

This document relates to the Scottish Biometrics Commissioner Bill as amended at Stage 2

(SP Bill 48A)

Scottish Biometrics Commissioner Bill

[As Amended at Stage 2]

Supplementary Financial Memorandum

Introduction

As required under Rule 9.7.8B of the Parliament's Standing Orders, this supplementary Financial Memorandum is published to accompany the Scottish Biometrics Commissioner Bill, (introduced in the Scottish Parliament on 30 May 2019) as amended at Stage 2¹.

This Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Financial Memorandum published to accompany the Bill as introduced².

The purpose of this supplementary Financial Memorandum is to set out the expected costs associated with the new and amended provisions included in the Bill following the amendments made at Stage 2. This document addresses those amendments with anticipated or potential cost implications. Amendments agreed at Stage 2 which are not covered in this supplementary Financial Memorandum are considered not to significantly or materially affect the assumptions in the original Financial Memorandum.

1

https://www.parliament.scot/S5_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48AS052020.pdf

2

https://www.parliament.scot/S5_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48FMS052019.pdf

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The focus of this supplementary Financial Memorandum is therefore—

- the estimated costs associated with adding the Police Investigations and Review Commissioner (“the PIRC”) to the purview of the Scottish Biometrics Commissioner (“the Commissioner”),
- the estimated costs relating to the requirement for the Commissioner to establish a complaints procedure,
- the estimated costs of carrying out a review of the Commissioner’s functions by dates specified under the Bill,
- the estimated costs associated with the Commissioner’s powers to enforce the code of practice through the use of compliance notices, and
- the estimated costs associated with the establishment of an ethics advisory group to support the Commissioner.

Costs on the Scottish administration

Functions

As amended at Stage 2, the Bill now extends the Commissioner’s general function under section 2 to supporting and promoting the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes by the PIRC. The PIRC will also now be subject to the Commissioner’s code of practice under section 7.

It is considered that this extension in functions will increase the running costs of the Commissioner’s office in particular with regard to the Commissioner’s remuneration. To provide some context, the most common source of data held by PIRC is CCTV, which is currently in the region of 500 discs per year. The PIRC collects relatively few criminal justice samples each year. On average the PIRC retains approximately 20 samples a year. Samples obtained by pathologists in any death investigations undertaken by the PIRC are retained by the relevant pathology department. On the basis that the volume of biometric material is relatively low compared with Police Scotland and the Scottish Police Authority, the Scottish Government considers that adding the PIRC would increase the Commissioner’s FTE rate from 0.6 FTE to 0.7 FTE. This would

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represent a £10,000 increase in remuneration of the Commissioner (bringing the Commissioner's remuneration to £67,000 in total). In association with this increase in remuneration, a consequential increase to Travel & Subsistence (T&S), payroll, HR services, other admin costs and professional fees has also been accounted for. Accordingly, the Scottish Government considers that such increases would equate to an additional £1,000 inclusive.

The additional costs associated with these amendments to sections 2(1) and 7(1) are therefore expected to total £11,000 per annum.

Complaints Procedure

As amended at Stage 2, section 5A of the Bill places a duty on the Commissioner to establish a complaints procedure by which persons may raise a complaint regarding the acquisition, retention, use or destruction of biometric data by or on behalf of some of the bodies subject to the Commissioner's oversight – namely, Police Scotland or the Scottish Police Authority. This complaints procedure must be available whether the complainant has or has not already made a complaint to Police Scotland or the Scottish Police Authority. The Commissioner must also consult on a proposed complaints procedure with specified bodies before such a procedure is established.

It is difficult to quantify the extra cost of the complaints procedure as the number of complaints will be an important factor. However, given the Commissioner's time requirement for this task, it is expected that, even for a small number of complaints, the inclusion of such a function will increase the running costs of the Commissioner's office, in particular with regard to the Commissioner's remuneration and staff salaries.

It is considered that adding a complaints procedure would increase the Commissioner's FTE rate by 0.1 FTE. This would represent a further £10,000 increase in the Commissioner's remuneration. In association with this increase in remuneration, a consequential increase to T&S, payroll, HR services, other admin costs and professional fees has also been accounted for. Accordingly, it is considered that such increases would equate to an additional £1,000 inclusive.

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It is expected that this amendment would also impact on the current staffing resources estimated for the Commissioner's office. It is considered that the Commissioner would have to recruit 1 additional full-time administrative member of staff. Using the rate in the Bill's original financial memorandum, this would increase recruitment set-up costs by an estimated £1,000 (bringing this to £5,000 in total); staff salaries by £33,000 (bringing this to £200,000) and IT support and Maintenance set-up costs by £2,000 (bringing this to £52,000). A consequential increase to T&S, payroll, HR services, other admin costs and professional fees has also been accounted for. Accordingly, it is thought that such increases would equate to an additional £1,000 per member of additional staff.

The additional costs associated with this amendment are therefore expected to total at least £48,000 – being £3,000 in set up costs with a further £45,000 per annum of ongoing costs. These costings are based on a small number of complaints and therefore such costs could fall or rise depending on the volume of complaints.

Review of the Commissioner's functions

As amended at Stage 2, the Bill will now require the Scottish Ministers to review the functions (i.e. the powers and duties) of the Commissioner by the end of the period of three years after the day the Bill gets Royal Assent, and thereafter by the end of each period of five years after the completion of the previous review. This requirement in new section 5B also places a duty on the Scottish Ministers to consult such persons as they consider appropriate as part of any review.

Based on the Scottish Government's experience of undertaking consultations, it is expected that the cost of preparing and publishing the consultation document; engaging with stakeholders; and the analysis of responses by an independent external consultant would be an estimated £34,000 in total.

Under the requirement to review powers and functions of the Commissioner, it is considered that a consultation process would be required. It is assumed that the consultation would be led by a suitably qualified external consultant with relevant expertise - as it would involve the consideration of wider powers and engage with a wider audience beyond criminal justice and policing. This cost also allows for higher costs for the

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analysis report, given that a higher number of responses can be anticipated, given the likelihood of wider engagement. That being the case, it is considered that a first review could cost an estimated £50,000. The same cost or more would likely then be incurred again at five-yearly intervals. The costs could increase over time, because more work could be generated by there being a longer period to review, in terms of looking at what the Commissioner had done over that longer time span.

It is not thought that the costs would be any lower if Scottish Government staff were to write the consultation paper, rather than using an external consultant. This would require someone with sufficient specialised knowledge to be available. Even if that were to be the case, the amount of time and the level of seniority it would require would mean that the salary costs would equate to at least as great a cost. It is therefore not anticipated there would be any cost saving to using a Scottish Government member of staff to prepare the consultation paper, rather than an external consultant.

There will, in any event, be staffing costs incurred by the Scottish Government to support the consultation – the remuneration and employer on-costs could be £40,000 for the first review based on Scottish Government pay rate for an additional B2 member of staff - and the same cost or more incurred at five-year intervals due to routine annual staff pay uplifts.

The additional costs associated with this amendment are therefore expected to total £90,000 at the end of the three-year period following Royal Assent; and a likely higher sum at five-yearly intervals thereafter.

Compliance Notices

As amended at Stage 2, the Commissioner's powers have been extended so that the Commissioner can issue compliance notices to a person under section 17A if that person has failed to comply with the code of practice. It is considered that the Commissioner would incur a one-off cost of developing compliance notices of up to £20,000, which includes legal fees and staff training. This is based on the cost of developing compliance

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notices per the Financial Memorandum for the Food (Scotland) Bill 2014³. However, costs could be lower than that if there is an ability to draw on the model already prepared there.

It is considered that the activity of preparing the template notices would likely be undertaken at an early stage (perhaps in conjunction with preparing the Code of Practice). It is considered that this cost could arise in the first year of operation along with the other set-up costs in the original financial memorandum. The cost of developing compliance notices is in any event highly unlikely to be incurred in the same financial year as any compliance notice being issued by the Commissioner. This is because a model notice will no doubt be developed at the outset of the Commissioner taking office and it is envisaged that a compliance notice will be used only as a last resort. Further, a compliance notice can only be issued after the Code has been finalised (which will take some time)) and is brought into effect. In addition, the Commissioner will need some time to monitor and ascertain whether the code is being complied with and it is likely that the Commissioner will take time to encourage compliance with the code before deciding that it is necessary to issue a compliance notice.

The administrative cost of issuing compliance notices is expected to be minimal and would be covered by the provision already made for staff time in the original Financial Memorandum. This is because the code of practice was already to be a core function for the Commissioner (as reflected in both the Bill at introduction and the Policy Memorandum). The Commissioner was also already given powers (which it was assumed would be used) to gather information on whether those named in section 7(1) were complying with the duty they had in relation to the code of practice, as well as a power to publish reports about that. The Commissioner would therefore already have been expected to be monitoring practice in relation to the code, and the expectation is that no additional monitoring would be required. While the duty to which those named in section 7(1) are subject has changed (from “having regard” to the code to “complying” with it), it is not expected that this would result in any increased costs for the Commissioner. The Commissioner’s role will continue to be monitoring whether the duty in relation to the code is being

3 [https://www.parliament.scot/S4_Bills/Food%20\(Scotland\)%20Bill/b48s4-introd-en.pdf](https://www.parliament.scot/S4_Bills/Food%20(Scotland)%20Bill/b48s4-introd-en.pdf)

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met, regardless of what that duty may now be. The monitoring that is required has therefore not changed: it is simply that the Commissioner now has another option at their disposal following that monitoring. The administrative cost of sending out a compliance notice in relation to a breach (even where the Commissioner opts to use this power) is considered to be negligible. While the Commissioner will no doubt wish to monitor whether a compliance notice is complied with, again this is not considered to be any different to the monitoring the Commissioner would continue to do in relation to a person following the issuing of a report and the making of a recommendation under section 15.

Failure to comply with a compliance notice

As amended at Stage 2, the Commissioner's powers have also been extended so that the Commissioner can report a failure to comply with a compliance notice to the Court of Session under section 17E. It is considered that such powers would be used in extreme circumstances, and that the power would be used only as a last resort.

It is, however, clear that legal costs would be incurred should the Commissioner decide to report such matters to the court. The costs are likely to comprise the cost of court fees, solicitor fees and advocate fees for the Commissioner in progressing the case. The costs are therefore difficult to quantify as there is uncertainty as to how long a case might last and to what extent the party subject to the compliance notice would seek to defend their position. On the assumption that there would be no more than one case a year (given the low likelihood of compliance notices being used, much less being ignored if they are used), the additional costs associated with this amendment are therefore estimated to be a maximum of around £10,000 in total per annum. However, it is considered that the mere threat of the court being able to order enforcement would be enough to ensure compliance with a compliance notice, and therefore these costs may not arise.

Ethics Advisory Group

As amended at Stage 2, the Bill will now require the establishment of an Ethics Advisory Group under section 22A to provide advice on ethics (and other matters) to the Commissioner, and to report annually to the Commissioner. The Group must meet at least twice annually. This section also places a duty on the Scottish Ministers to use the regulation-making

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power given to them in subsection (6) to determine the governance, remuneration and membership of the Group, and to provide such financial resources for the Group as Ministers consider necessary to support its operation. The costs associated with this amendment will ultimately depend on: the appointment process for members; the number of members; how often the group meets; and the extent to which members of the Group are recompensed for their services.

To provide some context, the Biometrics and Forensics Ethics Group (BFEG) which reports to UK Ministers incurred travel expenses for group members totalling around £2,800 in 2018, based on around 12 members attending three meetings per year - i.e. an average of £78 per member per meeting. Other costs were kept to a minimum by hosting meetings in Government buildings and keeping the secretariat functions in-house. The members were not remunerated. In comparison, average travel expenses incurred by members of the Scottish Human Rights Commission (SHRC) were higher at around £1,200 per member per annum for 12 monthly meetings - i.e. £100 per member per meeting. The SHRC also pay a daily rate of £263 to each member. This is for a time commitment of 30 days per year, with one meeting each month.

On that basis, if expenses for an ethics advisory group were costed at the mid-point between £78 and £100, this suggests £89 per member per meeting. If a working assumption is used of an Ethics Advisory Group of eight members then the Group's expenses per meeting would total £712. Section 22A(2) requires at least two meetings per year – hence a cost of at least £1,424. It is considered that in practice the Group could end up meeting more often (especially given a report is required to be made to the Commissioner on an annual basis) and therefore three meetings per year is a more realistic estimate, which would cost £2,136.

If a decision were made to pay remuneration to members on a daily rates basis (per the SHRC example of £263), and an assumption is made that each meeting requires 2.5 days' of work (to cover preparation before the meeting, the meeting itself, and any follow up action) then two meetings per year would lead to five days' remuneration per member per annum - i.e. £1,315 per member, meaning a total remuneration cost for the Group of £10,520. If the Group met three times a year, then this would lead to 7.5

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days' service per member per year, meaning that the remuneration cost for the Group would increase to £15,780.

If remuneration were therefore to be payable, then total remuneration and travel costs per annum for the whole group of eight members meeting twice a year would be £12,066 – rising to £17,916 if the group met three times per year - or between £12,000 and £18,000 if the figures are rounded.

In addition, if the Commissioner was required to arrange for secure IT set-up for members - including access to a secure connection to access sensitive files and data (as is the case with BFEG members) - then the costs of this would depend on the equipment and software needed by each member to facilitate such a connection and whether access to SCOTS or another IT system was required. It may be possible to absorb any extra cost within the existing budget for IT installation and maintenance. If customised mobile IT equipment were required for eight members (e.g. a tablet or laptop) then this could cost £500 each, equating to £4,000 in total.

In association with the establishment of an ethics advisory group, a consequential increase to T&S, payroll, HR services, other admin costs and professional fees has also been accounted for. It is considered that such increases would equate to an additional £1,000 inclusive.

The additional costs associated with this amendment, when allowance for rounding up is made, are therefore expected to be around £13,000 (based on an eight-member Group meeting twice a year) or £19,000 (based on meeting three times a year) with a potential further cost of £4,000 to be added for secure IT equipment for members if required.

Costs on local authorities

None of the Stage 2 amendments have any cost implications for local authorities.

Costs on other bodies, individuals and businesses

The Stage 2 amendments are expected to have minimal impact on other bodies, individuals or businesses. The original Financial Memorandum indicated that the cost on bodies to implement the recommendations of the Code of Practice was expected to be minimal. The original Financial

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Memorandum did however note the difficulty in estimating additional costs for a Code that is yet to be written. The costs on bodies subject to the Code of Practice are still expected to be absorbed within existing budgets unless a significant policy or legislative change applied which would require further government funding. Although those named in section 7(1) of the Bill are now required to “comply with” the code of practice rather than simply “have regard” to it, it is not considered that this should result in additional costs. This is because training costs have already been taken into account, and it is simply that the content of the training will differ. In addition, it was already expected that a body would wish to demonstrate that it had had regard to the code of practice by complying with it, and that deviations from it would only occur in exceptional cases.

It is, however, clear that legal costs would be incurred should a person decide to defend any court action raised by the Commissioner as outlined at paragraph 31. Again, these costs are likely to comprise the cost of court fees, solicitor fees and advocate fees. The costs are again difficult to quantify as there is uncertainty as to how long a case might last and to what extent the party subject to the compliance notice would seek to defend their position. On the assumption that there would be no more than one case a year (given the low likelihood of compliance notices being used, much less being ignored if they are used), the additional costs associated with this amendment are therefore estimated to be a maximum of around £10,000 in total per annum. However, it is considered that the mere threat of the court being able to order enforcement would be enough to ensure compliance with a compliance notice, and therefore these costs may not arise.

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Summary table of costs arising due to stage 2 amendments to the bill

Paragraph reference	Anticipated/Potential Cost*	Item	Who bears cost
5-7	£11,000	PIRC	Scottish Ministers
8-12	£48,000	Complaints Procedure	Scottish Ministers
13-18	£90,000	Review of the Commissioner's powers and functions	Scottish Ministers
19-21	£20,000	Compliance Notices	Scottish Ministers
22-23	£0 to £10,000	Failure to comply with a compliance notice	Scottish Ministers
22-23	£0 to £10,000	Failure to comply with a compliance notice	Persons subject to the code of practice who may choose to defend an action taken to the Court of Session to enforce compliance with a

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			compliance notice.
24-31	£17,000 to 23,000	Ethics Advisory Group	Scottish Ministers
Total	£ 186,000 to 212,000		

* Figures do not factor in inflation

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