



The Scottish Parliament  
Pàrlamaid na h-Alba

**Criminal Justice Committee**

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20 June 2022

Dear Brian,

**Re: Draft Code of Practice on the on the Acquisition, Retention, Use and Destruction of Biometric Data for Criminal Justice and Police Purposes in Scotland**

Thank you for appearing before the Criminal Justice Committee on Wednesday 15 June 2022 to give evidence<sup>1</sup> on the current draft Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland<sup>2</sup> ('the draft Code').

Implementation of the draft Code

The Committee found the session most informative and interesting and commend you on the production of the draft Code. The Committee, in particular, welcomes your decision to enshrine 12 guiding principles and ethical considerations at the heart of the draft Code.<sup>3</sup>

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<sup>1</sup> Criminal Justice Committee, *Official Report 15 June 2022*: <https://www.parliament.scot/chamber-and-committees/official-report/what-was-said-in-parliament/%20CJ-15-06-2022?meeting=13832>

<sup>2</sup> Draft Code of Practice on the on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland (April 2022): <https://www.biometricscommissioner.scot/publications/consultation-on-the-scottish-biometrics-commissioner-draft-code-of-practice/>

<sup>3</sup> The 12 guiding principles and ethical considerations are (i) lawful authority and legal basis, (ii) necessity, (iii) proportionality, (iv) enhance public safety and public good, (v) ethical behaviour, (vi) respect for the human-rights of individuals and groups, (vii) justice and accountability, (viii) encourage scientific and technological advancement, (ix) protection of children, young people, and vulnerable adults, (x) promoting privacy enhancing technology; (xi) promote equality and (xii) retention periods authorised by law.

The Committee is of the view that this principle and ethics-based approach is the correct foundation for the Code to achieve its intended goal, and help to shape a policing and criminal justice environment in Scotland where legitimate policing and public safety needs are balanced against individual rights, while limiting the overreach of the state into the biometric life of the individual.

### Observations arising from the session of 15 June

During your evidence session a number of specific issues were raised in relation to the draft Code which we hope you will consider. Reference was also made to your forthcoming annual report, and while not specifically related to the draft Code, we have included comments on this topic.

#### *Consultation*

The Committee discussed the consultation processes you had undertaken on the draft Code. You noted that there has been widespread support from various stakeholders for the draft Code, and we were pleased to hear this. However, we also recognise the importance of critical review to improving quality.

Therefore, could you please confirm whether it is your intention to publish all of the submissions received from stakeholders in response consultations on the draft Code online, including those with critical observations? This would allow public consideration of any critical issues raised by stakeholders to be more fully considered and demonstrate the variety of views being expressed on the draft Code.

#### *Remit and application*

In relation to the remit of your office and the organisations to which the draft Code will apply, the Committee welcomed your comments on the positive engagement with Police Scotland, the Scottish Police Authority (SPA) and the Police Investigations and Review Commissioner (PIRC).

The Committee would welcome your views on whether other parts of the criminal justice sector in Scotland should be brought within your remit and that of the draft Code? Whilst we appreciate this is ultimately a matter for Scottish Ministers under section (2)(7) of the Scottish Biometrics Commissioner Act 2020 (the 2020 Act), we are keenly aware that your current remit does not cover biometrics data held by other parts of the Scottish criminal justice system.

In particular, we would welcome early consideration of the Scottish Prison Service (SPS) being included within your remit. The SPS estate is a large and complex one, which includes public and private prisons. Your oversight of biometric data held by the SPS would, we believe, be appropriate.

The Committee also welcomes the Scottish Ministers plans to seek a section 104 order<sup>4</sup> from the UK Government to bring the activities of British Transport Police, the National Crime Agency and the Ministry of Defence Police in Scotland (in terms of the acquisition, possession, use and destruction of biometric material) within your remit, and that of the draft Code.

It was gratifying to hear that the Heads of all three agencies have indicated their willingness to follow the Code for their operations in Scotland.

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<sup>4</sup> Section 104 of the Scotland Act 1998, allows for consequential modifications to be made to reserved law in consequence of an Act of the Scottish Parliament: <https://www.legislation.gov.uk/ukpga/1998/46/section/104>

We would appreciate your views on whether the UK Border Agency (UKBA) in Scotland should also be included within your remit? The UKBA may collect significant amounts of individual biometric data in Scotland, and we are of the view that there may be merit in that agencies role in Scotland being included within your remit. We would also welcome your views on whether your remit should be extended to include any individual biometric data collected by the operations of the Security Service in Scotland.

#### *Advisory group and emerging technologies*

We welcome the establishment of your Advisory Group on biometric data and technologies, whose membership is set out in Appendix C of the draft Code. It is important that you, as Commissioner, can draw on a broad range of experience for advice and assistance.

This is especially pertinent when considering how your role, and the draft Code, interacts with the rapid pace of technological development and interconnectivity and how this can impact on the criminal justice sector.

One such area referred to in the draft Code, and on which we would welcome more information, is around the emerging use of artificial intelligence (AI systems) and machine learning systems in managing the vast volumes of biometric data held by the criminal justice sector. Could you please confirm whether the Advisory Group will assess the potential interactions between the Code and decisions by Police Scotland, the SPA and PIRC on the specification, procurement and operation of AI systems in managing biometric data? Could you also provide details of the level of human oversight and interaction with AI systems that would be required to ensure the 12 principles in the draft Code are complied with.

Furthermore, if British Transport Police, the National Crime Agency, Ministry of Defence Police and UK Borders Agency are to be included in your remit, could you confirm what consideration will be given to the specification, procurement and operation decisions on AI systems, made at a UK level, and how that will interact with the Code of Practice for those agencies when operating in Scotland?

#### *Complaints and public information*

During the evidence session you made reference to your plans to produce an 'easy to read' version of the Code for public use. This is to ensure that the public have a clear and straightforward understanding of what the Code covers and, as importantly, what it does not cover.

You also stated that, in your opinion, the level of public complaints you may receive for non-compliance with the Code will be low, given the likelihood that complaints will be on areas such as data protection, which more properly sit with other oversight bodies, such as the Information Commissioner.

Whilst we appreciate it is difficult to estimate the level of public complaints at this stage, we would ask your views on what if any resource implications may exist for your office in the event of an increased level of complaints, in terms of responding or redirecting these to other bodies.

### *Retrospective application*

In terms of 'historic' biometric data held by Police Scotland from their predecessor forces, such as photographs and fingerprints etc, could you please confirm whether the Code is to be applied retrospectively for this biometric data?

### *Compliance with the Code*

We note the provisions of sections 23 to 27 of the 2020 Act, in relation to compliance notices that you can issue to those who do not comply with the Code, and recourse to the Court of Session if required. However we would welcome your views on whether, going forward, you think that you may require more effective and quicker compliance methods, especially if your remit is expanded to include other organisations.

### Wider issues

#### *Annual report*

We note the anomaly you highlighted regarding the statutory reporting period for your annual report under the 2020 Act, as amended by legislation to respond to the Coronavirus pandemic, and the statutory auditing period for your annual accounts. The Committee intends to highlight this issue to Scottish Ministers and seek clarification on how this anomaly can be rectified.

#### *Collection of biometric data by other sectors*

While not directly part of your remit, the Committee is of the view that the development of the draft Code brings into sharp relief the lack of statutory oversight in Scotland of biometric data acquired and retained by other public sector areas, such as the health service and local government.

During your evidence session you indicated your intention to undertake a thematic examination of biometric data in relation to children and young people, starting in the latter half of 2022. This is welcome however, the Committee is keenly aware that local authorities, and education providers in Scotland, collect large amounts of biometric data on children and young people in an educational setting. We would ask that you consider the intersectionality of this area and whether further action is required by the Parliament or Scottish Ministers.

#### *Oversight of surveillance/CCTV cameras in Scotland*

You advised the Committee that, unlike England and Wales, Scotland does not have a surveillance camera commissioner. The operation of public realm surveillance/CCTV cameras in Scotland, and the lack of statutory oversight, is a matter of concern to the Committee. We would appreciate your views on how this situation can be resolved.

As discussed during your evidence, we are aware it is possible for public realm surveillance/CCTV cameras in Scotland to use facial recognition technology. Should facial recognition technology be used in these circumstances in Scotland, the Committee would welcome your views on how issues like this might be addressed, what legislative frameworks would apply and how appropriate public oversight and regulation might be achieved.

### Conclusion

In conclusion, we appreciate several of the points we have raised are more appropriately addressed to the Scottish Ministers. Therefore, I am copying this letter to the Cabinet

Secretary for Justice and Veterans, Keith Brown MSP, for his information and response where appropriate.

We thank you and your staff for your collective commitment to producing the draft Code and look forward to the commencement and implementation of the draft Code in the near future.

The Committee would welcome future opportunities to hear from you directly on the ever-developing field of biometric-using technology, how such technology can enhance public safety and crime prevention while ensuring human rights obligations are met.

The Committee is content for the draft Code to be brought into force, in due course, in accordance with section 12 of the Scottish Biometric Commissioner Act 2020.

Best wishes,

A handwritten signature in black ink that reads "Audrey N: CN". The signature is written in a cursive, slightly slanted style.

Audrey Nicoll MSP  
Convener, Criminal Justice Committee

cc: Keith Brown MSP, Cabinet Secretary for Justice and Veterans