



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 29 October 2019

Session 5



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JUSTICE COMMITTEE
26th Meeting 2019, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Green)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tom Nelson (Scottish Police Authority)
Detective Chief Superintendent Sean Scott (Police Scotland)
Zak Tuck (Scottish Government)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 29 October 2019

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the 26th meeting in 2019 of the Justice Committee. We have apologies from Liam McArthur.

Agenda item 1 is a decision on taking in private items 11 and 12, which are consideration of our pre-budget scrutiny report and our work programme. Do we agree to take those items in private?

Members indicated agreement.

Scottish Biometrics

Commissioner Bill: Stage 1

10:00

The Convener: Agenda item 2 is an evidence session on the Scottish Biometrics Commissioner Bill. I refer members to paper 1, which is a note by the clerks, and paper 2, which is a private paper.

I welcome to the meeting our witnesses, who are Detective Chief Superintendent Sean Scott, Police Scotland, and Tom Nelson, director of forensic services at the Scottish Police Authority. I thank the witnesses for their written submissions, which, as ever, are extremely helpful to the committee in advance of taking formal evidence.

We move to questions. Will you explain the process for collecting, storing, using and retaining biometric data? We know that the process is complex, but it would be good if you would explain how it works in practice.

Detective Chief Superintendent Sean Scott (Police Scotland): I am grateful for the opportunity to provide oral evidence this morning. In the criminal justice process, the acquisition, retention, use and disposal of biometric data starts with people being brought into custody as suspects or arrestees. We have the power to take DNA, fingerprints and photographs as part of the custody process. The biometric samples are processed and, thereafter, the criminal justice outcome of the inquiry—that is, whether or not a person is convicted—dictates the retention or weeding out of the samples.

The DNA and fingerprints go through a data process in which they are loaded on to databases, whether that is the Scottish DNA database, the national DNA database or the IDENT1 Home Office fingerprint live scan system. That is more Tom Nelson's area.

In crime scene investigations, we have ways and means of picking up samples. The samples are processed through the same kind of system, whereby they are profiled, loaded on to databases and recorded appropriately. Thereafter, we go through weeding protocols.

The Convener: In terms of the who, is custody evidence collected by the police initially?

Detective Chief Superintendent Scott: Sorry—could you say that again, please?

The Convener: Who initially collects samples when someone is in custody? Is it the police?

Detective Chief Superintendent Scott: Yes. The officers or the custody staff in custody areas carry out the collection process.

The Convener: Do you want to add anything, Mr Nelson?

Tom Nelson (Scottish Police Authority): Yes. We have a Scottish DNA database, which is based in Dundee, and load samples on to the national DNA database, which is obviously a United Kingdom database.

Fingerprints are slightly different from DNA, in that we do not have our own database and we load our samples on to the national IDENT1 fingerprint database. That historical issue goes back many years and DNA is a fairly new science. When it came into the forensic service environment, we brought in the Scottish DNA database. Other than that, the process is very similar.

The Convener: Is that an area in which there might be an overlap?

Tom Nelson: We initially search on the Scottish DNA database and, if we get a hit, there is obviously no need to load the sample on to the national database.

The Convener: Are there any other areas in which there might be an overlap in the process?

Tom Nelson: Not that I am aware of.

Detective Chief Superintendent Scott: Not that I can think of.

Rona Mackay (Strathkelvin and Bearsden) (SNP): You have talked about the process of collecting data in its various forms. I want to know about the control of the data at each stage. Who takes ownership of it? How is it shared with the Crown Office and Procurator Fiscal Service, the courts, defence solicitors and so on?

Detective Chief Superintendent Scott: The sample is a physical thing; the data is not. The data is processed and then, as Tom Nelson said, it is recorded on the fingerprint database or on the DNA database. We retain the physical samples, but the data is kept on a database and thereafter alluded to in police reports to the Crown Office. The Crown Office receives the information but does not have control of the databases. We report what we have, and any analysis of the fingerprints or DNA is part of that report. We get the results of the fingerprint or DNA analysis from Tom Nelson's staff and that is reported to the Crown Office. In other words, the data is retained in the database, and any physical samples are retained by us, or by the SPA in the lab.

Rona Mackay: If I understand you correctly, you share the data, but it remains your responsibility.

Detective Chief Superintendent Scott: Effectively, yes. Do you agree, Tom?

Tom Nelson: Yes, that is correct.

The Convener: It would be helpful to tease that out a bit more. Will you explain the governance of the process involved in collecting and using the biometric data? In effect, who has oversight of those processes in Police Scotland and the SPA, and who in those two organisations retains overall responsibility for the data collected?

Tom Nelson: The chief constable and I are effectively joint data controllers—we are responsible for the data. As I said, the data is stored on the national DNA database and the Scottish DNA database, and fingerprints are stored on the national IDENT1 database. It is through our working relationship with Police Scotland and the national system support unit that those samples are managed.

The Convener: What about governance, which may be a little different?

Tom Nelson: Overall, governance sits with the Scottish Police Authority, which oversees the whole process.

Shona Robison (Dundee City East) (SNP): The SPA's written evidence says that

"There is evidence of strong existing governance and practice within ... Police Scotland and the SPA with regard to the use of biometrics data."

Will you elaborate on that and, most important, explain how the establishment of a commissioner would further strengthen that area? What would the main difference be?

Tom Nelson: Scotland's practices were alluded to in the *S and Marper v UK* case, where the evidence was that our processes, retention and timelines were exemplary. Her Majesty's Inspectorate of Constabulary in Scotland inspection report in 2016 also picked up that governance was strong in Police Scotland and the SPA. However, we have always considered that we needed a biometrics commissioner. We in forensic services have wanted that for a number of years, and we are really pleased that a bill to create a commissioner has been introduced.

One way in which a commissioner would add significant value is around public awareness. It is crucial that we keep the public aware of what we are doing with data. New technologies relating to DNA are coming on board, for example. In a couple of years' time, we could be getting more characteristics from samples, such as hair and eye colour. We believe that that needs public debate, to make sure not just that what we are doing is what the public wants, but that the public understands why we want to take the data in a particular direction. We believe that a commissioner could begin to lead the public debate on where the science is going.

Shona Robison: You are saying that, in your opinion, the current governance and practice are sound, but that we need to consider the future and public support for areas that are unknown and where technology is developing.

Tom Nelson: Very much so. To me, it is all about keeping the public informed and engaged. That is crucial, because the last thing that we want is for the public to lose confidence in our databases. At the end of the day, we are public servants, and we want the public to be involved in the discussion. That could be one of the key roles that the biometrics commissioner has.

We also believe that codes of practice are crucial. When Detective Chief Superintendent Scott and I were members of the independent advisory group, we developed a draft code of practice, which went out for public consultation. There was very strong support for the code, because it goes into the detail of how we would deal with new sciences and technology. We live in a world in which technology changes all the time, and my view is that technology should be validated and that a full and proper process put in place around it before it is used. Through the code of practice and working with the biometrics commissioner, that approach would bring some benefit to Scotland.

Detective Chief Superintendent Scott: On Tom Nelson's point about public awareness, ahead of any decision about the bill, we are working in Police Scotland on giving notice to people who come into custody. You could argue that biometrics and what happens with them more directly affect those who come into custody than is the case for any other member of the public. We have composed and are about to introduce a notice for people about why we take biometric information, what powers we have, what happens to the information and what their rights are. It is a fairly simple but direct information sheet. Traditionally, we take the biometric information, but often people do not ask what we are doing with it, so they do not know what happens to it, why we are doing it and what their rights are. We are therefore about to introduce a notice—which is a bit like the notice on solicitor access rights—that clearly sets out people's rights in relation to biometrics.

Shona Robison: Will the notice be routinely given out?

Detective Chief Superintendent Scott: Yes. Every person in custody who has biometrics taken from them will be provided with the information so that they know exactly what we are doing, why we are doing it and what their rights are.

Rona Mackay: As we understand it, uploading DNA and fingerprint data is done voluntarily. Will

you explain the background to that and comment on why no legislation underpins that process? Is that an effective way of collecting the data?

Detective Chief Superintendent Scott: In Scotland, we upload the data on to the UK databases on a voluntary basis. It is about interjurisdictional co-operation. There are many unsolved crimes and unsolved profiles on the system. Clearly, we want to solve crimes, so if we have a sample of data, such as DNA or a fingerprint, we will upload it. UK-wide, we want to use every opportunity to protect the public by identifying offenders. Therefore, the voluntary uploading of data on to the national databases is for the wider public good. We do not have to do that, but it seems like the right thing to do.

Tom Nelson: Yes, I think that that is right.

Rona Mackay: Just to be clear, it is not voluntary for the suspect to give a sample, but whether you upload the data to the national database is voluntary.

Detective Chief Superintendent Scott: Yes, absolutely.

Rona Mackay: Do you think that that is the most effective way of doing it? Is it just part of your process?

Detective Chief Superintendent Scott: Yes, it is part of the process. As Tom Nelson said, if we got a hit for DNA on the Scottish DNA database, the DNA would not be loaded on to the national one. However, if we do not get a hit, the DNA would go on to the national database in order to give us the best opportunity of identifying an offender.

It is not only about identifying offenders, but about potentially exculpating people, and I think that that aspect sometimes gets lost. Forensics and biometrics are as much about making sure that we get the right person. That is why we do it.

Tom Nelson: One of the big advantages is the value that the databases bring not only for cases that are live and on-going, but for cold cases. In the past couple of months, we had a case in which a 21-year-old murder was solved because someone was arrested, their DNA and fingerprints were taken and there was a hit in the DNA database. We were able to solve a 21-year-old crime because of the database. There is significant value in having samples on those databases.

10:15

Rona Mackay: At the moment, the data is shared across the border, but it is also shared across Europe. Is that something that will no longer happen following Brexit?

Tom Nelson: Yes. At the moment, a process is in place where data can be shared, but member states do not have access to our databases. It is done through a police process. However, a concern for the SPA and Police Scotland is that if, as a result of leaving the European Union, we lose that ability, it would reduce the impact that those databases could have.

Rona Mackay: As you understand it, you will not be able to share that data if we leave the EU.

Detective Chief Superintendent Scott: It depends on the withdrawal agreement. In recent times, we have successfully passed information or data 23 times to Europe through the Prüm decisions. That process is successful because it is rapid. The original Prüm decision related to DNA, fingerprints and vehicle registration, but at the moment it covers only DNA. If we withdraw without a deal, we will lose that ability. If we are part of a deal, we should retain some of that. Whether we have a deal or no deal is, like everything these days, a bit up in the air.

Rona Mackay: Okay, thank you.

The Convener: What photographic images are uploaded to a national database? Although body-worn video cameras are not currently in use, when they come into use, would those images be uploaded? If so, which ones?

Detective Chief Superintendent Scott: The legacy arrangements for custody images were a bit disparate. However, we now have a national custody system, and anyone who comes into custody has their image automatically uploaded on to the criminal history system and there will be no retention of any images on databases in Police Scotland. Independently from the criminal justice outcome, if there is no conviction, the images are automatically weeded. If there is a conviction or a process thereafter, there are retention arrangements and timescales. The new system is far more robust in respect of retention.

Video from body-worn cameras will not be uploaded to the criminal history system or any national system in place at the moment. Body-worn cameras are about recording activity by police officers on the front line. If that footage becomes evidence, it will enter the evidence chain. If it is a case of trying to identify people from those images, we have the capability either to send physical briefings around officers to ask whether they recognise those people, or we can go through retrospective facial recognition through the police national database.

The Convener: You mentioned legacy and custody images. Are those straightforward, front-on photographs?

Detective Chief Superintendent Scott: Yes.

The Convener: What about the body-worn cameras? What kind of images do they produce?

Detective Chief Superintendent Scott: Body-worn cameras would be used to video activity on the streets. That footage would record the interaction between police officers and a member of the public and so on. If it is required that that is reviewed as potential evidence of a crime or of certain conduct having taken place, it is treated as evidence, a bit like how closed-circuit television is treated. That is separate to custody images.

Shona Robison: There would appear to be broad agreement that the proposal for the creation of the commissioner is timely—presumably, you feel that the Scottish Government has got the timing right. You have talked a bit about the public awareness role and the fact that the relationship with the public is important, but what kind of relationship do you envisage having with the commissioner?

Tom Nelson: From a forensic services perspective, we hope to have a strong relationship with the commissioner. We feel that the commissioner is there to help us to determine the best way forward in relation to, for instance, databases in Scotland. As I mentioned earlier, there is new technology coming along, and we want to ensure that public debate happens around that. The commissioner will have a significant role in that regard.

Obviously, we would like to be involved in the development of the code of practice. On the draft code that has been developed, I was impressed by the range of people who were represented on the independent advisory group—there were people who are involved in human rights, the Information Commissioner's Office, universities and the Crown Office and Procurator Fiscal Service, as well as Sean Scott and me from Police Scotland and forensic services. A good breadth of knowledge was represented, which is why the report of the independent advisory group and the draft code of practice were so well received. We hope that the commissioner will work through the report and the code, because they contain a lot of good stuff.

Detective Chief Superintendent Scott: Police Scotland welcomes the creation of the commissioner. As you know, our approach involves policing by consent, which is based on public confidence. We are very much bound by legislation, regulations and operating procedures, and we are used to working in that way. However, our ability to develop technologies and adapt to advances in investigation techniques requires a degree of independent rigour, and we would want to have a close working relationship with an individual who can provide that, as we do with HMICS; we would welcome input from the ethics

panel, too. That will give us a platform from which we can move on with the advances in technology that the public would expect us to explore in order to keep them even safer. Criminal enterprise is getting even more ingenious—ingenuity is everywhere, and we want to keep pace with that in order to keep people safe.

I expect us to have a close relationship with the commissioner.

Shona Robison: Given that we have just been talking about the code of practice, it might be worth asking a question that I was going to ask later. Should the code of practice be established in legislation, as the independent advisory group advised?

Tom Nelson: We agree with the code being established in legislation. However, we feel that the detail of the code should sit outside that, in order to give us flexibility, because things are changing quickly. We want to ensure that the legislation and the code of practice enable us to be fleet of foot so that we can quickly move with the times. Our recommendation is that the code be established in legislation, but that the details of the code should be worked out separately and should come back to the Parliament and be consulted on before final sign-off.

Shona Robison: So, the code should have a statutory footing, but the detail could change over time.

Tom Nelson: It could change over time, so you would want it to be kept as live as possible. However, it is important that it remains subject to public and parliamentary scrutiny, and parliamentarians need to be aware of the code.

Detective Chief Superintendent Scott: It is right that the bill places a requirement on the commissioner to establish a code of practice. However, there is a need to consult on the details with the organisations that are named in the bill and with other organisations, and there must be flexibility to do that. Once the commissioner is in place, they can work with those organisations, including us, to create the code of practice, which can be agreed by Parliament. At that point, we can move on.

I agree with what Tom Nelson said about the necessity for flexibility. You do not want to have to alter primary legislation all the time, so it is better to have a flexible instrument that sits below that. In the near future, there is the potential for us to be able to engage in gait analysis, vein-pattern analysis and the analysis of a host of other biometrics, so we need something that is flexible and agile.

John Finnie (Highlands and Islands) (Green): It has been suggested that the commissioner's

responsibility should extend further than Police Scotland and the SPA. For example, it has been said that it should include those who share images with Police Scotland, such as the British Transport Police, councils, the National Crime Agency and private entities. Is that reasonable?

Detective Chief Superintendent Scott: We need to start somewhere. The bill and the code of practice should be flexible enough to bring others into the mechanism. The British Transport Police currently uses our facilities. If it has a suspect or an arrestee whom it plans to put to court, it will use Police Scotland facilities for fingerprints and DNA biometrics, which are loaded on from there. There is already co-operation in that sense.

I do not think that having Police Scotland and the SPA is the prescriptive end of it, but I do not have a strong view either way on whether there should be an extension now.

Tom Nelson: Obviously, we try to cover the majority of the casework that we get in Scotland. We and Police Scotland would do that. We recognise that there might be occasions when the British Transport Police would take samples but, as Sean Scott said, that would mostly be in police custody suites and would therefore come under our DNA and fingerprint regime. There might be occasions when that is not the case, so it would be useful to have the British Transport Police involved, as well. The independent advisory group certainly recommended that it and maybe others could adopt the codes for how they practise. That could widen the value that the codes bring to the public in Scotland.

John Finnie: Would that include the National Crime Agency, for instance?

Tom Nelson: Yes, it could, but I will let Sean Scott speak about that.

Detective Chief Superintendent Scott: If we went down south to pick up an arrestee in England, we would bring them back up under cross-border powers, take their biometrics in Scotland and load them. Tom Nelson has described that. Conversely, if English or Welsh officers came to Scotland, they would have the same ability to do that.

The NCA sometimes employs us to help it. We deal with the custodies and the biometrics in Scotland, or the person goes back down south under the cross-border powers. Jurisdictionally, the agreement is sound.

John Finnie: CCTV has been referred to. Local authorities and, indeed, private enterprises rely on it. Would there be a frailty in the system if they were not subject to the same level of control that you, who ultimately receive the information, are? Would there not be the potential for some

reputational damage at the very least for Police Scotland and the SPA?

Detective Chief Superintendent Scott: Do you mean reputational damage for Police Scotland if local authorities were not subject to that control?

John Finnie: Yes—or anyone from whom you receive information from which to process data images, for instance.

Detective Chief Superintendent Scott: On evidence capture, we can, in effect, get CCTV images from anywhere. If somebody in a private house or a local authority has recorded something and there is the potential for evidence, we will acquire that and process it according to the law. Maybe I am not quite picking up where you think that that might—

John Finnie: Do you see no challenges to the SPA or Police Scotland from the source of that information? You know about the concerns that there have been about open space that the public presume is public but is private, for instance. There have often been concerns about the jurisdiction of that.

Detective Chief Superintendent Scott: Are you talking about simple recording by CCTV cameras or facial recognition by local authorities?

John Finnie: I presume that you sometimes use your facial recognition techniques on CCTV footage.

Detective Chief Superintendent Scott: If there is a suspect whom we cannot identify from a CCTV image, there is the facility to upload that image on to the police national database for retrospective facial recognition to see whether we can get intelligence. When we have done that, there might be five, six or seven suggestions with a varying degree of probability. That has to be worked around. It is just intelligence; it is not a facility to go and arrest someone. Other evidence corroboration has to be thought about. Some suggestions might be way left field. As I said, it is just intelligence, so it does not necessarily impinge on anyone's immediate rights, because we need to work around it to create corroborative evidence, if there is any. If there is not any, we destroy that.

John Finnie: Okay. Thank you.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): My line of questioning follows on from John Finnie's questions. The bill as it stands suggests that the commissioner's role should be part time. That has been the subject of debate by previous panels. Do you agree that the position should be part time?

10:30

Detective Chief Superintendent Scott: I think that they will be busy, so they might need to be full time. I do not have a strong view on the matter, because it depends on the decision about what the bill says the person should do and how many support staff would be at their disposal. It will be an extremely busy role; it is a burgeoning area of business and there is so much to do.

It has probably been touched on previously that the issues are more about private databases and what happens outwith the police and the SPA. We are very heavily regulated and legislated for and are pretty good at what we do, but so much is sitting out there in private databases in private companies and other areas—that is the area that is unregulated and ungoverned. Extending the code of practice into other areas will be a huge task, so full time might be the best option. Tom Nelson might have a view on that.

Tom Nelson: England and Wales has a biometrics commissioner, Paul Wiles, who covers the 43 forces and all the forensic practitioners down south, so 0.6 of a full-time equivalent is probably reasonable. However, a lot depends on the number of staff that the person would have to support them. In the early days, there might be a requirement to be full time to get the ball rolling—to get things in place and begin public engagement and debate—but 0.6 FTE may be a reasonable amount of time, given the size of Scotland compared with England and Wales.

The Convener: I will follow on from the point about the position being part time. Do you think that the commissioner's general function carries enough weight, given that it is to

"support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data"?

Detective Chief Superintendent Scott: Are you asking whether we think—

The Convener: Does that general function carry enough weight? When you answer, perhaps you could tell us a little more about retention—how long data is retained and for which crimes—and provide assurance about the immediate destruction of data that is no longer required.

Tom Nelson: I am sorry, but can you give us the first question again?

The Convener: Yes—there was a lot in my question. Does the general function carry enough weight? There is a lot in it about lawful, effective retention and destruction.

Tom Nelson: With regard to the general process, that is correct. There was discussion previously about whether there should be enforcement or penalties. In the policing world,

naming and shaming is probably the worst thing that can be done, so there is a lot of strength in that approach. Paul Wiles mentioned in his evidence that, when he does that, police forces and others respond.

There is a lot of regulation around all that we do; forensic services are accredited by the United Kingdom Accreditation Service, or UKAS, to a 17025 standard, so our business is covered by that assessment organisation, which comes into our organisation and spends between 60 and 70 days a year going through all our processes and practices. In effect, it gives me the licence to operate; if it does not sign off our work, we cannot load samples on to the national DNA database, for example. A lot of assessment and review of our practices and processes is done externally by UKAS and other bodies such as HMICS.

The Convener: Is that review reactive rather than proactive? If the commissioner's general function had more weight—if it had more enforcement powers—might it be more proactive?

Tom Nelson: If the commissioner came up with recommendations that we should do something, I think that we would adopt them.

Detective Chief Superintendent Scott: Your point is well made, convener. The commissioner is to

“promote, and monitor the impact of, the code of practice”,

and we need to consider the general principles for how the police and the SPA will act. We know that the new technologies are coming in, and I think that it is implicit that we will work closely with the commissioner and the ethics panel and be proactive about what is coming up and what is now, potentially, a valuable tool in keeping the public safe. I do not know whether the word “proactive” should be included. Greater minds than mine might think that it should be, but I think that it is implicit. It is a bit like what we do with HMICS—we work with it to consider where we can improve areas of business, and I think that the same will apply in this case.

On the retention of biometric data, one of the IAG's nine recommendations was about the retention periods and a presumption of deletion, and that is absolutely right. The choreography of the IAG's recommendations, which the Government accepted as legitimate, is that we start with a commissioner and a code of practice and we then start to work on and develop the other recommendations. As I said, we are proactively doing some work on some of the recommendations within Police Scotland—we are not waiting for any legislation—because that is the right thing to do. It concerns people's awareness of their rights and proportionality.

On whether we should take biometric data from children aged 12 to 17, we are implementing a process whereby we consider the matter case by case. The fact that we can take it does not mean that it is the right thing to do, as there is a question of proportionality.

Others might think that the bill needs to be more explicit but, based on what is in it, I think that the commissioner will be proactive in their role.

The Convener: What is the retention policy? I know that there is three-year retention for certain offences and there is immediate deletion for others.

Detective Chief Superintendent Scott: Yes. It is a mixed bag. If you like, I can provide the committee with a written chart of all the retention times depending on whether the data is fingerprints, photographs or DNA, because we have that.

The Convener: Is there three-year retention for certain offences such as sexual and violent offences?

Detective Chief Superintendent Scott: Yes, and the chief constable can apply for an extension of two years if it is required. That is already in legislation. However, there are other retention periods based on other levels of criminality.

The Convener: Does it end at five years or can the extension be repeated time and time again?

Detective Chief Superintendent Scott: There is no limit to how many two-year extensions can be applied for, but that has not happened. We have not had to do that, but the power exists if there is an exceptional circumstance in which we want to do that.

The Convener: In the interest of reassuring the public, will you confirm that, if data is collected from an individual who has not previously committed an offence but is arrested, and they are not convicted, it is destroyed immediately afterwards?

Detective Chief Superintendent Scott: That is correct.

James Kelly (Glasgow) (Lab): Mr Nelson, in an answer to Shona Robison, you discussed the code of practice, and you said that you have done some work on a draft code of practice. That is helpful. Will you outline the main factors that you believe the code of practice should encompass in order to ensure that it is robust?

Tom Nelson: Sure. It is quite a lengthy document—it is about 20 pages long—but I will outline the content. It defines biometric data, it goes through the purpose of the code of practice and it looks at the human rights aspect of retention and how we should review that. It goes through

some general principles, one of which is on the introduction of new technology, and it considers the process that we should follow in introducing new technology or new evidence types into, for example, forensic services.

In England and Wales, there is a Forensic Science Regulator, who is currently Dr Gill Tully. I sit on her Forensic Science Advisory Council. The advisory council and Dr Tully have generated some guidelines on how new technologies can be validated to show that they are fit for purpose and that instruments that are used give the expected results. A process is built around that, and it is also included in the code of practice, as are the ways in which people can get information on how data is used and how successful it has been.

The code of practice covers all that. The document, which went out for consultation about 12 months ago, was positively received. There were some recommendations from that process, but the code of practice is in draft form.

James Kelly: That is helpful. In particular, the comments on new technology are helpful because it is important that the code of practice is able to deal with changes in technology as it evolves. Does the code of practice need separate sections for different technologies?

Tom Nelson: Most technologies will probably follow the same principles. Providing that we get the validation principles correct, they could be applied to any technology. For example, we have just brought in the equipment for the drink driving legislation. We had to spend almost a year preparing for that, by ensuring that the instrumentation was giving the desired result. The people who supply the equipment tell us that it will give us the results, but we have to put the equipment into its working environment to make sure that the desired result is produced every time. That is part of the validation process. That then goes through for accreditation. We ask UKAS to go through all the work that we have done and to give us the validation stamp to show that it has been accredited.

John Finnie: As the bill stands, Police Scotland and the SPA will only be required to “have regard to” the code of practice and failure to do so will not in itself give rise to grounds for legal action. Do you have a view on that approach? During this evidence session, much has been said about public confidence. Is there a contradiction in Police Scotland and the SPA just being required to “have regard to” the code of practice and there being no legal sanction for failure to do that?

Detective Chief Superintendent Scott: It is a bit like how we work with HMICS. We work with it and we generally work to implement its recommendations. If there is an area in which we

have an opposing view, we have discussions and come up with a resolution. In working with a commissioner, I do not think that we would ever get to a point at which we would refuse to comply. If we had issues with a recommendation or a direction of travel, we would have dialogue with the commissioner far in advance of getting to that stage, and I would like to think that we would be able to work it through. Tom Nelson probably feels the same.

Tom Nelson: As director of forensic services, I think that, if the commissioner came up with a proposal that we should follow, it would be hard for me not to follow it. My board would certainly hold me to account for why we did not follow it.

John Finnie: So you do not see the provision as a frailty. You used the term “opposing view”, Mr Scott.

Detective Chief Superintendent Scott: By the point at which recommendations are made, we will have worked closely with the commissioner and the ethics panel, and we will then implement them. It is highly unlikely that we would ever get to an impasse.

John Finnie: To clarify, would either of you have any concern if the bill was amended to ensure that there was a requirement to comply rather than just a requirement to “have regard to” the code?

Tom Nelson: If that was the feeling of Parliament, that would be the way to go. From my perspective, I know that I could not stand before my board and say why I had not followed a recommendation from the commissioner.

Detective Chief Superintendent Scott: I would be more comfortable running that terminology past our legal services, so I will reserve judgment on that.

John Finnie: Okay. Thank you.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, panel. You have both talked about the fact that biometric technologies are evolving at a rate of knots—I think that we all accept that—and the associated issues. Is the bill a reasonable attempt to keep up with developments in the area? Will the code of practice be enough for us to adapt to new issues and technologies as they arise?

10:45

Detective Chief Superintendent Scott: Tom Nelson mentioned the general principles that are included in the draft code of practice, but it also mentions how the general principles are to be implemented, so there is a clear direction on that, and there are directions to help us with how we

process data. I think that the principles and the directions on how they are to be implemented and what we must consider when collecting, processing and retaining data are sufficiently broad to cover any eventuality in how biometric data might be used in the future and advances in technology.

I am comfortable with the draft code as a starter for 10, but the commissioner and others will refine the work to get to the final product. The code will definitely help.

Tom Nelson: The independent advisory group did a lot of work in drafting the code. A lot of people were involved, including those with a human rights perspective, practitioners, academics and the Crown Office, and a lot of thought went into developing it. I think that it is very much fit for purpose. It addresses some of the new technologies that are coming in. In England and Wales, Mr Wiles was concerned that he does not have that control over new technologies. The bill certainly gives us that control.

The draft code is definitely fit for purpose, but that does not mean that it will not evolve. When the commissioner is in post, he or she could carry out another phase of consultation before taking the code to Parliament to get it signed off. Thereafter, there should be a process for regularly reviewing the code.

Fulton MacGregor: You are satisfied that the draft code is flexible enough and that, as far as you can envisage at this stage, no further legislation will be required.

Tom Nelson: That is correct.

Detective Chief Superintendent Scott: The fact is that the validation and the reliability of new techniques are explicitly included in the draft code. Tom Nelson mentioned validation. Technologies being fit for purpose is key, and that aspect is covered in the draft code. Whatever the technologies might be in the future, we have to bear in mind the need for them to be validated and reliable.

Fulton MacGregor: You have both made the case that it should be the SPA's forensic services department that is subject to the code of practice rather than the SPA itself, and you have asked for the bill to be amended in that respect. Will you elaborate a wee bit on the thinking behind that request?

Tom Nelson: The document, which I have read, mentions the Scottish Police Authority. The SPA is the legal entity, but I think that it could be more prescriptive, because the SPA could mean many things to different people, including the public. The work and the delivery of the service is done within

the SPA forensic services department, and it might be worth while to draw attention to that. It is drawn out for the constables and the police staff who work for Police Scotland. That is the only reason why I mentioned the issue.

Fulton MacGregor: Okay. The Scottish commissioner will work with only one police force whereas the situation in England and Wales is that the commissioner deals with multiple forces. Do you see any benefits or, alternatively, any disadvantages to that approach?

Tom Nelson: I think that working with one police force will be an advantage. Instead of things being done differently 43 times, there is potential to have one way of operating, and there will be just one group of people to engage with. That will probably make the role of the commissioner easier.

Detective Chief Superintendent Scott: I agree.

The Convener: I want to return briefly to the question of who should be subject to the code of practice. When I asked who currently takes on the governance of the process of collecting and using biometric data and who, of Police Scotland and the SPA, has oversight of such processes, Tom Nelson said that overall governance sits with the SPA. That being the case, surely it is reasonable for the SPA, as an entity, to be subject to the code of practice.

Tom Nelson: Yes, it is, totally. I was not asking for the SPA to be taken out; I was asking for forensic services to be added.

The Convener: Right. The SPA, as a legal entity, will be subject to the code, but forensic services should be added. That is helpful—thank you.

Detective Chief Superintendent Scott: The issue is that the bill is explicit about constables and police staff but not quite as explicit in relation to the Scottish Police Authority. That is why we made the same point in our submission.

Liam Kerr (North East Scotland) (Con): A lot of ethical issues are coming through. The bill as it stands does not provide for an ethics advisory group, but we know that the cabinet secretary intends to establish such a group. Do you have a view on the merits of establishing an ethics advisory group? If you are broadly in favour of the approach, do you have thoughts on who might be on the group and how it might help the commissioner?

Detective Chief Superintendent Scott: We are very supportive of the approach. Everything that we do in Police Scotland, in the context of new processes and how we want to do our business, is underpinned by human rights and the appropriate

equality impact assessments. That is especially the case for an issue that is as sensitive as the one that we are considering. Traditionally, when the police have been looking to implement new ways of working, opportunities could probably have been enhanced and processes could have been better if there had been wider engagement on ethics, because it is about not just the police but the public—although I am not saying that things have been done in isolation.

We welcome the potential opportunity to explore areas with an ethics panel, and I think that we would be neglectful if we did not have wider consultation and input. As Tom Nelson said, the IAG's construction was very much about that, with explicit human rights representation and input from the Information Commissioner's Office and academics. The process worked really well, and the recommendations that came out of it are balanced and show the benefit of wider engagement, which we whole-heartedly embrace. Such engagement is necessary.

Tom Nelson: I sit on quite a few bodies down south, in England and Wales, such as the Forensic Science Advisory Council; I also sit on the Home Office biometrics strategy board, and as part of that there is also the forensic information databases strategy board. The ethics group of England and Wales reports to that group. Certainly in England and Wales there is a strong need for us all to have an ethics group, and by setting up such a group in Scotland we would be replicating what is in place in England and Wales, which brings value. Particularly in the context of DNA and some of the advances that are potentially coming down the line, it is essential that ethics are discussed, and I would have thought that the commissioner will want to bring in such an approach very soon.

Liam Kerr: The bill as drafted does not provide an opportunity for members of the public to raise concerns about the commissioner. For example, I do not think that it provides for a complaints process that individual members of the public can use. Should the bill be amended to provide for such a process, or is that unnecessary?

Detective Chief Superintendent Scott: The public have the right to complain to the Parliament about anything they like, on any subject, and a complaint would be addressed. I am not sure that the lack of a specific public complaints mechanism means that there is no effective way of dealing with a complaint. If a complaint came in, it would be dealt with. I am not sure that the bill needs to be explicit in that regard.

Tom Nelson: Much depends on what a complaint is about. The ICO has a role to play in relation to complaints about information, so that is a potential route for people who want to complain. However, I would have thought that the

commissioner would want to hear the public and understand where their concerns were coming from. That ability to engage with and speak to the public, which was the number 1 recommendation of the IAG, would certainly allow the commissioner to provide assurance to the public, and it would ensure that the public and the commissioner could identify any challenges.

The Convener: The issue is one of public confidence, not just awareness. I think that we all agree that, if there is a clear way for people to be able to complain, and that is advertised, public confidence will be increased.

John Finnie: I want to continue to discuss the issue of public awareness and confidence. There is a suggestion that there is a role for the commissioner in that regard, and you might have some views on how the commissioner would promote public awareness and understanding.

You have both talked about public awareness, and Mr Nelson talked about critical public awareness. You will be aware that there is suspicion about police activity and that an inherent part of any liberal democracy is that people will question the powers that the police have. With regard to the intention behind the bill and the potential for any unintended consequences, collateral intrusion or whatever, will you tell us how Police Scotland and the SPA currently engage with the public to provide assurance? Have lessons been learned about the dearth of that with regard to cyberkiosks, which the public view in a similar vein to this issue?

Detective Chief Superintendent Scott: If I pick up correctly what you mean, I would say that cyberkiosks are a separate subject to the one that we are discussing today. What is going on with cyberkiosks has been well rehearsed, and I do not have any involvement in that area of business. However, in terms of—

John Finnie: Sorry to interrupt, but I was asking about public confidence and engagement on the part of the police. I was wondering whether lessons have been learned from failures in that regard in the case of cyberkiosks.

Detective Chief Superintendent Scott: Sorry—I understand you now. Of course, there are lessons to be learned anywhere. As I said, I do not have an explicit involvement in cyberkiosks, but we always try to take on board any lessons that we can learn in terms of public engagement with regard to our local and corporate communication. I do not know exactly what those lessons are with regard to cyberkiosks because I have not been involved in that area, but I am aware that there have been issues with implementation in that regard.

On the wider public engagement around biometrics, we are starting off with a focus on anyone who has their biometrics taken from them, so there will be an awareness about what happens to that information, as I explained earlier. Clearly, any work that we do around biometrics in conjunction with the commissioner would be part of a wider communication strategy for the general public, and we would look to ensure that we were explicit about our intentions and how we intended to work. If there are areas in relation to which the public needs more information, we will provide that.

Tom Nelson: From a forensic services perspective, I would say that we do not do enough communication. We could do an awful lot more. On our website, we have information in relation to DNA samples and hits, and we explain what DNA is. Quite a lot of work has gone into developing that. However, that approach needs to go wider. We hope to work with the commissioner to see how we can do more to increase that awareness on the part of the public, because it is crucial. If we lose public confidence, we lose everything.

John Finnie: I am sure that all the members of the committee want the police to be given all the tools that they need to protect the community. However, when we are dealing with legislation, it is important that it is robust and thoroughly scrutinised. Concerns have been raised about the use of some biometric technologies. With regard to live facial recognition technology, there are specific concerns about privacy and human rights issues, the accuracy of the technology and the potential for bias. How valid are those concerns?

Detective Chief Superintendent Scott: They are valid, and I think that they have been borne out. We are acutely aware that any progress in relation to live facial recognition technology needs to be appropriately considered. We are about to provide you with a fairly detailed response on the issue because there has been a separate request to Police Scotland for written evidence on that technology. That response is in the pipeline and it will be with you shortly.

At the moment, we have not been involved in any kind of live testing of or involvement in live facial recognition technology. However, through the media and other police forces, we understand that there are issues with the technology, such as the algorithms that it uses, and we need to get that absolutely right before we do anything with it in Police Scotland. We will go through the necessary governance in relation to ethical considerations and so on before we make any moves in that direction.

You alluded to the fact that the public expect us to use the best type of technology to keep them safe. Clearly, live facial recognition technology is

an area that we want to explore, but it will be done in a way that involves the appropriate measures and regulations.

Tom Nelson: We are looking at what has happened down south and we are learning lessons from that. As Sean Scott said, we need to understand and test the system before we would even consider using it in Scotland. Work has to be done around the validation of the technology and the algorithms that lie behind it. All of that can be tested by developing what is called a ground-truth database, which is in effect a database of known results against which a system can be tested. That is one way in which we can begin to understand how confident we can be in the system and what the limitations of the system are.

The Convener: That concludes our questioning. I thank both witnesses for attending. If any further questions come up in our scrutiny of the bill, we will write to you, and I hope that you will give us further answers. In the meantime, I thank you for a worthwhile session.

I will suspend the meeting briefly to allow for a change of witnesses and a five-minute comfort break.

11:01

Meeting suspended.

11:06

On resuming—

Subordinate Legislation

Victims and Witnesses (Scotland) Act 2014 (Supplementary Provision) Order 2019 [Draft]

Victim Surcharge (Scotland) Regulations 2019 [Draft]

The Convener: Item 3 is consideration of two affirmative instruments. I welcome the Cabinet Secretary for Justice, Humza Yousaf, and his officials from the Scottish Government: Zak Tuck, who is victims and witnesses team leader; Pam Stott, who is victims and witnesses policy adviser; and Craig McGuffie, who is director of legal services.

I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper. I invite the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Justice (Humza Yousaf): I thank the committee for inviting me to give evidence in support of the affirmative instruments that are needed to introduce the victim surcharge and the victim surcharge fund. First, I acknowledge that it has taken longer than anticipated to lay these instruments. The time taken has been necessary to ensure that the scheme is administratively efficient, legally competent and enforceable, and—important—that it will provide help to victims of crime at the point of need.

The work that was undertaken to get us to this point included seeking an order under the Scotland Act 1998 to enable recovery of the surcharge through a deduction from an offender's benefits. The order came into force in July this year, enabling us to lay these regulations now. We also had to address an issue whereby the surcharge could potentially have been interpreted as a fine. If we had left that matter unresolved, it could have resulted in the imposition of the surcharge being challenged—for example, where there are maximum fines in place for specific offences.

We are committed to putting victims at the heart of our justice system and making sure that their voices are heard. Building on the positive measures that were introduced through the Victims and Witnesses (Scotland) Act 2014, we have delivered a range of initiatives to support victims and witnesses. For example, we introduced the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, which ensures that

more child witnesses are able to pre-record evidence ahead of jury trials. We have also set up a dedicated task force, as the committee knows, to listen to victims' experiences, and we are investing in a new service to provide dedicated support for families that are bereaved by crime.

Over the past five years, we have invested more than £155 million to improve support for victims and their families and to provide compensation to victims who have sustained a criminal injury in Scotland. That includes funding for Victim Support Scotland's victims fund, which provides practical support to victims in the aftermath of crime.

With regard to the victim surcharge, we know that experiencing crime can be an isolating and frightening experience, and it is only right that criminals should pay towards helping victims to recover and move on with their lives. The instruments before the committee today will enable that to happen. The victim surcharge will be imposed on individuals who are sentenced to pay a court fine. The amount of surcharge imposed will be proportionate to the value of the fine. The surcharge will be collected by the courts in the same way as fines and compensation orders are collected, and transferred to the Scottish Government to be banked in the victim surcharge fund. As set out in the regulations, no awards will be made from the fund until after 25 May 2020, in order to allow time for money to accumulate.

Victim support organisations will be able to apply to the Government for a share of the fund to cover the costs of providing short-term and practical support such as new windows and locks for victims of housebreaking or funeral expenses for families of murder victims.

This model, whereby the Government administers the fund, will ensure that victim support organisations can focus on doing what they do best—supporting victims of crime in communities across Scotland. The model also ensures that victims can access quick support at the point of need from those best placed to help them.

In terms of likely income from the surcharge, we estimate that around £100,000 could be collected within the first 12 months of the surcharge being in operation. That could reach a steady state of around £800,000 per year after four to five years of operation.

The regulations also state that we will prepare and publish guidance for applicants on the operation of the fund, which will cover topics such as assessment criteria for awards and what the fund can and cannot be used for. This has been shared with victim support organisations, to seek their feedback and to ensure that the application

and award process is as efficient and effective as possible. That engagement will continue as we move towards finalising the document, which we will publish no later than May next year.

The support that will be provided through the victim surcharge fund will mean that victims and their families have one less thing to worry about at what is already a traumatic time. In supporting these regulations, the committee will ensure that the money raised through the surcharge can make a real difference to victims and their families. As always, I am happy to take questions.

The Convener: We will start with a question from Liam Kerr.

Liam Kerr: Cabinet secretary, can you tell us about the thinking around restricting the surcharge to those paying a court fine? I think that I heard you say that it is to do with the surcharge not being an extra penalty. Will you elaborate on that and on how the surcharge is calculated—the method behind it?

Humza Yousaf: Thank you for the question. First, we will continue to keep things under review. It is important that, not just when the surcharge has come into force but when the fund is distributing money, we should be open minded—and we will be open minded—about potential ways to improve, strengthen, widen and expand the process.

Secondly, the surcharge is attached to those who receive a court fine because the courts already have a mechanism in place to collect court fines and are very good at it; 88 per cent of fines are collected or part collected. There will be no discretion in that, so if someone receives a court fine, the victim surcharge comes on top of that.

Imposing an additional surcharge on top of a court fine should not be a hugely cumbersome process and the mechanisms are there to allow that to happen. If, for example, the surcharge was not related to offences that carry a court fine, the collection of the money would involve a whole new process, which could involve further delay. I reiterate that we should be open to any suggestions that are made. However, aligning the surcharge to court fines carried support in the consultation.

The second part of the question, if I understood it correctly, was about the amount that is payable. In the draft guidance, we consider how much the surcharge, which will be proportionate to the fine, will be. That work has been done on the back of the consultation that we had. I was discussing the matter with my officials before I came to the meeting. I mentioned in my opening statement that we have shared the draft guidance with victim support organisations and so on. I see no harm in sharing the draft guidance with the committee as

well, if the committee is interested in looking at it and giving us its thoughts.

The surcharge will be proportionate to the value of the fine. My officials might want to add something on the proportionality of the surcharge and issues to do with the level of the surcharge compared with the original fine.

Zak Tuck (Scottish Government): Part of the reason for going down that route was that we used the standard fine scale in Scotland and could map the surcharge on to that, to ensure that it would be proportionate. The committee might have noticed the change once we go above the statutory maximum fine: the surcharge is set at a percentage of the total fine rather than an amount, to ensure that when that high level of fine is reached, the proportionate approach is maintained.

Liam Kerr: Let us take that to the logical next step. Cabinet secretary, you said that 88 per cent of fines are collected, and we talk about the surcharge being “proportionate”. How do you envisage the courts dealing with the ability of a person to pay a financial penalty once the surcharge is introduced? That could obviously have an impact on the 88 per cent figure.

11:15

Humza Yousaf: It should not do. Part of the reason why we have aligned the amount to court fines is that the courts have a mechanism in place. Of course, we want that percentage to be even higher, and work is taking place around that.

The surcharge will not place an extra or significant burden on the courts in collecting court fines. The order that we required from the UK Government will, I hope, help with that, as it will mean that fines and surcharges can be directly collected from benefits, which is hugely important. That order, under section 104 of the Scotland Act 1998, means that we can make a deduction from an offender’s social security benefits. That existed for the victim surcharge in England and Wales, but it did not extend to the new victim surcharge in Scotland. The new order from the Westminster Government allows us to do that. I do not think that that will place an undue burden on the courts, and I expect collection rates to remain steady—indeed, I hope that they increase.

The Convener: In your opening remarks, you said that the Scottish Government would administer the system, rather than any victim support organisation, to allow those organisations to do what they do best. Will you outline in more detail what would be involved in the Scottish Government’s administration?

Humza Yousaf: The approach allows organisations to get on with doing the victim support element of their work. When we think about victim support, we often think about national organisations such as Victim Support Scotland—and I do not doubt that Victim Support will have an interest in the fund—but there might be a number of smaller organisations that do not have a huge amount of resource that they can divert to the administration of a fund. Victim Support Scotland is a relatively large organisation, but getting smaller organisations, particularly in more rural locations, to divert resource into the administration of a fund would not be the best use of that resource. That is why the Scottish Government will step in.

To answer your question a bit more directly, the approach will allow for Scottish Government oversight of the fund. We disburse a number of funds under a number of Government portfolios, so we have a robust application process.

The Convener: May I stop you there? You are answering the question that is on my printed sheet, but not the question that I asked you. I asked whether you could outline exactly what would be involved in the Scottish Government administering the fund. There is obviously a cost: perhaps that cost can be broken down into its component parts.

Humza Yousaf: For organisations that make applications to the fund, up to 5 per cent of their application can be for the costs that might fall to them for their part of the administration of the fund.

Let me see whether the details of the costs to the Scottish Government are in the business and regulatory impact assessment—the BRIA. I am sure that they will be there. I do not see it as being overly burdensome for us to administer the fund. Victims organisations can apply to the fund.

I have now found some of the costs involved, as set out in the BRIA. For the Scottish Government:

“There would be a cost associated with fulfilling the role of operator of the VSF ... Recurring costs—We estimate this cost will be approximately £26,000 per annum and will be recouped from the VSF as an outlay occurred in administration in terms of section 253G(4)(d) of the 1995 Act.”

There will also be an estimated cost to the Scottish Courts and Tribunals Service, some non-recurring costs and some recurring annual costs. That is all laid out in the BRIA.

The Convener: According to the BRIA, the role of operator

“would require staff time to account for funds received from SCTS, processing of applications from VSOs for payment from the VSF, record keeping, oversight and reporting.”

Who in the Scottish Government will do that?

Humza Yousaf: I do not think that I can give you a name.

The Convener: Will there be ministerial input or will it be regulated purely by the civil service?

Humza Yousaf: As the guardians of public money, ministers always have to sign off applications. However, applications go through a rigorous process first; ministers sign them off at the final stage. Perhaps Zak Tuck can provide a bit more detail.

Zak Tuck: My team—the victims and witnesses policy team in the Scottish Government’s criminal justice division—will administer the fund. We will open up the fund to applications from victim support organisations. They will have to fill in an application form, which we will assess, as we do currently with applications for grant funding. There will be criteria for organisations to meet and they will need to demonstrate that they have a track record of supporting victims of crime. There will also be the usual due diligence and finance checks. If organisations satisfy the process, we will move to recommending that they are given a share of the victim surcharge fund, which they can use as they see fit to support victims.

At the stage of us having done our official assessment, a paper outlining our recommendations on how we disburse the funding will normally then go to the cabinet secretary. That process will be open and transparent, and it will be in the guidance, which will be shared by the end of May 2020.

The Convener: Officially, the Scottish Courts and Tribunals Service will have a key role to play and the Scottish Government will liaise with it. SCTS has said that the set-up costs will include those of the case management system and that progress is being made on that. Will you update the committee on progress? Is it reliant on information technology being improved or replaced?

Zak Tuck: We do not have anyone from the courts service here today, but my understanding is that the SCTS needs to make some changes to its database and fine-collection processes. At the moment, it does not collect the surcharge, so a new process is needed to enable that to happen. SCTS has estimated that there will be a one-off set-up cost of £22,000.

In its submission to the committee, SCTS has confirmed that all will be in place for 25 November, which is the coming-into-force date. It has also flagged up recurring costs from the additional time that it will take the courts to impose the surcharge on people. It has estimated that that will take one minute per case, which works out at about £135,000 per year. That funding will not come from the victim surcharge fund, so we will be

looking for a separate income stream to cover those costs for the courts.

The Convener: You mentioned that there is no one here from the SCTS. As part of the administration, Scottish Government staff time will be required to receive the funds from SCTS and, to avoid any hitches, I imagine that you are keen to have an indication that the SCTS case management system is progressing, even at this stage. After all, we are talking about the roll-out of the collection of the surcharge in November. It would be helpful if you could provide an update, perhaps in other evidence, on exactly where we are with that, because it seems key to the whole process.

Before I move on, will VSS and other organisations be allowed to keep any unused surplus to use as and when they need it? They are keen to know.

Humza Yousaf: I have not looked at that issue in great detail and I need to look at whether, accounting-wise, that could be done or whether the funds would have to come back to the general pot and organisations would have to reapply. However, as the money is there for a set purpose, I am happy to explore whether it could be kept by victims organisations for that purpose. For transparency's sake, if nothing else, I will have to go back and speak to finance officials about whether the various regulations would allow that.

The Convener: That would be helpful, as organisations were keen to know whether they could bank those funds and use them as and when required.

James Kelly: Cabinet secretary, in your opening statement you said that support for victims should be at the heart of the justice system, which I agree is absolutely correct. Will you explain, then, why provision has not been made to allow victims to apply directly to the fund?

Humza Yousaf: The proposals that we have set out would offer a much quicker—and, frankly, easier—way for victims to apply to the fund, as opposed to the Government disbursing funds directly to them. I respect your reason for asking the question—there is a legitimate argument to be made for the view that you express—but I think that direct application to the fund would potentially take longer for victims of crime.

The Government's alternative suggestion is that a pot of money should go to organisations such as VSS, which work with victims day in and day out, know their circumstances really well and are able to make decisions on a quick turnaround—perhaps within 48 hours. That would allow money to be got to victims—for example, to pay invoices for fixing broken locks or even for funeral expenses—within a very short timeframe.

Of course, the Government does not necessarily have a direct relationship with victims of crime, therefore if it were to administer the fund it would have to undertake a rigorous due diligence process, which would have to be done centrally. That would add time to the process, which would not be good for victims. I respect your very legitimate reason for asking your question, but our proposed approach will see victims benefit in a much shorter timescale.

James Kelly: Just to be clear, if a victim wanted to make an application, would they have to apply to a victim support organisation, or would such an organisation apply to the fund on the victim's behalf?

Humza Yousaf: Twice a year, the fund will be open for victim support organisations to make bids. Once those applications for funding have been granted, victims will approach such organisations, which will have pots of money sitting there, open for victims' applications. Our current thinking—of course, the guidance is currently in draft form—is that the process will open twice a year, but we will keep that under review. Therefore it is proposed that victim support organisations will have pots of money made available to them and victims will then approach such organisations.

James Kelly: So a victim support organisation will have a pot of money and a victim will make their application to such an organisation, which will sign it off and authorise the money to go to the victim.

Humza Yousaf: Yes, that is correct.

James Kelly: Will you give examples of victim support organisations that will be able to administer the pots of funds that you have described?

Humza Yousaf: We will try to make the criteria as wide as possible. At the same time, we must undertake a fair degree of due diligence, as the committee would expect us to do.

Again, the matter will be covered in the draft guidance, which I will share with the committee, through the convener. However, I can say that, for example, we would want such organisations to have a track record of providing services to victims of crime, or providing treatment that is intended to benefit their physical or mental wellbeing, over at least a two-year period. We would also want to look at an organisation's aims and objectives, to see that it had a clear focus on providing support to victims. We are also considering asking questions about the approximate number of victims that an organisation might help, the geographical area that it might cover and so on.

We are trying to make the process as open as possible, so that organisations that are distinct from those that are set up purely for victim support may apply. I will give an example: a number of racial equality councils across the country do a plethora of work, across a range of issues, some of which might involve supporting victims of crime who are from ethnic minority backgrounds, who might not normally go to other services. Such organisations are not set up specifically for such work but have a proven track record of helping victims of crime. In such cases, the victims are from ethnic minorities, but the same might be said of many other organisations in relation to other protected characteristics.

We are trying to make the criteria as wide as possible, while ensuring that the obvious due diligence processes that would be expected of the Government are carried out.

James Kelly: Okay, thank you.

Jenny Gilruth: I would like to flip James Kelly's question around and ask the cabinet secretary to give examples of organisations that might not qualify for the fund, although I am not sure whether he will be able to do so today. For example, might the Miscarriages of Justice Organisation Scotland not qualify—or are you unable to provide such detail at this time?

11:30

Humza Yousaf: We would not want to prejudge applications. Jenny Gilruth mentioned the Miscarriages of Justice Organisation. I have met the organisation a couple of times and know it well. Members will know that Willie Rennie is a director of the organisation, and I have met him on occasion to discuss the good work that it does.

I am not sure that we could say that MOJO helps victims of crime. It helps victims of miscarriages of justice, but I am not entirely sure that that would fall under the criteria in the draft guidelines, although we are trying to design those criteria to be as open as possible.

We are talking about victims of crime, and the surcharge comes from offenders who have had a court fine imposed on them because they have committed a crime that had a victim at the other end of it. I am not focusing on MOJO, but the help would have to be specifically for victims of crime.

John Finnie: In your opening statement, you said that you would be happy to share the draft guidance. Can you give an outline of what might be covered, and what might not be covered, in relation to the counselling of victims in particular? Do you imagine that financial support would be provided for that?

Humza Yousaf: I will give a bit more detail on the guidance and would welcome feedback from members of the committee. Counselling is the exact type of support that could be covered.

I am talking about making the victim surcharge as open as possible, but the one caveat to that is, if there are other funds that are legally obligated to assist victims of crime, a victim should go to those funds first. If they are not covered, the victim surcharge should then come in and be able to help. That means that the victim surcharge is not just plugging a gap that home insurance or the Department for Work and Pensions should cover. For example, broken locks in a housing association property should be the responsibility of the housing association and the victim surcharge should not fill that gap; it should cover genuine gaps.

The member will be aware that we have funeral grants and so on—other funds exist. The one caveat is, where there is a legal obligation on another institution or organisation, that should be the first port of call.

I am almost going to contradict myself now. The victim surcharge could be disbursed relatively quickly. A victims organisation could do that within 48 hours, whereas a housing association, for example, might take longer to fix a lock. In such cases, we would have to be open and flexible.

John Finnie: What you said about counselling is reassuring. I imagine that there is an obligation on the national health service to provide that. How does that square up?

Humza Yousaf: I am not sure that there is a statutory obligation on the NHS to provide counselling for victims of crime per se. People can be referred by their general practitioner after a particularly traumatic crime.

I worked for the late Bashir Ahmad. When he was an MSP, he was the victim of a mugging, which had a profound effect on him. It was a relatively low-level offence—he was not too badly injured, thankfully, and they did not get too much off him—although I know that these things are all relative. You would not necessarily get NHS counselling for that, but I know that it shook Bashir at the time. Something like that might be traumatic for an individual and they might want to speak to somebody about it.

Where the NHS might not be able to offer counselling—it might take a while because there is a waiting list and other priorities, for example—it would be possible for the victim surcharge fund to cover that.

I am trying to be as open as I can be with the member. We are genuinely looking to ensure that we are not restrictive with the fund, but where

there is a legal obligation on others to provide assistance in emergency situations, victims should go there first. The money from the surcharge should be used as widely as possible to fill some gaps.

Shona Robison: In your opening statement, you talked about the estimate of how much will be in the fund—I think that you said that it would be £800,000 a year after four or five years. I want a bit more information on that estimate. Is it based on full recovery, or does it take into account non-payment of some of the penalties, for example? Obviously, non-payment will impact on the level of the fund, so it would be useful to know what the estimate is based on. Is it based on actual payments made? That is, if the fund is £800,000 per year after four or five years, do you expect all that money to go out each year, or would that sum be a running total? When do you expect the first payments to be made?

Humza Yousaf: Thank you for those questions. It is important to put on the record that the figures are estimates. They are not absolutely scientific but based on the current collection rates. The member will be aware that currently we have not only court fines but compensation orders. The estimate is therefore based on the collection rate, which is relatively high, as I said in answer to Liam Kerr. The rate is about 88 per cent at present, but we obviously want it to be higher.

We estimate that there will be £800,000 in the fund after four or five years and we would expect that money to be fully disbursed to organisations. However, that depends on the level of applications that come to us. If the applications were not at the expected level, we would not disburse it all. However, I do not expect there to be any difficulty with organisations coming forward for the amount that we will have.

Forgive me, but what was your last question?

Shona Robison: It was about how quickly the first payments will go out.

Humza Yousaf: The plan is to allow six months for the money to accumulate. We expect the first payments to be made six months from the fund coming into operation, which we expect to happen in late spring or early summer next year.

Shona Robison: Mr Tuck referred earlier to costs. I presume that the estimate for the fund takes into account the fact that costs will have been covered. The sum of £135,000 for the SCTS was mentioned, with the indication that a separate income stream would cover that, which would not come from the surcharge. What is that separate income stream?

Zak Tuck: It will be Scottish Government funding. Rather than taking the money from the

surcharge fund, whose purpose is obviously to benefit victims, it would come from other, separate core grant funding.

Shona Robison: Okay. So any money raised from the surcharge would go out to victims.

Humza Yousaf: Yes.

Rona Mackay: I was going to ask about the effect on the administration requirements of victim support organisations, but that point was covered in an answer to an earlier question. I am aware that the surcharge fund is part of a much wider programme of support for victims of crime. Are there any precedents for such a fund? Does any other country do it?

Humza Yousaf: Yes. England and Wales have a surcharge fund, and there are examples in other countries. The point is that it is just one tool in a suite of measures that we have to bring forward. We have brought in a number of positive changes to how victims are treated, which I think has been recognised—the committee has played an important role in that in terms of legislation. We know from victims that the victim surcharge fund will go a long way towards addressing the practical impacts that they have to deal with, particularly for some of the most heinous crimes that are committed. For example, in relation to the homicide statistics that have come out today, the families of those victims should not have to worry about funeral costs on top of the grief and trauma that they are already dealing with. The surcharge fund will be an important tool in our support for victims, although, as I said, it is just one tool in a suite of measures that we are looking to bring forward.

Rona Mackay: I am sure that it is a very welcome one.

Fulton MacGregor: Good morning, cabinet secretary. We know that rates and types of offending can be different in different places, so how will the Scottish Government ensure that communities across the country can benefit from the fund?

Humza Yousaf: That is an important point. Frankly, the only way to do that is to monitor the situation. In the draft guidance—I will, of course, share it—we ask what geographical areas organisations provide support to. That will allow us to monitor which geographies are covered. Some national organisations such as Victim Support Scotland will have an interest. I have known VSS since before I became cabinet secretary, and I have been to its volunteers conference, so I know that it covers a wide geographical area.

We are well aware of and will keep a close eye on the geographical element. For example, a victim of crime in an island community will incur

certain expenses and costs that would not be faced if they were in Glasgow or any other city on the mainland. We will monitor the situation closely and, if geographic gaps exist, we will have conversations with organisations in those areas to see whether we can encourage them to apply to the fund.

Fulton MacGregor: Has the Government done any analysis of the potential impact on sentencing of the introduction of the surcharge, given the restorative nature of the measure? [*Interruption.*] I am sorry—I have the cold that has been round my whole family. Has there been any analysis of its potential impact in relation to sheriffs who might be thinking of giving out a community disposal? Might there even be an impact on custodial sentences?

Humza Yousaf: There is nothing in the modelling work that we have done to suggest that it would shift the sentencing behaviour of sheriffs or judges. Members will be aware that things such as compensation orders already exist, and I have seen no suggestion that that there would be a shift in sentencing behaviour—perhaps officials will tell me otherwise. Remember that the measure relates to court fines, which can also be applied to community payback orders and the like. I do not see there being any particular shift, but I understand the logic behind the question. Are officials aware of anything that would affect shrieval behaviour?

Zak Tuck: No, but it is something that we will monitor and keep an eye on.

The Convener: Given that there may be some concerns about the geographical spread of the fund, might the Government consider relinquishing its administrative role to an organisation such as VSS, once the process is up and running and you are satisfied that it is working properly?

Humza Yousaf: We always keep things under review, but I am keen that victims organisations—even an organisation of the size and scale of VSS, which is capable of administering and running funds—should concentrate on the support element. Also, although I expect VSS to be around for a long time and we are happy to support and fund it for a variety of different projects, organisations can come and go and we want to make sure that funds such as the victim surcharge fund have stability, which is so crucial and important for victims.

I am not ruling out the convener's suggestion. When we review any fund, we should always be open minded so that we ensure that we are getting the best out of it. However, I do not envisage the position changing in the near future.

11:45

The Convener: Agenda item 4 is formal consideration of the motion in relation to the draft Victims and Witnesses (Scotland) Act 2014 (Supplementary Provision) Order 2019. The Delegated Powers and Law Reform Committee has considered and reported on the draft order and had no comment on it.

Motion moved,

That the Justice Committee recommends that the Victims and Witnesses (Scotland) Act 2014 (Supplementary Provision) Order 2019 [draft] be approved.—[*Humza Yousaf*].

Motion agreed to.

The Convener: Agenda item 5 is formal consideration of the motion on the draft Victim Surcharge (Scotland) Regulations 2019. The Delegated Powers and Law Reform Committee has considered and reported on the draft order and had no comment on it.

Motion moved,

That the Justice Committee recommends that the Victim Surcharge (Scotland) Regulations 2019 [draft] be approved.—[*Humza Yousaf*].

Motion agreed to.

The Convener: That concludes our consideration of these affirmative instruments. The committee's report will note and confirm the outcome of the debate. Is the committee agreed to delegate authority to me as convener to clear the final draft of the report?

Members indicated agreement.

The Convener: I thank the cabinet secretary and his officials for attending the committee.

11:47

Meeting suspended.

11:47

On resuming—

Proceeds of Crime Act 2002 (Investigations: Code of Practice) (Scotland) Order 2019 [Draft]

The Convener: Agenda item 6 is consideration of a further affirmative instrument. I welcome back Humza Yousaf, Cabinet Secretary for Justice and his officials from the Scottish Government: Alan Nicholson, who is proceeds of crime policy adviser; and Isobel Joiner, who is from the directorate for legal services. I refer members to paper 5, which is a note by the clerk, and I invite the cabinet secretary to make a short opening statement on the instrument.

Humza Yousaf: Thank you, convener, for giving me the opportunity to speak briefly on the draft order.

Section 410 of the Proceeds of Crime Act 2002 requires Scottish ministers to prepare, consult on and publish a code of practice on the functions of the proper person. A “proper person” is defined in section 412 of POCA as: a constable, an officer of Her Majesty’s Revenue and Customs or an immigration officer, in relation to a confiscation or money laundering investigation; or the Scottish ministers or a person named by them, in relation to a civil recovery, detained cash, detained property or frozen fund investigation.

The order proposes to bring into operation a revised code of practice for the exercise by proper persons in Scotland of the investigative functions conferred on them by sections 380, 382, 387, 397 and 404 of POCA. Those sections provide, respectively, for the exercising of orders and warrants in relation to: production orders; orders to grant entry; search warrants; customer information orders; and account monitoring orders.

Those orders and warrants allow the proper person to require an individual or company to provide information that is of significant value to an investigation, or indeed to search for such information. The powers allow the proper person to fully exercise their functions under chapter 3 of part 8 of POCA.

A code of practice has been in operation for 16 years and was last revised in 2009. Although there has been no material change to the legislation that would require a re-issue of the code, we have taken the opportunity to strengthen the code, which makes more comprehensive and enhanced guidance available to proper persons.

The revisions simply include more detailed guidance on each of the individual orders, including procedures for serving orders and the copying and retention of materials. The new code also includes more thorough advice to proper persons on legal privilege and on the statutory requirements for customer information orders and account monitoring orders.

The revisions provide additional guidance for practitioners on how to comply with the requirements in exercising their functions under the 2002 act lawfully, proportionately and consistently. In turn, that will provide the public with confidence that the exercise of those functions is carried out fairly and with integrity and respect. As ever, I am happy to answer any questions that members may have.

The Convener: Members have no questions for the cabinet secretary, so we will move on to agenda item 7, which is formal consideration of the motion on the instrument. The Delegated

Powers and Law Reform Committee has considered and reported on the instrument and had no comment on it.

Motion moved,

That the Justice Committee recommends that the Proceeds of Crime Act 2002 (Investigations: Code of Practice) (Scotland) Order 2019 [draft] be approved.—
[Humza Yousaf]

Motion agreed to.

The Convener: That concludes our consideration of the instrument. The committee’s report will note and confirm the outcome of the debate. Is the committee agreed to delegate authority to me as convener to clear the final draft of the report?

Members indicated agreement.

The Convener: I thank the cabinet secretary and his officials for attending the committee.

11:52

Meeting suspended.

11:53

On resuming—

Enforcement of Fines (Relevant Penalty) (Scotland) Order 2019 SSI 2019/280

Victim Surcharge Fund (Prescribed Relatives) (Scotland) Regulations 2019 SSI 2019/282

The Convener: Agenda item 8 is consideration of two negative instruments. I refer members to paper 6, which is a note by the clerk. The Delegated Powers and Law Reform Committee has considered and reported on the instruments and had no comments on them. Is the committee agreed that it does not wish to make any recommendations in relation to the instruments?

Members indicated agreement.

Sentencing (Pre-Consolidation Amendments) Bill and Domestic Abuse Bill

The Convener: Agenda item 9 is consideration of two legislative consent memorandums relating to the Sentencing (Pre-consolidation Amendments) Bill and the Domestic Abuse Bill, which are currently before the UK Parliament. The bills touch on devolved matters and the Scottish Government is recommending that the Scottish Parliament gives its consent to the UK Parliament to make the relevant provisions in the bills. I refer members to paper 7, which is a note by the clerk.

Are members agreed that the Scottish Parliament should give its consent to the relevant provisions in the Sentencing (Pre-consolidation Amendments) Bill?

Members *indicated agreement.*

The Convener: Are members agreed that the Scottish Parliament should give its consent to the relevant provisions in the Domestic Abuse Bill?

Members *indicated agreement.*

The Convener: That concludes the public part of today's meeting. Our next meeting will be on Tuesday 12 November, when we will hear closing evidence from the cabinet secretary on the Scottish Biometrics Commissioner Bill.

11:54

Meeting continued in private until 12:14.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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