and, in 2016-17, on average, universities recovered:

- 92.4 per cent of the full economic cost of publicly funded teaching (93.1 per cent in 2015-16), including the teaching of Scottish, RUK and EU students
- 80.1 per cent of the full cost of research activities (79.1 per cent in 2015-16).

33. This means that universities rely on being able to generate ‘cross-flows’ of funding between activities. For example, to maintain and improve their position, research-intensive universities will usually have to increase income from other activities, such as non-publicly funded teaching, to cover the full economic cost of their research activity. In 2016-17, on average, universities recovered:

- 138.2 per cent of the full cost of non-publicly-funded teaching (135 per cent in 2015-16), mainly for teaching non-EU students
- 144.2 per cent of the full cost of other activities (for example, commercial activities, residences and conferences) (128.5 per cent in 2015-16).

34. Universities decide whether to pursue or grow research activity. Their ability to recover the full economic cost, or to cross-subsidise their research activities, may influence their decisions. For example, Dundee has made a strategic decision that it will not target further growth in research, because the university deemed it not to be financially sustainable.
Part 2

Financial pressures affecting universities

Key messages

1 In addition to reductions in SFC funding, universities are facing several financial pressures, and their ability to respond varies. Ancient universities are generally better placed to withstand the pressures, because of their ability to generate income from other sources and the balances in their reserves, but they face strong competition from other universities in the UK and the rest of the world.

2 All universities face increased contributions to their pension schemes. Universities estimate these could be as high as £23 million per year. Scottish ministers have committed to pass on any specific UK funding to help meet planned increased employer pension contributions to the Scottish Teachers’ Superannuation Scheme up until 31 March 2020.

3 At July 2018, universities estimated it would cost £937 million (25 per cent of income) to address estate maintenance requirements.

4 Universities have been trying to respond to cost pressures by increasing income from non-government sources and implementing efficiencies. Most universities are planning to increase income from non-EU students to maintain financial sustainability.

Universities face future cost pressures, and there is significant uncertainty around some important areas of activity

35. In addition to reductions in SFC funding (paragraph 22) universities face other financial pressures (Exhibit 4, page 18).

Pension deficits will result in increased contributions for universities, with risk of further industrial action

36. Universities in Scotland generally have several pension-funding obligations:

- the Universities Superannuation Scheme (USS) (a UK-wide non-government-funded scheme) of which 13 Scottish universities are members
- the Scottish Teachers’ Superannuation Scheme (STSS), of which 15 Scottish universities are members
- Local Government Pension Scheme (LGPS)
- NHS Scheme for Scotland (NHSSS)
• Universities’ own funded schemes.

At March 2019, the sector estimated that the total annual cost of increased employer contributions for all of the schemes would be £23 million a year from April 2019.25

Exhibit 4
Financial pressures affecting universities
The scale of the pressures affecting universities vary. The extent of how these risks affect universities is dependent on a number of external factors and the decisions universities take on how they plan to address them (eg capital investment).

Notes:
1. The darker the arrow the more certain the cost pressure.
2. Under a UK Government guarantee, in the event of EU withdrawal with no deal, the Scottish Government estimates that at least half of the £114 million EU research funding would be protected (Guidance, Horizon 2020 funding after Brexit, UK Government, August 2019).

Source: Audit Scotland
37. In 2017, the USS had a deficit of £7.5 billion (£5.3 billion in 2014). To address the deficit, USS proposed to increase contributions from both universities and their employees. This proposal contributed to staff taking industrial action in March 2018. In November 2018, USS completed a further valuation of the scheme, which is still to be finalised. Increases to employer and employee contributions, based on the 2017 valuation, were implemented in April 2019. Since November 2018, USS and universities have been negotiating further changes to employer and employee contributions. The Universities and College Union was balloting members (between 9 September 2019 and 30 October 2019) to consider further industrial action.

38. The STSS will require increased contributions from employers, to cover a growing deficit. The SFC estimates the annual increase to employer contributions will be around £8 million per year. The UK Government has confirmed funding allocations for the period 1 September 2019 to 31 March 2020, and the SFC advised universities in July 2019 that the Scottish Government will provide additional funding of £2.75 million to the sector up until 31 March 2020, with universities having to absorb any remaining costs. The increased contributions are due to come into effect in September 2019. The Scottish Government is liaising with the UK Government about funding arrangements beyond 31 March 2020.

At July 2018, universities estimated that it would cost £937 million to address estate maintenance requirements

39. The Scottish university estate is large and diverse. There are 1,856 buildings throughout Scotland, in 146 locations. Ancient universities have the most buildings (998, or over 54 per cent of the sector total) and modern universities have the most sites (88, or 60 per cent of the sector total). Six per cent of the estate was built before 1840 and 24 per cent between 1840 and 1959. The value of the estate is just over £5 billion, with Edinburgh having 33 per cent (£1.7 billion) of the total value.

40. In an increasingly competitive environment, universities need to maintain buildings and facilities at a high standard, to meet the specifications required for world-leading research and teaching, and to continue to be able to attract students, staff and researchers. The age, occupancy levels, listed status of buildings, space restrictions, and the cost or availability of land in convenient locations all add to this challenge. Some universities have chosen not to upgrade parts of their estate as they no longer fit with their strategic plans and are no longer in operational use, though these will still be included in the calculations of estate maintenance costs.

41. Buildings are assessed as being in one of four categories, from A to D. In 2017-18, the sector estimated that the total cost of upgrading university buildings in Scotland to category B was £937 million. While most of this (£798 million, or 85 per cent) was not urgent (from condition C to B), the remaining £139 million was required to upgrade buildings from condition D to B (urgent backlog maintenance). This was equivalent to four per cent of total sector income in 2017-18, but it varies by university (Exhibit 5, page 20). The estimated cost of urgent backlog maintenance was consistently more than ten per cent of income for Aberdeen, Abertay, GSA and UWS between 2014-15 and 2017-18.

Building condition categories:
A: as new condition
B: sound, operationally safe, and exhibiting only minor deterioration
C: operational but major repair or replacement needed in the short to medium term (generally three years)
D: inoperable or at serious risk of major failure or breakdown (urgent backlog maintenance).
The extent to which individual universities are exposed to these pressures, and their capacity to respond, varies

Universities’ exposure to the cost pressures varies throughout the sector. The above cost pressures will not affect all universities to the same extent. The extent to which universities are exposed to them is summarised in Exhibit 5.

### Exhibit 5
Relative exposure of universities to financial challenges in 2017–18

Modern universities are generally more reliant on SFC funding than other groupings.¹

<table>
<thead>
<tr>
<th>Grouping</th>
<th>University</th>
<th>SFC funding as % of income</th>
<th>Staff costs as % of expenditure</th>
<th>Urgent backlog maintenance as % of income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ancient</td>
<td>University of Aberdeen</td>
<td>34</td>
<td>60</td>
<td>20.8</td>
</tr>
<tr>
<td></td>
<td>University of Edinburgh</td>
<td>19</td>
<td>54</td>
<td>1.7</td>
</tr>
<tr>
<td></td>
<td>University of Glasgow</td>
<td>25</td>
<td>54</td>
<td>0.2</td>
</tr>
<tr>
<td></td>
<td>University of St Andrews</td>
<td>15</td>
<td>55</td>
<td>0</td>
</tr>
<tr>
<td>Chartered</td>
<td>University of Dundee</td>
<td>32</td>
<td>57</td>
<td>2.2</td>
</tr>
<tr>
<td></td>
<td>Heriot-Watt University</td>
<td>21</td>
<td>48</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>University of Stirling</td>
<td>37</td>
<td>58</td>
<td>2.4</td>
</tr>
<tr>
<td></td>
<td>University of Strathclyde</td>
<td>33</td>
<td>57</td>
<td>9.3</td>
</tr>
<tr>
<td>Modern</td>
<td>Abertay University</td>
<td>58</td>
<td>70</td>
<td>18.4</td>
</tr>
<tr>
<td></td>
<td>Edinburgh Napier University</td>
<td>48</td>
<td>64</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Glasgow Caledonian University</td>
<td>55</td>
<td>66</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Queen Margaret University</td>
<td>42</td>
<td>57</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Robert Gordon University</td>
<td>46</td>
<td>57</td>
<td>0.4</td>
</tr>
<tr>
<td></td>
<td>University of the Highlands and Islands³</td>
<td>75</td>
<td>13</td>
<td>1.9</td>
</tr>
<tr>
<td></td>
<td>University of the West of Scotland</td>
<td>61</td>
<td>64</td>
<td>12.6</td>
</tr>
<tr>
<td>SSI</td>
<td>Glasgow School of Art</td>
<td>35</td>
<td>47</td>
<td>39.2</td>
</tr>
<tr>
<td></td>
<td>Royal Conservatoire of Scotland</td>
<td>51</td>
<td>75</td>
<td>N/A³</td>
</tr>
<tr>
<td></td>
<td>Scotland’s Rural College</td>
<td>32</td>
<td>59</td>
<td>N/A</td>
</tr>
</tbody>
</table>

### Sector
<table>
<thead>
<tr>
<th></th>
<th>Lowest</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>Highest</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>30</td>
<td>55</td>
<td></td>
<td></td>
<td>3.8</td>
</tr>
</tbody>
</table>

Notes:
1. For each measure, the higher the figure the darker the shading. The highest third are shaded the darkest and the lowest third the lightest.
2. Urgent backlog maintenance, is the estimated cost of upgrading buildings from condition D to B.
3. Staff costs at the University of Highlands and Islands are low (13 per cent) compared with other universities because it is not the direct employer of staff at the colleges and research institutes with which it partners.
4. RCS and SRUC do not submit figures on backlog maintenance to the Higher Education Statistics Agency because there is no requirement to do so. Total SRUC backlog maintenance is reported in the SFC’s college estates condition survey, although the college figures were calculated on a different basis, so data is not comparable to that used for other universities.

Source: Audit Scotland using data provided by the SFC and Higher Education Provider Data: Finance, Higher Education Statistics Authority, March 2019, and university financial statements (2017-18).
EU withdrawal is likely to have significant implications for university students, staff and funding

43. EU students, staff and funding are all important to universities’ activities (Exhibit 6). In 2017-18, the Scottish Government provided around £97 million to universities for teaching EU students.33

44. EU withdrawal is likely to have significant implications for universities. For example, a loss of EU students in key subject areas (for example, biological sciences, engineering and technologies, and subjects allied to medicine) could make it harder for universities to achieve Scottish Government strategic priorities. Departure from the EU could also result in skills shortages in teaching and research – in 2017-18, 28 per cent of research staff were EU nationals. Universities also cite their ability to collaborate with European partners as a significant contributory factor in attracting research staff and maintaining their strong reputation for research.34

Exhibit 6
EU research funding, staff and student numbers at 2017-18
Ancient and chartered universities secure most EU research funding and generally have a higher proportion of EU staff compared to other groupings, but this varies by university.

<table>
<thead>
<tr>
<th>EU staff</th>
<th>EU students</th>
<th>EU research funding</th>
</tr>
</thead>
<tbody>
<tr>
<td>8,270</td>
<td>21,605</td>
<td>£114m</td>
</tr>
</tbody>
</table>

14% of total staff | 9% of total students | 3% of total income

Notes:
1. 28 per cent of research only staff are non-UK EU nationals.
2. EU student numbers exclude visiting/exchange students. For some universities, visiting/exchange students from the EU accounted for a significant proportion of their total EU student body (41 per cent for UWS in 2017–18).
3. Under a UK Government guarantee, in the event of EU withdrawal with no deal, the Scottish Government estimates that at least half of the £114 million EU funding would be protected. (Guidance, Horizon 2020 funding after Brexit, UK Government, August 2019).
4. UHI (University of the Highlands and Islands), GSA (Glasgow School of Art), QMU (Queen Margaret University), RCS (Royal Conservatoire of Scotland).
Source: Audit Scotland using data provided by the SFC and HESA, Higher Education Provider Data: Finance, Higher Education Statistics Authority (HESA), March 2019 and university financial statements (2017-18).

Ancient universities are generally better placed to respond to cost pressures

45. When an organisation faces an unexpected, or short-term, cost pressure, it may be able to draw on readily available sources of funding. For example, an organisation can use the cash and cash equivalents (Appendix) that it holds. Cash and cash equivalents held by all Scottish universities was equivalent to 23 per cent of total income in 2017-18, and this percentage varied across all groupings (Exhibit 7, page 22). Cash relative to income in 2017-18 was lower than in 2014-15 for eight universities (including four of the seven moderns).
In the short-term, universities may also be able to convert other assets, such as buildings, into cash to meet increasing costs. However, the sale of buildings is not a sustainable solution to meeting cost pressures and should only be

### Exhibit 7
Cash, income and expenditure reserves and net assets as a percentage of income in 2017–18
Ancient and chartered universities are generally better placed to respond to financial pressures than modern universities, but there is variation within each grouping.1

<table>
<thead>
<tr>
<th>Grouping</th>
<th>University</th>
<th>Cash and cash equivalents as % income</th>
<th>Unrestricted income and expenditure reserves as % income</th>
<th>Net assets as % income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ancient</td>
<td>University of Aberdeen</td>
<td>14</td>
<td>72</td>
<td>178</td>
</tr>
<tr>
<td></td>
<td>University of Edinburgh</td>
<td>24</td>
<td>155</td>
<td>225</td>
</tr>
<tr>
<td></td>
<td>University of Glasgow</td>
<td>33</td>
<td>104</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>University of St Andrews</td>
<td>12</td>
<td>99</td>
<td>134</td>
</tr>
<tr>
<td>Chartered</td>
<td>University of Dundee</td>
<td>16</td>
<td>72</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>Heriot-Watt University</td>
<td>34</td>
<td>25</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>University of Stirling</td>
<td>21</td>
<td>132</td>
<td>136</td>
</tr>
<tr>
<td></td>
<td>University of Strathclyde</td>
<td>36</td>
<td>104</td>
<td>115</td>
</tr>
<tr>
<td>Modern</td>
<td>Abertay University</td>
<td>21</td>
<td>130</td>
<td>133</td>
</tr>
<tr>
<td></td>
<td>Edinburgh Napier University</td>
<td>18</td>
<td>71</td>
<td>78</td>
</tr>
<tr>
<td></td>
<td>Glasgow Caledonian University</td>
<td>12</td>
<td>72</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>Queen Margaret University</td>
<td>22</td>
<td>64</td>
<td>150</td>
</tr>
<tr>
<td></td>
<td>Robert Gordon University</td>
<td>12</td>
<td>203</td>
<td>205</td>
</tr>
<tr>
<td></td>
<td>University of the Highlands and Islands</td>
<td>10</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>University of the West of Scotland</td>
<td>14</td>
<td>77</td>
<td>78</td>
</tr>
<tr>
<td>SSI</td>
<td>Glasgow School of Art</td>
<td>11</td>
<td>23</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>Royal Conservatoire of Scotland</td>
<td>15</td>
<td>96</td>
<td>111</td>
</tr>
<tr>
<td></td>
<td>Scotland’s Rural College</td>
<td>18</td>
<td>9</td>
<td>16</td>
</tr>
<tr>
<td>Sector</td>
<td></td>
<td>23</td>
<td>103</td>
<td>142</td>
</tr>
</tbody>
</table>

Notes:
1. For each measure, the lower the figure the darker the shading. The lowest third are shaded the darkest and highest third the lightest.
2. This is the total value of cash held by the university, including items that can be converted easily and quickly into cash.
3. This is the accumulated surplus produced from a university’s activities.
4. This is the total assets (eg buildings) owned by a university minus its total liabilities (eg debt).

undertaken as part of a longer-term estate plan. Any decision on the sale, lease or transfer of an asset with a value greater than £3 million must comply with the SFC’s procedures for disposal of property.  

47. In the medium term, universities could also draw on unrestricted income and expenditure reserves (reserves), where they have them (Appendix). If a university generates surpluses, it can build up reserves that can be used, for example, to fund planned improvements to the university estate, and manage financial difficulties. As reserves include some longer-term investments, they cannot necessarily be used to fund day-to-day running costs. Total sector reserves increased from £3.5 billion (96 per cent of income) in 2014-15 to £3.9 billion (103 per cent of total income in 2017-18) (Exhibit 7, page 22). Edinburgh accounted for 40 per cent of the sector’s total reserves (£1.5 billion, or 155 per cent of its income).

48. Net assets (Appendix) can also indicate a university’s ability to manage medium-term financial pressures. Net assets for the sector increased from £4.8 billion in 2014-15 to £5.3 billion in 2017-18 (or 142 per cent of total income for the sector), and all universities were in a net asset position in 2017-18 (Exhibit 7, page 22). UHI was the only university to be in net debt during the period (in 2015-16 and 2016-17) but returned to a net asset position in 2017-18.

Scottish universities are competing with universities in the UK and the rest of the world

49. In 2017-18, total sector income from research grants and contracts was £785 million, which was 21 per cent of the sector’s total income (Exhibit 2, page 13). Scottish universities have a good reputation for delivering world-class research; however, the research market is globally competitive.

50. Funding arrangements for teaching in Scotland are different from those in the rest of the UK. In Scotland, universities can charge tuition fees for RUK students (up to £9,250) and non-EU students. Universities in the rest of the UK can charge fees for the entire student population but have a cap on tuition fees for UK and EU students of £9,250. Their ability to charge higher fees allows them to generate increased income, which can be invested in maintaining or improving what they can offer to prospective students and researchers.

51. In 2018, the UK Government instructed a wide-ranging review into post-18 education and funding (the Augar review). It recommended in its final report that the cap on the fee chargeable to RUK and EU students (in England) should be reduced from £9,250 to £7,500 per year, with the UK Government replacing the lost fee income by increasing the teaching grant. The UK Government has not yet announced how it will respond to the recommendations, but it could result in lower tuition fees, which could have a significant impact on Scottish universities.

Universities have been trying to respond to cost pressures, by increasing income from non-government sources and implementing efficiencies

52. The recruitment of non-EU students is an important and growing source of other income for most universities, and is one way in which universities are responding to cost pressures. Scottish universities attract students from around the world and, between 2014-15 and 2017-18, the number of non-EU students attending Scottish universities increased by 13 per cent (income from non-EU student fees increased by 31 per cent, to £599 million over the same period). The
recruitment of non-EU students is highly competitive, with Scottish universities competing with universities throughout the world. The sector has highlighted that financial pressures could constrain universities’ ability to remain competitive, for example if they are unable to maintain and enhance estate condition or are faced with a more restrictive immigration policy than other countries.

53. Exhibit 8 (page 25) highlights some of the responses universities are taking to manage the cost pressures they are facing.

Borrowing increased at many universities and across all groupings

54. Some universities are increasingly using borrowing to fund investment in their estates. Total borrowing increased by 114 per cent, from £628 million in 2014-15 to £1.3 billion (36 per cent of income) in 2017-18. Borrowing increased at 11 universities, across all groupings. Decisions on borrowing are for individual universities and the SFC does not routinely monitor how much universities borrow or the purposes of their borrowing. Universities must get consent from the SFC before taking out any loan that would take their total annualised cost of debt servicing to exceed four per cent of their income. The SFC has given such consent to eight universities between 2014 and 2019. The SFC also considers the level of borrowing when analysing the financial health of individual universities (paragraph 79). Some larger loans involve universities paying interest for around 20 to 30 years, with repayments made in stages over this period.
Exhibit 8
Examples of universities' responses to cost pressures and opportunities
Universities are responding to cost pressures in a number of ways.

<table>
<thead>
<tr>
<th>Increasing income</th>
<th>Efficiencies</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alumni funding for specific capital projects:</strong></td>
<td><strong>Developing long-term plans for capital projects:</strong></td>
</tr>
<tr>
<td>The University of St Andrews, philanthropic funding for Laidlaw Music Centre, has raised £8.4 million of £12.5 million required for the project.</td>
<td>Edinburgh Napier University is engaging with stakeholders to develop a long-term plan for future capital projects, to ensure that future capital projects provide the best return on investment.</td>
</tr>
<tr>
<td><strong>Corporate partnerships:</strong></td>
<td><strong>Developing shared services with other institutions and the local community:</strong></td>
</tr>
<tr>
<td>The University of St Andrews received a £13.6 million facilitation fee from its development partner for the joint development of a student accommodation project.</td>
<td>The sports and aquatic centre in Aberdeen was developed in partnership between the University of Aberdeen, Aberdeen City Council and sportscotland.</td>
</tr>
<tr>
<td><strong>City Region Deals:</strong></td>
<td><strong>Working with current EU partners to develop teaching/research agreements:</strong></td>
</tr>
<tr>
<td>Some universities are involved in City Region Deals; working with the Scottish and UK governments, local councils and other partners to drive economic growth in their regions. City Region Deals present an opportunity for universities to consolidate and grow their income, or to enhance what they can offer to prospective students, staff and businesses.</td>
<td>The University of St Andrews signed a memorandum of understanding with the University of Bonn, Germany.</td>
</tr>
<tr>
<td>For example, as part of the £1.3 billion Edinburgh and South East City Region Deal The University of Edinburgh and Heriot-Watt University are leading on a ten year 'Data-Driven Innovation' (DDI) programme. This will include the introduction of new undergraduate, postgraduate and professional development programmes and well as expansion of the universities’ research activities. The UK and Scottish governments have together committed up to £270 million to support the development of the DDI Programme. This will be matched by up to £391 million capital investment from universities and other sources.</td>
<td><strong>Costs savings for procurement:</strong></td>
</tr>
<tr>
<td><strong>Professionalising services:</strong></td>
<td>All universities are members of Advanced Procurement for Universities and Colleges Limited (APUC), which works on behalf of its members (colleges and universities) to secure efficiencies in procurement, achieved mainly from economies of scale. It has helped to deliver over £20 million of annual procurement savings for the university sector.</td>
</tr>
<tr>
<td>Edinburgh Napier University has capitalised on strengthening its professional services (eg human resources and information technology) and provided these services to other businesses and institutions to generate other income.</td>
<td><strong>Workforce planning:</strong></td>
</tr>
<tr>
<td><strong>Expanding course subjects:</strong></td>
<td>Universities have implemented staff restructuring and more flexible recruitment, to drive efficiencies, which in some cases has included voluntary severance.</td>
</tr>
<tr>
<td>In 2019-20, Edinburgh Napier University and Queen Margaret University introduced Professional Graduate Diploma in Education courses.</td>
<td><strong>Entrepreneurial income:</strong></td>
</tr>
<tr>
<td>Some universities generate income from their estates outside the academic year, by offering conference and accommodation facilities.</td>
<td>Source: Audit Scotland</td>
</tr>
</tbody>
</table>
Part 3
The roles of the Scottish Government, the Scottish Funding Council and universities

Key messages

1. The SFC is responsible for distributing most of the Scottish Government’s funding to universities and for providing advice to ministers. Universities are accountable to the SFC for the funding they receive. The SFC provides funding mainly for teaching and research, but it also provides funding for specific priorities, such as widening access.

2. Outcome agreements between the SFC and universities set out what universities plan to deliver in return for SFC funding. The Scottish Government’s priorities for the sector are reflected in outcome agreements between the SFC and universities. The outcome agreements also contain measures to assess progress. But, in 2017-18, many universities did not have agreed targets for some outcome agreement measures relating to teaching and research and, in some cases, as few as two universities met their targets.

3. The SFC recovers funding where universities have not delivered an agreed volume of teaching activity, but there is no evidence of a direct link between funding and university performance against other agreed targets, such as those for student retention and for recruitment to courses in STEM. The current funding model provides transparency and a degree of certainty about how funding for teaching and research is allocated. However, strategic funding for specific purposes has reduced in real terms by 46 per cent since 2014-15.

4. The Scottish Government and the SFC have a good understanding of the issues affecting both the sector and individual universities, though there is scope for the SFC to improve its monitoring and reporting on universities’ finances. The SFC has not set out specific actions to mitigate risks to the sector’s ability to deliver the Scottish Government’s priorities.

The SFC is responsible for distributing funding and for monitoring universities’ contributions to the Scottish Government’s strategic priorities

The SFC’s funding to universities is mainly for teaching and research

The Scottish Government provides more than a third of the Scottish university sector’s income and it needs assurance that this significant investment supports the delivery of its strategic priorities. The Scottish Government determines and allocates...
the budget for university funding on an annual basis, with most funding supporting
the delivery of teaching and research over several years. Therefore, the Scottish
Government needs assurance in both the short and medium-term.

56. The SFC’s Chief Executive is the accountable officer responsible for the use of
the funding received from the Scottish Government, and universities are accountable
to the SFC for the funding they receive.

57. The SFC is responsible for determining how Scottish Government funding is
distributed to individual universities. The SFC provides universities with indicative
funding allocations in February each year and announces the final funding
allocations in May (for the academic year starting in August). There are two main
funding streams:

- for teaching Scottish and EU students (£713 million in 2019-20)
- to support research and innovation (£285 million in 2019-20) (Exhibit 9).

### Exhibit 9
**SFC grant funding for universities in 2019-20**
There are four SFC grant-funding streams for universities: teaching, research and innovation, capital and ‘other’.

<table>
<thead>
<tr>
<th>Category</th>
<th>Funding (2019-20)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Main Teaching Grant</strong></td>
<td>£627 million</td>
</tr>
<tr>
<td><strong>Controlled subjects</strong></td>
<td>£86 million</td>
</tr>
<tr>
<td><strong>Research Excellence Grant</strong></td>
<td>£236 million</td>
</tr>
<tr>
<td><strong>Research Postgraduate Grant</strong></td>
<td>£36 million</td>
</tr>
<tr>
<td><strong>University Innovation Fund</strong></td>
<td>£14 million</td>
</tr>
<tr>
<td><strong>Research and Innovation</strong></td>
<td>£285 million</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td>£34 million</td>
</tr>
<tr>
<td><strong>Capital</strong></td>
<td>£21 million</td>
</tr>
<tr>
<td><strong>Teaching</strong></td>
<td>£713 million</td>
</tr>
<tr>
<td><strong>Total SFC funding</strong></td>
<td>£1.05 billion</td>
</tr>
</tbody>
</table>

Notes:
1. Funding (as at May 2019) is for the academic year 2019-20, except for capital funding which is for the financial
   year 2019-20.
2. Includes funding for The Open University in Scotland (£24 million).
3. Capital funding excludes £16.8 million SFC funding for research capital grants, which was confirmed in June 2019.
4. Other funding includes non-core teaching funding for small and specialist institutions, for widening access and retention,
   and for disabled students.
5. Controlled subjects include nursing, medicine and teaching. This grant is ring-fenced and is based on the Scottish
   Government’s workforce requirements.

Source: Audit Scotland using Funding allocations to universities for academic year 2019-20, Annex A, Scottish Funding
58. The SFC also provides funding for capital and strategic projects. For example, in 2019-20, the SFC allocated £15 million to modern universities and to The Open University, to support widening access and the retention of students from the most disadvantaged backgrounds.

Outcome agreements are intended to set out what universities plan to deliver in return for the Scottish Government funding allocated by the SFC

59. The SFC has several accountability mechanisms in place for the funding it provides to universities (Exhibit 10). Outcome agreements are intended to be the key link between funding and performance. The process aims to deliver a funding system that supports universities in pursuing ambitious goals, while delivering progress towards SFC and Scottish Government priorities.

Exhibit 10
Key accountability arrangements between the SFC and universities

There are three main documents that outline how universities are accountable to the SFC.

<table>
<thead>
<tr>
<th>Scottish Funding Council accountability documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Memorandum</td>
</tr>
<tr>
<td>Outcome agreements</td>
</tr>
<tr>
<td>Conditions of outcome agreement funding</td>
</tr>
</tbody>
</table>


It is difficult to determine whether universities are delivering all that Scottish ministers expect of them

There is no specific reference to the NPF outcomes in university outcome agreements

60. The Minister for Further Education, Higher Education and Science wrote to the SFC in November 2018, setting out Outcome Agreement Guidance for 2019-20. The guidance includes a clear reference to the NPF (Exhibit 11, page 29) as part of the wider policy context for higher education, but it does not highlight the NPF outcomes to which the Scottish Government expects universities to contribute.
61. Although the NPF was first introduced in 2007, and was refreshed in 2011 and 2016, neither outcome agreements nor ministerial letters of guidance to the SFC prior to November 2018 refer to the NPF. The 2017-18 outcome agreements were developed before the 2018 NPF was launched. There are outcome agreement measures relating to some of the NPF indicators, for example there is a specific outcome agreement measure for carbon footprint, and outcome agreement measures for widening access link to the NPF indicator for young people’s participation in education. However, there are no outcome agreement measures that link to other, significant indicators, for example there are no outcome agreement measures for attainment.

62. In its new strategic framework, published in June 2019, the SFC has mapped the measures it intends to use to measure progress towards its objectives to the 11 long-term NPF outcomes (paragraph 8). There is scope, therefore, for the SFC to reflect these measures in future outcome agreements.
The Scottish Government’s priorities for higher education are reflected in outcome agreements

63. The SFC provides universities with a framework to support the development of outcome agreements. Outcome agreements set out universities’ commitments and how they will contribute to each of the five Scottish Government priorities for higher education, alongside 15 associated national measures.

64. University outcome agreements include specific references to the Scottish Government’s five strategic priorities for: teaching; research; widening access; knowledge exchange and innovation between universities and industry; and good governance.

<table>
<thead>
<tr>
<th>Scottish Government strategic priorities</th>
<th>Number of measures</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Access to education for people from the widest range of backgrounds, including implementation of the recommendations of Commission on Widening Access (CoWA) and addressing gender balance.</td>
<td>5</td>
</tr>
<tr>
<td>2 High-quality learning in a learning system which is seamlessly connected for the learner, including learning which prepares people well for the world of work, prioritising provision that meets known skills gaps in the economy.</td>
<td>4</td>
</tr>
<tr>
<td>3 Internationally competitive and impactful research.</td>
<td>3</td>
</tr>
<tr>
<td>4 Effective knowledge exchange and innovation including excellent collaboration between universities and industry.</td>
<td>2</td>
</tr>
<tr>
<td>5 Ensuring provision of quality learning in Scottish higher education institutions.</td>
<td>1</td>
</tr>
</tbody>
</table>

Outcome agreements provide a means of supporting delivery of specific Scottish Government priorities, such as widening access

65. Every year, the SFC expects universities to identify targets for each of the 15 national measures, to demonstrate progress towards the Scottish Government’s priorities. Targets against these measures vary between universities, reflecting their specific circumstances (ie past performance, student population cohort and subjects taught). The SFC encourages universities to focus on their areas of expertise but also to be aspirational and ambitious with their targets.

66. In her letter of guidance in October 2017, the Minister for Further Education, Higher Education and Science requested that the SFC ‘intensify’ the outcome agreement process to secure better progress against the Scottish Government’s priority areas, including:

- driving improvement towards fairer access, securing progress with the challenging targets set out in the final report of the Commission on Widening Access (CoWA)
- setting more ambitious and challenging targets
- encourage engagement and collaboration
67. The Minister also asked the SFC to demonstrate how Scotland’s universities are contributing to the delivery of the national priorities and to provide a clearer line of sight between Scottish Government investment and the delivery of desired outcomes. This follows a recommendation in our 2016 report on higher education.

68. In response to the Minister’s request for intensification, the SFC asked universities to include a new section in their outcome agreements, outlining how each university will achieve its targets related to widening access to university for students from deprived areas. The SFC also specified the following requirements in its guidance to universities:

- More ambitious and challenging targets in 2018-19, including a focus on improving retention, attainment, and outcomes.
- More rapid progress on tackling gender imbalances in institutions’ senior ranks, on their Boards and Courts.
- Further progress on delivering STEM provision, aligned with the Government’s STEM Strategy for Education, Training and Lifelong Learning.

The absence of targets, and evidence of under-performance against some agreed targets, makes it difficult to determine whether universities are delivering what is expected of them

69. The SFC agrees targets with universities, to demonstrate progress against the Scottish Government’s priorities but, in 2017-18, not all universities had targets for all outcome agreement measures.

70. The SFC’s annual summary of progress and ambitions report provides a high-level overview of the performance of universities against the SFC’s outcome agreement measures. Our analysis of teaching and research performance measures found that many universities did not have agreed targets in place for some measures and, in some cases, as few as two universities met their targets (Exhibit 12, page 32). It is not possible, therefore, to assess the performance of all universities against the seven national performance measures relating to teaching and research through their outcome agreements. This also means that the annual summary of progress and ambitions report does not show performance against targets for all measures or for all universities. It also does not include complete trend information.
Exhibit 12
Outcome agreements measures for teaching and research
Not all universities set targets in their outcome agreements for 2017–18.¹

<table>
<thead>
<tr>
<th>Scottish Government strategic priority</th>
<th>Outcome agreement measures</th>
<th>Universities with targets</th>
<th>Universities who met targets</th>
<th>Change between academic years 2014-15 and 2017-18</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Teaching</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Measure 6</td>
<td>Retention rates for all Scottish domiciled full-time first degree entrants</td>
<td>15/18</td>
<td>9/15</td>
<td>Retention rates increased at 12 universities (by the most at UHI, by five percentage points).</td>
</tr>
<tr>
<td>Measure 7</td>
<td>Proportion of students satisfied with the overall quality of their course in the National Student Survey</td>
<td>18/18</td>
<td>2/18</td>
<td>Student satisfaction dropped in all but four universities. St Andrews and UHI both saw an increase of five percentage points.²</td>
</tr>
<tr>
<td>Measure 8</td>
<td>Proportion of Scotland-domiciled undergraduate entrants on STEM programmes</td>
<td>9/18</td>
<td>2/9</td>
<td>Declined at 10 universities. The biggest increase was at SRUC (by eight percentage points).</td>
</tr>
<tr>
<td>Measure 9A</td>
<td>Proportion of Scotland-domiciled graduates entering positive destinations</td>
<td>No agreed target for this measure but, in 2016-17 students entering a positive destination after completing their course was 93% or higher at all universities.³</td>
<td>No data available for 2017-18</td>
<td></td>
</tr>
<tr>
<td><strong>Research</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Measure 10</td>
<td>Number of research postgraduate students</td>
<td>9/18</td>
<td>3/9</td>
<td>Numbers increased at 11 universities. The biggest increases were at Glasgow (by 296) and Edinburgh (by 218).</td>
</tr>
<tr>
<td>Measure 11</td>
<td>Total income from UK Research Councils</td>
<td>9/18</td>
<td>3/9</td>
<td>Income declined at nine universities; five do not report baseline and target data consistently.⁴</td>
</tr>
<tr>
<td>Measure 12</td>
<td>Total research income from all sources</td>
<td>10/18</td>
<td>3/10</td>
<td>Income declined at 11 universities.⁴</td>
</tr>
</tbody>
</table>

Notes:
1. Analysis excludes the OU (Appendix).
2. Comparison is between the national student survey results at July 2015 and July 2018.
3. No data available for 2017-18. The data for this measure is currently drawn from a UK-wide survey of graduate destinations. It will be replaced by a survey of graduate outcomes.
4. Trends in research income are in real terms and measure 12 excludes research and development expenditure credits (RDEC) (Appendix).

There is limited evidence of a clear link between SFC funding and university performance

The SFC has recovered funding where universities have delivered less than the agreed volume of learning activity

71. The SFC places limits on the number of university places it will fund for Scottish and EU students undertaking undergraduate courses and selected taught postgraduate courses. The SFC will recover funding from universities if they under- or over-recruit against the target number of places it sets for the year. Funding is recovered for over-recruitment to ensure the total fees paid out by SAAS do not exceed the figure for which the Scottish Government has budgeted. In 2017/18, a total of £2.5 million was recovered from universities for recruiting outside the target number of places.

72. The SFC’s model for funding to support research takes account of a university’s performance in the Research Excellence Framework (REF) (paragraph 77), which takes place approximately every five years. Funding to support research at each university is adjusted based on their performance in the most recent REF exercise. Because much academic research is undertaken over the medium to long-term, recovering funding is not appropriate and could jeopardise research that is already under way. However, annual monitoring of performance against outcome agreement targets for research does provide an opportunity for the SFC to assess, understand and, if necessary, challenge a university’s performance on a more frequent basis.

The SFC has not recovered funding for under-delivery against outcome agreement targets

73. Since the introduction of outcome agreements in 2012, the SFC has not recovered funding for under-delivery against outcome agreement targets. While, in some cases, the margin of under-delivery was relatively small, taken together, small margins of under-delivery by several universities will affect national performance. In 2017-18, there were also some instances where universities missed targets by more than 20 per cent; and in two cases, by over 50 per cent.

74. The SFC engages with individual universities around the content of outcome agreements. However, prior to intensification, the SFC did not require universities to set targets for all outcome agreement measures. For example, the SFC was less inclined to specify a target for measures relating to research for non-research intensive universities. The SFC engages with universities when they face challenges in delivering against agreed targets, but evidence of specific challenge by the SFC when target performance levels were not achieved is limited.

75. Following intensification, the SFC has agreed targets for almost all measures for all universities, and will systematically review performance against these targets as part of its monitoring arrangements. Given our findings in relation to target setting and performance against targets in 2017-18, it will be important that the SFC monitors trends in performance and, where agreed targets are missed, takes action appropriate to the circumstances.

The SFC’s funding models provide universities with a degree of stability but strategic funding has reduced

76. The SFC calculates funding for its main teaching grants each year based on: its annual budget; the amount allocated to the sector in the previous year; any new policies introduced by the Scottish Government; and consultation with
universities around changes to planned provision in specific subjects. For subjects that are nationally controlled, such as nursing, medicine and teaching (‘controlled’ subjects), the teaching grant is ring-fenced and is based on the Scottish Government’s workforce requirements for that year.

77. The SFC’s funding to support research has three main components (Exhibit 9, page 27). The main grant is the Research Excellence Grant (REG) which is formula-based and informed by universities’ performance in the REF. REF is a joint exercise conducted by all four UK higher education funding bodies including the SFC. REF results are intended to provide accountability for public investment in research as well as benchmarking information. The exercise assesses research quality and considers publications, impact beyond academia and the environment that supports research, including facilities and the quality of staff. Overall, the performance of Scottish universities improved in the last REF in 2014, but the total amount of SFC research funding did not increase. This meant that the research grant was spread more widely across the sector than in previous years and most research-intensive universities received less SFC research funding.

The current SFC funding models offer little scope to reflect individual universities’ circumstances

78. The formula-based funding models for the core grants for teaching and research are widely accepted by the sector because they provide transparency, understanding and are perceived by the sector to be fair. However, there is little scope for the SFC to adjust funding to individual universities to reflect specific circumstances. The SFC allocates strategic funding for specific purposes, such as innovation centres, diversity and specialism. Strategic funding has reduced by 46 per cent in real terms, from £69 million in 2014-15 to £37 million in 2017-18 (four per cent of total revenue funding). The reduction in strategic funding means that less funding is available to support new developments or to respond to specific circumstances or issues that arise. In the most recent letter of guidance in July 2019, the Minister for Further Education, Higher Education and Science emphasised the need for projects funded from strategic funds to be self-sustaining where appropriate, asking the SFC to reduce universities’ reliance on strategic funds and to integrate and mainstream such funding arrangements where possible.

The SFC has a good picture of the sector’s short- to medium-term financial health

The SFC’s financial analysis relies on the knowledge of a small team

79. The SFC formally reviews the financial performance of the sector twice a year, using the audited accounts submitted in December and three-year financial forecasts in June. The SFC reviews the accounts and forecasts, alongside audit reports and discussions with the universities’ finance teams.

80. The SFC does not routinely review universities’ long-term financial strategies. Financial strategies are likely to provide more contextual information, scenario plans and longer-term forecasts, which could reduce the number of enquiries the SFC needs to make of universities each year. It would also provide a greater level of assurance on financial sustainability in the longer-term including, importantly, the ability of universities to deliver the Scottish Government’s strategic priorities.
81. The SFC currently relies on the knowledge and experience of a small team of staff. While the SFC has guidance to assist staff when analysing financial information, there is scope for this to include clearer criteria and specific examples of areas that might lead to increased engagement with individual universities. This means if any members of the team are absent, or were to leave the SFC, there would be less risk that knowledge is lost or that the SFC would not be able to continue assessing the financial health of the sector to the same standard.

**The SFC publishes a very high-level summary of the sector’s financial position**

82. For both the annual accounts and financial forecasts, the SFC reports its analysis to its finance committee, which includes an observer from the Scottish Government. The reports provide a good summary of the accounts, forecasts, challenges facing individual universities, and actions the SFC is taking to help address any problems.

83. The SFC also publishes an annual summary of the financial position of the sector based on the audited accounts. This includes very high-level commentary on the sector’s income profile, operating position and balance sheet performance. While the report does not include any analysis of universities’ financial forecasts, it does outline the key risks to financial sustainability (which broadly align with those we discuss in part two).

84. Publishing a more detailed summary of the SFC’s analysis of annual accounts and financial forecasts, anonymising individual universities (like that published by the Office for Students in England), would increase transparency, and support scrutiny by interested stakeholders.

**The SFC has a framework that helps it to determine whether it needs to engage more closely with individual universities**

85. In August 2017, the SFC began developing a framework, to help it determine how it should engage with individual universities. It does this by assessing the finances and performance of each university. This is summarised in a document covering the sector. For the April 2019 meeting of the SFC finance committee, the document included the SFC’s judgements on financial health and governance arrangements, and quality of learning and funded teaching activity. The report for the committee’s meeting in May 2019 also included the SFC’s commentary on the quality of research and innovation. However, these reports do not include any quantitative assessment of performance against targets and there is no link or commentary on the implications of underperformance for future funding.

**The SFC has not set out proposals to secure the delivery of the Scottish Government’s priorities**

86. The Scottish Government has acknowledged the valuable contribution that universities make to economic growth, as well as the wider social benefits of university education. It is important that the Scottish Government is aware of the challenges the sector faces, as well as the risks that may affect delivery of its strategic priorities.
87. The Strategic Futures Group, comprising representatives from the Scottish Government, SFC and Universities Scotland, meets regularly to discuss issues affecting. The Scottish Government has also provided support to the university sector for specific issues. For example, the Scottish Government decided not to implement a recommendation from the Barclay review, which recommended removing rates relief for universities, commercial activities outside term time. The Scottish Government also implemented changes to funding packages for postgraduate students, which contributed to a slight increase in enrolment figures.

88. The financial analysis prepared by the SFC provides the Scottish Government with a clear picture of the challenges the university sector faces, as well as specific challenges for individual universities. The SFC’s new Strategic Framework highlights the challenges and, at a high level, outlines the activities the SFC will undertake to support the delivery of Scottish Government priorities. However, the SFC has not yet set out specific proposals to mitigate risks to the sector’s ability to deliver the Scottish Government’s priorities.
Endnotes

4. In Scotland, higher education is delivered by both higher education institutions and colleges.
5. Student numbers by HE provider and subject of study at Scottish universities (headcount), for all levels and modes of study, excluding the Open University in Scotland, Higher Education Statistics Agency, January 2019. Figure includes some double counting due to some students enrolling on more than one programme of study.
6. Audit Scotland using the amount of university tuition fees paid by SAAS in academic year 2018-19, Student Awards Agency for Scotland, February 2019. The figure excludes tuition fees for nursing and midwifery students.
13. Except for Scotland’s Rural College (SRUC), which has a financial year end in March.
14. Audit Scotland using the lines for higher education in Scottish spring budget revisions, Scottish Government, February 2011 to February 2019. Figures exclude financial transactions loans. Figures include funding for The Open University in Scotland (OU, £23 million in 2017-18), which is excluded from the analysis of financial statements (from paragraph 22), because OU does not split out operations in Scotland in its financial statements.
17. Audit Scotland using amount of tuition fees paid by SAAS in academic year 2018-19, Student Awards Agency Scotland, February 2019. The figure excludes tuition fees for nursing and midwifery students.
18. Financial Transactions are a form of capital budget allocated by HM Treasury to the Scottish Government, which can only be used for the provision of loans or equity investment beyond the public sector and cannot be used to fund public services. Financial transactions have to be repaid to HM Treasury in future years.
19. This figure does not include funding universities receive directly from local authorities, European Structural Funds, local health boards, enterprise agencies or UK Government.
20. Scottish and EU fee income is largely determined by the number of students funded by the SFC, which in turn is based on the annual Scottish Government budget.
27 Announcement to members, University and College Union, 28 June 2019.
28 Letter to Principals of Higher Education Institutions, Scottish Funding Council, June 2019.
31 Scottish university financial statements, 2017-18.
33 Audit Scotland using data provided by the Scottish Funding Council and Student Awards Agency for Scotland, July 2019.
37 The 24th meeting of the Finance Committee of the Scottish Funding Council, SFC, May 2019.
41 University Outcome Agreements, Summary of Progress and Ambitions Report 2018, Scottish Funding Council, October 2018.
42 Outcome Agreements for universities – indicative funding decisions for the Research Excellence Grant for AY 2015-16 to AY 2017-18 and Research Postgraduate Grant for AY 2015-16, Scottish Funding Council, March 2015.
43 Audit Scotland using Funding allocations to universities for Academic Year 2014-15 and 2017-18, Annex A, SFC.
45 Financial Memorandum with Higher Education Institutions, Scottish Funding Council, December 2014.
47 Financial sustainability of higher education providers in England, Office for Students, April 2019.
Background information

Throughout the report, we refer to the following four university groupings:

- **Ancient universities** – University of Aberdeen (Aberdeen), University of Edinburgh (Edinburgh), University of Glasgow (Glasgow), University of St Andrews (St Andrews).

- **Chartered universities** – University of Dundee (Dundee), Heriot-Watt University (HWU), University of Stirling (Stirling), University of Strathclyde (Strathclyde).

- **Modern universities** – Abertay University (Abertay), Edinburgh Napier University (Napier), Glasgow Caledonian University (GCU), University of the Highlands and Islands (UHI), Queen Margaret University (QMU), Robert Gordon University (RGU), University of the West of Scotland (UWS).
  
  - UHI is unlike other universities in the sector because it delivers higher and further education through a partnership of 13 colleges, research institutes and specialist institutions across the Highlands and Islands. These partners are separate legal entities which employ their own staff and own their assets. All figures taken from the financial statements exclude income and expenditure (around £12 million or 10 per cent of UHI’s total income in 2017-18) for research undertaken by UHI’s partners.

- **Small and specialist institutions (the SSIs)** - Glasgow School of Art (GSA), Royal Conservatoire of Scotland (RCS), Scotland’s Rural College (SRUC) and the Open University in Scotland (OU).
  
  - As OU financial statements do not differentiate their operations in Scotland from the rest of the UK, OU was excluded from the analysis of financial statements. In 2017-18, the SFC provided £23 million to the Open University in Scotland. OU was also excluded from the analysis of outcome agreements as the performance measures they use are not directly comparable to those used for other universities in Scotland (Exhibit 12, page 32).

When referring to student income (paragraph 30), we use the following terms:

- ‘Scottish students’ to refer to students whose home address is in Scotland

- ‘RUK students’ for students whose home address is in the UK but outside Scotland

- ‘EU students’ to refer to students whose home address is in the EU but not in the UK
• ‘non-EU’ students for students whose home address is outside the EU.

When we refer to Scottish Government funding to universities via the Student Awards Agency Scotland (SAAS), for Scottish and EU student tuition fees, this includes only income relating to eligible Scottish and EU students, as defined by SAAS.

**Audit methodology**

**Evidence for the audit was gathered using three main approaches:**

- **Desk Research:** We reviewed a range of information on universities in Scotland, including the SFC’s letters of guidance, outcome agreements, other SFC reports, university strategic plans and accounts, ministerial letters to the SFC, Scotland’s Economic Strategy and the National Performance Framework.

- **Interviews:** We conducted interviews with officials from the Scottish Government, SFC and the SAAS. We also met with a range of stakeholders, including universities, unions and auditors.
  
  - We carried out interviews at four universities: Edinburgh Napier University, Scotland’s Rural College, Strathclyde University and the University of St. Andrews. We interviewed a range of staff, including principals, vice principals, directors of finance, heads of research and innovation, knowledge exchange, international recruitment, student support and strategic planning, estates directors.

- **Data analysis:** We analysed data from: the Scottish Government, the SFC, the Higher Education Statistics Agency and university financial statements. This included trend data on: the Scottish Government’s budget; student numbers; and university income, expenditure and balance sheet information. Unless otherwise stated, all financial figures are in real terms.

**Audit advisory group**

Audit Scotland would like to thank the members of the advisory group who provided advice throughout the audit. The advisory group comprised:

- Lorna MacDonald (Scottish Funding Council)
- Professor Nigel Seaton (Abertay University)
- Liam McCabe (University of Stirling)
- Dr Roddy MacDonald (Scottish Government)
- Richard Dale (University of Newcastle).

Note: Members of the project advisory group sat in an advisory capacity only. The content and conclusions of this report are the sole responsibility of Audit Scotland.
Notes on financial data

The Scottish Government’s budget (paragraph 21):
- Around half of capital funding is for maintenance, which is allocated pro-rata, to a university’s share of its main teaching grant. The remaining capital funding is to support research or specific projects. For example, in 2018-19, the SFC provided GSA with loan support of £3.8 million.
- The capital budget fluctuates from year to year. In 2016/17, an additional £24.3 million was allocated to universities for the upgrade and maintenance of estates and research infrastructure. This was part of the Scottish Government’s £100 million capital investment package to support the economy following the EU referendum result.

Measures of financial health: operating position and underlying position

Earnings Before Interest Tax Depreciation and Amortisation (EBITDA) (paragraphs 15–19)
- Operating position is the surplus or deficit at the year-end. It is the income minus expenditure. There are a number of reasons why this can be an unreliable measure of financial health. For example, since 2015-16, universities must comply with Financial Reporting Standard 102 (FRS102). FRS102 changed the way some income and expenditure items were reported. This could make the operating position more volatile from year to year, making trend analysis more difficult. For example, capital grants, donations and endowments are now recognised as income, in full, in the year they are received. Before FRS102 was implemented, capital grants, donations and endowments were accounted for as income as the money was spent. In 2017-18, SFC capital grants were £28 million (0.7 per cent of income) and total donations and endowments were £41 million (one per cent of income). While this income is small relative to total income, it is concentrated in a small number of universities each year.
- To ensure figures are comparable between 2014-15 and 2017-18, we used the 2014-15 figures reported in the 2015-16 accounts. However, variation in universities’ accounting policies across the sector prior to the implementation of FRS102 continue to affect the operating position for each university in different ways. For example, universities have different policies on the frequency of asset revaluation. For some universities, depreciation charges resulting from the revaluation of assets in 2014 continue to be included in the operating position, despite fluctuations in the property market over this period.
- EBITDA is the operating position before decisions on accounting and financing policies are applied. We calculated EBITDA using the definition recommended by the British Universities Finance Directors Group (BUFDG) in 2017. The figure does not include an adjustment for tax as this is very small for universities. EBITDA was calculated as follows:
  - surplus/(deficit) before other gains/losses and share of surplus/(deficit) in joint ventures and associates
    - plus: share of operating surplus/(deficit) in joint venture(s); share of operating surplus/(deficit) in associate(s); depreciation; amortisation of intangibles; amortisation of goodwill; interest payable; pension cost adjustment; fundamental restructuring costs
    - minus: capital grant income; new endowments; Research Development and Expenditure Credits (RDEC).
While RDEC is not in the BUDFG definition of EBITDA, it is an exceptional item that seven universities received in 2014-15 (totalling £64 million). RDEC was an HM Revenue and Customs tax credit that universities were able to claim on eligible research expenditure between 2013 and 2015.

**TRAC (paragraphs 31–34)**
- TRAC was established in 2000, to identify the full economic cost of research activities. It was intended to improve accountability for the use of public funds for research and to inform university decision-making. TRAC was subsequently extended to other university activities, including teaching. In 2015-16, to reflect changes resulting from the introduction of FRS102, the methodology for calculating TRAC was adjusted. These changes make it difficult to compare TRAC results from 2015-16 onwards with historical TRAC data.
- The calculation of TRAC requires individual universities to assess how costs should be allocated. For example, it is up to a university to decide how to apportion the maintenance and utility costs for a building that is used for both teaching and research, and this approach may vary across the sector. This subjectivity may result in TRAC data being inconsistent or misleading, particularly when comparing individual university-level data.

**Cash and cash equivalents (paragraph 45) (Exhibit 7):**
- This is the total value of cash held by the university, including items that can be converted easily and quickly into cash. We have used the cash and cash equivalent figures reported in university financial statements.

**Unrestricted income and expenditure reserves (paragraph 47) (Exhibit 7):**
- This is the accumulated surplus produced from a university’s activities. In 2017-18, the £3.9 billion reserve consisted of:
  - the £3.5 billion balance at August 2017
  - minus a £25 million operating deficit in 2017-18
  - plus:
    - £392 million other comprehensive income (including, for example, gains or losses on investments that are classified as available for sale; pension plans and foreign currency translation)
    - £37 million transfer from the revaluation reserve (gains from the revaluation of fixed assets)
    - £4 million release of restricted funds spent in the year.

**Net assets (paragraph 48) (Exhibit 7):**
This is the total assets (eg buildings) owned by a university minus its total liabilities (eg debt).

**Borrowing (paragraph 54):**
- This includes: bank overdrafts, bank loans and external borrowing, obligations under finance leases and service concessions, and loans repayable to the SFC. The figure excludes other creditors such as SFC grant recovery, deferred income and deferred capital grants.
Finances of Scottish universities

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