



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 19 February 2019**

**Session 5**



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Pàrlamaid na h-Alba

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**JUSTICE COMMITTEE**  
**6<sup>th</sup> 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)
- \*Daniel Johnson (Edinburgh Southern) (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:**

Ash Denham (Minister for Community Safety)  
Philip Lamont (Scottish Government)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



## Scottish Parliament

### Justice Committee

*Tuesday 19 February 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 Justice Committee's sixth meeting in 2019. We have no apologies. Agenda item 1 is a decision on taking business in private. Are members content to take in private item 6, which is on the committee's work programme?

**Members** *indicated agreement.*

## Subordinate Legislation

### Sheriff Court Simple Procedure (Limits on Award of Expenses) Amendment Order 2019 [Draft]

10:00

**The Convener:** Agenda item 2 is an evidence session on an affirmative instrument. I welcome Ash Denham, the Minister for Community Safety, and her officials from the Scottish Government, who are Walter Drummond-Murray, courts and tribunals policy officer, and Samantha Rore from the directorate of legal services. This item is a chance for members to put questions to the minister and her officials to seek clarification on the instrument before we formally dispose of it. I refer members to paper 1, which is a note by the clerk.

Minister, do you wish to make an opening statement?

**The Minister for Community Safety (Ash Denham):** I have a very brief one, if that is okay.

The expenses order that has been laid supports the operation of the new simple procedure, which was partially introduced on 28 November 2016. For low-value claims, it has been recognised that the cost of obtaining legal representation will often be disproportionate to the sum sued for and that it is therefore unreasonable to expose litigants in those types of low-value cases to uncertain expenses in the event that they are the unsuccessful party. Therefore, for cases with a value of under £3,000, the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 restricted the recoverability of expenses in small claims by reference to the monetary value of the claim.

The 2019 order that has been laid makes minor amendments to the 2016 order so that, for claims with a value of under £300, no claim for expenses can be made, which is a small change from the current level of £200. The rationale for the change is to ensure continuing alignment with the court fees system, which, from 1 April 2019, will be amended to increase from £200 to £300 the level of claim that attracts the minimal court fee of £19. The committee will recall considering the relevant sheriff court fees order at around this time last year. The intention of the alignment is to ensure that low-value litigation is not rendered prohibitive either by the court fee or by the possibility of an award of expenses.

**The Convener:** Do members have any questions or comments?

**Liam Kerr (North East Scotland) (Con):** Just briefly, for interest, where did the figure of £300 come from? I know that it has been aligned with the court fee system, but why has the figure been changed from £200 to £300?

**Ash Denham:** The simple procedure is meant to be much easier for people. We thought that we would raise the figure slightly to bring it into line and make it more appropriate.

**The Convener:** As there are no more questions, we will move on to agenda item 3, 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 has no comments on it. I ask the minister to move motion S5M-15526.

*Motion moved,*

That the Justice Committee recommends that the Sheriff Court Simple Procedure (Limits on Award of Expenses) Amendment Order 2019 [draft] be approved.—[Ash Denham]

*Motion agreed to.*

**The Convener:** That concludes consideration of the instrument. The committee's report will note and confirm the outcome of the debate. Are members content to delegate authority to me, as convener, to clear the final draft report?

**Members indicated agreement.**

**The Convener:** I suspend the meeting briefly to allow the officials supporting the minister to change over.

10:04

*Meeting suspended.*

10:04

*On resuming—*

### **Drug Driving (Specified Limits) (Scotland) Regulations 2019 [Draft]**

**The Convener:** Agenda item 4 is an evidence session on an affirmative instrument. For this item, the minister is joined by Philip Lamont from the criminal justice division and Louise Miller from the directorate for legal services. Again, members have the chance to put to the minister and her officials any points of clarification that they seek on the instrument before we formally dispose of it. I refer members to paper 2, which is a note by the clerk, and paper 3, which is a private paper. I invite the minister to make an opening statement.

**Ash Denham:** The drug-driving regulations that the committee is considering are an important step forward in seeking to improve road safety in Scotland. The regulations provide for the different

drug types that will be included in the new offence and the limits associated with each of those drug types. The approach adopted with the regulations follows consideration of the Scottish results of a United Kingdom-wide consultation that found general support for the limits proposed.

The implementation of the new offence will have an impact on various agencies within our justice system, including Police Scotland and the Scottish Police Authority. In particular, the Scottish Police Authority will be required to provide forensic testing of blood taken from those suspected of committing the new offence to assess what drug types are in a person's blood and at what levels.

As part of consideration of what drug types should be included in the new offence, the Scottish Police Authority carried out an analysis of what drug types were identified among drivers caught over the six-month period from July to December 2017 under the existing offence of driving while impaired through drugs. That analysis revealed that, of the 261 drug-driving impairment cases in that period, just over half, at 51 per cent, involved cannabis; just less than half, at 49 per cent, involved diazepam; and just over a quarter, at 28 per cent, involved cocaine. Those drug types are included in the 17 drug types covered by the new offence.

Overall, 95 per cent of the impairment cases revealed the presence of at least one of the drug types included in the new offence. In each of those cases, the drug type included in the new offence was either the only drug type identified or was identified in combination with other drug types, including drug types not included in the new offence.

The analysis suggests that the list of 17 drug types provided for in the new offence provides very good coverage of the drug types most commonly used in Scotland by those currently being caught driving while impaired through drugs. Although 95 per cent of all cases tested contained at least one drug type included in the new offence, it should be noted that only 43 per cent of samples had one or more drug type included in the new offence that was over the limit associated with each drug type. That indicates that there will be a continuing need to consider prosecution for drivers who have drugs in their system under the existing offence of driving while impaired through drugs in certain cases. That offence is, of course, unaffected by these regulations.

The analysis also reveals the extent of polydrug use in Scotland, with approximately 45 per cent of all impairment offences showing four or more drug types in a person's system. That clearly suggests that, where a drug type may have been taken that is not on the list of 17, it has very often been taken in combination with a drug that is on the list. That

means that it would be caught by the new offence if the limit was exceeded for the drug type in question. On that basis and following consideration of the Scottish views offered to the 2013 consultation, we consider it appropriate to proceed with the introduction of the limits in Scotland based on the 17 drug types and associated limits already used in England and Wales.

If Parliament approves the regulations, Scotland will have the toughest criminal law approach on drink and drug driving in the UK, with the lowest drink-driving limit as well as robust drug-driving limits through the new offence. We hope that the new offence will act as a clear deterrent for those who may wish to take drugs and drive.

I am happy to take any questions.

**The Convener:** Given the concern and dissatisfaction about the use of a device south of the border that could identify only two types of drug, as opposed to one that could detect all the banned drugs, has any consideration been given to the type of device that the Scottish Government is thinking of deploying?

**Ash Denham:** The committee will be aware of the testing device that is currently used at the roadside in England and Wales and will understand that the decision on the type of device that is used is ultimately an operational decision for Police Scotland. However, it is safe to say that it is likely that the device used in England and Wales, or something very similar to it, will be used in Scotland. My official may want to add something.

**Philip Lamont (Scottish Government):** In terms of the capability to detect other drug types using screening devices, to a certain extent we are reliant on the UK Government. Such devices need to be what is called "type approved", and only one device is type approved for cannabis and cocaine. Type approval is a means of ensuring the validity and robustness of the testing procedure. Police Scotland and police forces in England and Wales would not want to use any devices that are not type approved. Therefore, the UK Government would need to type approve other devices, and no other devices currently have that status.

**The Convener:** Does that severely limit the number of people who might be established as being under the influence of the 17 or so drugs that have been identified? Initially, will it be a phased approach that is gradually brought in with the hope of increasing the number of drug types that will be detected?

**Philip Lamont:** To explain, roadside devices detect cannabis and cocaine, but the forensic testing that is done by the Scottish Police Authority that produces the evidence that is used in criminal

cases is separate and will cover all 17 drug types. Police Scotland's devices are based on cannabis and cocaine. It is matter for the police, but officers are likely to continue to use field impairment tests to detect whether somebody has taken drugs and, if they have sufficient suspicions, to take that person back to the police station, where a blood test will be taken and a full analysis will be done of that person's blood. That is the evidence that is used in court and that process is capable of assessing for all 17 drug types.

**The Convener:** That is helpful.

**John Finnie (Highlands and Islands) (Green):** I am pleased that the minister referred to the existing long-standing legislation on impairment through drink or drugs. Our briefing refers to the fact, which the minister mentioned, that 95 per cent of impairment cases revealed the presence of at least one of the drug types but

"that only 43% of samples had one or more drug type included within the new offence that was over limit associated with each drug type."

The briefing notes that, as the minister said, that indicates a "continuing need" to consider prosecution under the existing offence. How does that happen? There is a lot of case law in this area. For example, in a case in which a driver is tested after being stopped in a line of vehicles, not because they seem to be impaired, how do you go from one to the other? Will there not be difficulties with that? If the rationale for undertaking the test in the first place is not the belief that the driver's ability to drive is impaired through the consumption of drugs, and the level of drugs present does not exceed the limit, how then do you move to the fall-back position?

**Philip Lamont:** First, as you say, the police cannot just stop someone and test them; there has to be a reason. A driver may have been involved in an accident or the police may receive a report that someone has been driving after taking drugs or has been driving in an erratic way. Once the police stop the driver and do the field impairment test, there may be enough evidence or suspicion to take them back to the police station and go through a formal procedure to authorise a blood test.

The police might see drugs in a person's car, which will lead to a suspicion that that person has taken drugs and then driven. The roadside screening devices for cannabis and cocaine are relevant only for those two drugs, but there will be other reasons why the police might suspect that someone has taken drugs and driven and, if there is evidence for that, they can take them back to the police station for a blood test, which is the crucial evidence that will be used in a criminal case. To be clear, the roadside screening devices are not used as evidence but are used to confirm

suspicion about cannabis or cocaine use to allow the police to take someone back to the station. It is true that it makes it easier to detect cannabis and cocaine use, rather than the use of other types of drugs, but the devices are not the only way in which someone can be taken back to a police station.

10:15

**Ash Denham:** It is an additional offence that should help the police. It should be easier to bring prosecutions, because the police will not need to prove the level of impairment.

**John Finnie:** Are you content that new psychoactive substances will be picked up in the regulations or other legislation? Was consideration given, at any time, to enable the police to stop anyone at random?

**Ash Denham:** As is the case with any type of legislation, we will keep it fully under review and consider all the evidence. We will then be able to either extend the types of drugs on the list or adjust the limits at which the drug types are set. If at any time we feel that the evidence suggests that those changes need to be made, we can do that through secondary legislation.

**John Finnie:** What about the question of the police being able to stop anyone at random?

**Ash Denham:** The police will still have to have a reason to stop someone.

**Philip Lamont:** It might help if I clarify that the law in this area is reserved. What has been devolved is simply the ability to set the limits and specify the drug types. The alcohol limit was also devolved, so the Scottish Parliament can set it. All the other powers in this area are reserved, so it would be for Westminster to decide whether that approach was appropriate.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** To follow on from John Finnie's question, are psychoactive drugs on the list at the moment?

**Philip Lamont:** They are not on the list.

**Liam McArthur (Orkney Islands) (LD):** I, too, wanted to follow up that point. The Royal Pharmaceutical Society's evidence drew our attention to the absence of new psychoactive substances from the list. Given the rate at which those drugs reformulate, I suspect that it would be difficult to write them into legislation. I was slightly surprised that the breakdown of the drugs that have been taken in cases where individuals have been stopped did not include a substantial proportion of so-called legal highs. To what extent has that been factored into the workings around how the changes to the regulations are expected to bite?

**Ash Denham:** The list extends to the 17 drugs that it does because of the research and analysis that has been done. The legislation has been working in England and Wales for several years now and we have been able to consider any lessons that have been learned. The legislation seems to have been working quite effectively south of the border. It is obviously quite complicated for the lab to test forensically for the 17 drug types. However, these 17 types give us a very broad coverage of 95 per cent, which is the most important thing to note. We could extend the list and add any kind of drug that we wanted to, but every time we add an extra drug, it increases complexity. My official can explain that point further, if Mr McArthur would like.

**Liam McArthur:** When he does, perhaps Mr Lamont can tell us what the lessons from England and Wales have been in relation to the treatment of legal highs. We are told that, in a certain demographic, the problem of legal highs is growing exponentially. I assume that we would see that played out in the evidence that is emerging from England and Wales.

**Philip Lamont:** The figure of 95 per cent for the coverage of the 17 drug types relates to the existing sample of people caught driving while impaired; that is a very high number. Some of those people will have taken the new psychoactive substances, and that is something that will be kept under review. We will continue to work with the Scottish Police Authority to analyse the data on the results of testing to see the prevalence of substances that are not on the list, so that we can keep under review whether they should be added. We are satisfied that the 95 per cent figure is robust.

**Liam McArthur:** I will move on to the issue of public awareness. Awareness raising will be needed for those who take prescribed medicines that are listed here and for those who prescribe or administer them. The Royal Pharmaceutical Society and others who have given evidence have pointed to the need for a wider public awareness campaign. Can you outline the steps that the Government will take—directly or through agencies—to raise public awareness about the changes that are being introduced?

**Ash Denham:** You are right to say that there is a role for medical professionals and pharmacists in making sure that people have the correct information. Those who are on prescribed medications will be able to rely on the medical defence, as long as they have complied with instructions that are given to them by their medical professional. For that reason, we will make sure that bespoke information and advice about the change in the law and about the operation of medical defence is made available to all medical



practitioners, including pharmacists. It is not intended that the information will change any medical decisions about the treatment of a patient, but we want to make sure that people are aware of how the change will affect them.

On a wider note, we want awareness to be raised because we want to change people's behaviour—that is why we want to create this offence. We want the roads to be safer and we do not want people to drive cars when they are impaired by alcohol or drugs. We will undertake an awareness-raising campaign to make sure that people are fully aware of the change in the law, and we hope that it will help to change their behaviour. We are looking into that at the moment; it will involve social media, but the shape of the campaign has not been finalised—that will be done in the next few weeks.

**Liam McArthur:** Has an assessment been made, possibly based on what has happened in England and Wales, of the risk of people who are on prescription medications not taking medication that they should take for fear of falling foul of these laws?

**Ash Denham:** That is why it is very important that everyone has the correct information. The change in the law should not make any difference. If a medical professional has prescribed a medication for a person and told them that they are fine to drive if they take it appropriately, they are fine to continue to do so. For some medicines, a doctor will say that a person is not safe to drive while taking that medicine. People will need to comply with the instructions that they are given by their medical professional. If they do that, they will be fine and will be in accordance with the law.

**Liam McArthur:** Has that issue emerged in the experience of England and Wales? Has it been managed reasonably effectively?

**Philip Lamont:** I am not aware that that has been a major issue. There may have been the odd case in which someone was confused, but it has not come out as a major issue.

**Daniel Johnson (Edinburgh Southern) (Lab):** I will follow up those points. I declare an interest: I take a controlled drug, methylphenidate, which is prescribed as a result of my attention deficit hyperactivity disorder diagnosis. What will people have that they can rely on? Will they be required to be fully aware of the small print that comes with their medication? The minister is correct when she says that medical advice should be clear to people, but how will she make sure that people are aware whether they are safe to drive? The flip side is that people may worry that they may be in breach of the law when they do not need to worry, because the drug that they take is not on the list or

because they are well within the safe limits, based on medical advice.

**Ash Denham:** That issue is part of the wider awareness-raising campaign. As I have said, updated guidance to medical professionals and pharmacists will ensure that they advise their patients correctly. However, it is people's duty to make sure that they are not impaired if they consume medicines. If they feel that they are impaired, they should not drive. If people take medication in the appropriate dosage in line with a medical practitioner's advice, they should be in accordance with the law at that point.

**Daniel Johnson:** Will there be specific instructions to pharmacists and general practitioners about providing communication? What form would the communication take—would it be in writing, or would it take place the next time a person picks up their prescription? This population of people may have been taking medication for a prolonged period of time so that it is very normalised for them. They may not think to ask the question.

**Ash Denham:** We will update the advice for doctors and pharmacists, and they will advise their patients accordingly. Philip Lamont may have more detail on how that will be done.

**Philip Lamont:** It is a fair point. Someone on a repeat prescription may not always see a doctor. There will be a need for medical professionals to make sure that patients are reminded about any previous guidance that should have been offered about whether to drive or not. We can make sure that that point is part of the guidance to medical professionals.

**Daniel Johnson:** I want to ask about the practicalities of the medical defence. In the scenario in which an individual is tested following an accident and tests positive for a drug that they have a prescription for, will they then be required to go to a police station with their prescription? Will they have to give permission to their GP to make their medical records available? What are the practical implications for people taking prescribed drugs who may test positive?

**Ash Denham:** I will ask my official to answer those questions.

**Philip Lamont:** A person in that position who claims the medical defence as part of their defence would need to put forward evidence that they were following the guidance that was given with a prescription. If they do that, and the evidence shows that they were following the instructions of the medical professional, they will not have committed the offence.

**Daniel Johnson:** Is there a risk that we will be at best inconveniencing such a person? There is a

degree of stigma attached to some of the drugs that people might take for a particular condition, and we may inadvertently entrench such attitudes.

**Ash Denham:** I do not think so. It is important to bear in mind that the legislation and the drug types, the limits and the medical defence are already in operation in England and Wales and have been working effectively for the past few years.

**Daniel Johnson:** Has there been consultation with groups representing people who are prescribed drugs for medical conditions?

**Ash Denham:** Extensive consultation was done in 2013, before the legislation was brought in in England and Wales. There was a Scottish sample of responses, and the general approach was well supported.

**Daniel Johnson:** Is there a risk of false positives, for example when people take medication that is not on the list but, because of the way in which drugs are metabolised, appears as a false positive in either roadside or subsequent drug testing?

**Philip Lamont:** The process that the Scottish Police Authority has put in place to test for the 17 drug types is, as the committee would expect, robust. It will be formally accredited and that should avoid any suggestion of what Mr Johnson is indicating. Certainly, I am not aware of that being an issue in the process down south, where the same drug types are tested for.

**Liam Kerr:** At the start of the discussion, the minister said that this would be the toughest approach in the UK. Presumably, she means when it is combined with the drink strategy, because the drug strategy on its own just mirrors that of the UK.

On timescales, I think that I am right that it has taken about four years from when the provision was brought in for England and Wales to when it will be brought in for Scotland. Can you tell the committee why it has taken so long? Presumably, it is because the success or otherwise of the English and Welsh scheme is being assessed, perhaps on the points that Daniel Johnson just made. If that is right, what was the extent of the assessment and did it really conclude that the scheme is perfect and there needs to be no change at all?

**Ash Denham:** To answer the first part of your question, our analysis, which is well backed up by the evidence, suggests that the biggest risk on our roads is people who are driving under the influence of alcohol. We prioritised lowering the drink-drive limit because we thought that that was the most important thing to do and that it would save the most lives. We did that in 2014. Once

that had bedded in, we looked at drug driving. That is the reason for the timescale. With the SPA undertaking the testing of drug types, quite a bit of equipment needed to be purchased and training needed to be done. We wanted to make sure that that was appropriate and in position before we moved to this point.

On the second part of your question, the answer is yes. We can look at the position south of the border and the consultation that was done in 2013, and the fact that the law is working effectively there means that any lessons can be learned from that for the implementation in Scotland.

10:30

**Liam Kerr:** I will return to the equipment in a moment. You said that there was the assessment in 2013 and that the law is working south of the border, but can you reassure me about that? What assessment has been made since 2015 that it is working, if you see what I mean, and what can be learned from that? What improvements could be made?

**Ash Denham:** Any lessons that can be learned from south of the border will be learned. Also, the SPA undertook an analysis of the drug types in the Scottish context, as I set out in my opening statement. That gives us confidence that the 17 drug types and the limits that we are proposing are appropriate in the Scottish context and that they will be robust and work well here.

**Liam Kerr:** In the evidence that we have, the National Police Chiefs Council says that the roadside equipment, which I think you mentioned earlier, is single use—unlike, presumably, the drink-drive test. Has any assessment been done of whether that might make officers less likely to use it? Every time that they use a piece of equipment, that will be it, as it cannot be reused.

**Ash Denham:** It will be an operational decision for Police Scotland to determine how to use the screening devices within the legal framework. In general terms, however, I note that police officers will retain their discretion as to which devices they use and in which circumstances. We also need to take into account that the offence is not intended to replace the existing offence of driving while impaired. I ask my official to give you some more detail on that.

**Philip Lamont:** As the minister said, it is an operational matter for Police Scotland, but it might be helpful to note that the cost of each device is estimated at £20.50. If Police Scotland—it is a matter for them—decided to purchase, say, 3,000 of the devices for use across Scotland, the total cost would be £61,500. Although that sum is clearly not insubstantial, it is not massive in the grand scheme of Police Scotland's operating

budget. Through operational practice and policy, Police Scotland will approach the matter appropriately in terms of which officers will have the devices and when they will be used.

**Liam Kerr:** Thank you.

**The Convener:** The maximum penalty will be the same as for a section 4 offence under the Road Traffic Act 1988. Will you say what that is and which other disposals might be used for someone who is found guilty of a drug offence?

**Ash Denham:** The penalties that will apply for the new offence are set by the UK Government. On conviction, somebody could receive up to six months in prison and/or a fine of up to £5,000 and a mandatory minimum 12-month driving ban; their driving licence will be endorsed for 11 years with details of their conviction.

**The Convener:** The financial impact assessment does not contain any specific costings for that, but in the first year for which the provision was in operation in England and Wales, 8,000 people were arrested. Clearly, not all of them will have been found guilty, but there are quite big resource implications for the police just for arrests. If cases go to trial, there are resource implications for the courts, and if there are challenges, there will be resource implications for expert witnesses. If, ultimately, the maximum penalty of imprisonment is imposed, there will be more pressure on prisons. What costings have been done on that?

**Ash Denham:** I ask my official to give you a bit more detail on the financial memorandum.

**Philip Lamont:** As you said, convener, the financial impact assessment does not estimate how many times the provision will be used. In the first instance, it will be up to Police Scotland to determine its operational approach. The financial impact assessment seeks to lay out three different scenarios for the total costs that may arise from different usage of the new offence, based on the English experience. The final page of the financial impact assessment, at paragraph 54, has a table that gives all the details that you seek.

**The Convener:** Will you give us those for the record?

**Philip Lamont:** On the costs that will fall on the justice system from prosecuting cases, which are the costs on the Scottish Courts and Tribunals Service, the Crown Office and the Scottish Legal Aid Board, the mid-range estimate—it is based on 942 convictions a year for the new offence, which is roughly 10 per cent of the English and Welsh total—is about £1.633 million a year. For sentencing costs, which occur after the court finds someone guilty, the mid-range estimate is

£548,000. The estimated total recurring costs from the mid-range estimate are £2.182 million.

**The Convener:** What is the total cost of the list of things that were looked at in the impact assessment?

**Philip Lamont:** The cost that I gave is for prosecuting cases and sentence disposals.

**The Convener:** So that is the cumulative cost. Have you assessed the cost of providing more prison places?

**Philip Lamont:** That is included in the sentencing costs. Assumptions have been made about the number of convicted people who might receive a custodial sentence, and the costs of that are included in the table at paragraph 53. The average custody costs, which are not an actual cost but an opportunity cost for prisons, are about £160,000 a year.

**The Convener:** There is sometimes pressure on the ability to hold prisoners in police cells. Has that been taken into account?

**Philip Lamont:** It was certainly taken into account in the dialogue that we had with Police Scotland, but an estimate for that cost has not been specified, because it involves using existing facilities. We expect more people to be arrested, although we hope that behaviour will change, so we note that dealing with the aftermath of those arrests will put some pressure on the justice system, which includes pressure on police custody.

**The Convener:** Were the costs worked out on a pro rata population basis as a percentage of the arrests and things that happened in England?

**Philip Lamont:** Yes—it was felt that it was most appropriate to look at the English and Welsh experience on a pro rata basis and to include upper and lower estimates.

I am sorry—I have just looked at the estimates and I see that I have given the committee the upper estimates; the central estimates are a little lower. As I said, the figures are in paragraph 54 of the financial impact assessment, which outlines in one table all the cost estimates.

**The Convener:** That is helpful. The Brake submission says that, unless sufficient resource is provided, there will be a culture of non-compliance and the intended benefits will not materialise.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** I have two brief questions. I appreciate that the offence is driven by UK legislation, but did the minister say a wee minute ago that a custodial sentence could be of up to six months? How does that tie in with the overall policy framework of not having sentences of less than a year?

**Ash Denham:** The penalty is reserved to the UK Government, but we in Scotland certainly want to move away from short sentences as part of the wider justice setting.

**Fulton MacGregor:** Excellent. I assume that the answer to my next question will be that the issue that I am raising is not a serious concern. Earlier, a lot of members talked about controlled drugs for medical use. Has the law in England and Wales had any commercial impact? A quick five-second Google search led me to an article—it was published in 2000, right enough, which is some years ago—whose abstract says:

“There has been a recent and significant increase in the use and availability of hemp seed oil products. These products are being marketed as a healthy source of essential omega fatty acids when taken orally. Although the health aspects of these oils is open to debate, the probability that oils derived from the hemp seed will contain ... THC”—

I will not try to pronounce the full term—

“is noteworthy. Recent additions to the literature cite a number of studies illustrating that the ingestion of these products results in urinary levels of the THC metabolite”—

again, I will not try to pronounce the full term—

“above the administrative cutoff”.

Has that come up in England and Wales? Various commercial products contain trace amounts of illegal substances.

**Ash Denham:** Philip Lamont will answer that question.

**Philip Lamont:** The list of 17 drugs is split into two types; there is the zero-tolerance approach for illegal drug types and the medicinal approach, which is about the road safety level. Within the substances that you refer to, if there are elements of the drug types on the list, an offence will be committed if the driver’s level is above the limit. It depends on the substance. I am not an expert on the exact substance that you referred to.

Of course, there is the more general offence of driving while impaired. Even if someone is beneath the limit for one of those drug types, if they are still driving in an impaired way due to drugs—even if the drugs were purchased in the manner that you suggested—the driver could still be committing an offence under the existing offences.

**Fulton MacGregor:** Thank you. It is a good piece of legislation, which I fully support.

**Liam Kerr:** I will pick up on Fulton MacGregor’s point. To clarify, for a person who is in charge of a vehicle and who has cocaine in their system, one of the sanctions would be six months imprisonment. If you bring in a presumption against sentences of under 12 months—some might call it a ban—one of the sanctions for that

offence would effectively be removed. The person would not go to prison for being in charge of a car while under the influence of cocaine. Is that correct?

**Ash Denham:** First, a presumption is not a ban. It would be for the courts to decide on the appropriate disposal. We would support that.

**Liam Kerr:** You have decided on the appropriate disposal, because you have told the court to take a presumption against 12 months. The six-month sentence would not be available to sanction the guilty party.

**Ash Denham:** The six-month sentence would be available, because a presumption is not a ban. It would be up to the court to make that decision.

**The Convener:** I have a final question. South of the border, there has been concern about Radox Testing Services Ltd. I want to tease out where that kicks in. Is that about the device itself? Police Scotland said in its submission that it would use the SPA’s forensic experts to carry out tests. How does that fit together?

**Ash Denham:** You are correct—there have been problems with that. Forensic testing in England and Wales is done by different private providers. In Scotland, forensic testing will be the responsibility of the SPA, which is very experienced in carrying out that type of forensic testing in relation to drugs. We do not expect similar problems to arise in Scotland.

There has been on-going and extensive collaboration on that matter between all the relevant justice partners—the Crown Office, Police Scotland and the SPA. They have worked together to put in place the appropriate procedures for the new offence, to learn any appropriate lessons from implementation south of the border and to take them into account in the on-going work in Scotland.

**The Convener:** That is very helpful.

As there are no more questions, and the minister has nothing further to say in closing, we move to agenda item 5, which is formal consideration of the motion on the instrument. The Delegated Powers and Law Reform Committee considered and reported on the instrument and had no comments on it. I ask the minister to move motion S5M-15527.

*Motion moved,*

That the Justice Committee recommends that the Drug Driving (Specified Limits) (Scotland) Regulations 2019 [draft] be approved.—[Ash Denham]

*Motion agreed to.*

**The Convener:** That concludes consideration of the instrument. The committee’s report will note

and confirm the outcome of the debate. Are members content to delegate authority to me, as convener, to clear the final draft report?

**Members** *indicated agreement.*

**The Convener:** I thank the minister and her officials for attending.

At our next meeting, on 26 February, we will take oral evidence on the issue of elder abuse and whether that should be an aggravated offence.

10:45

*Meeting continued in private until 12:47.*



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