Scottish Biometrics Commissioner
Coimiseanair Biometrics na h-Alba

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

Audrey Nicoll MSP
Convenor
Criminal Justice Committee
Scottish Parliament
Edinburgh
EH99 1SP
justicecommittee@parliament.scot

cc Keith Brown MSP, Cabinet Secretary for Justice and Veterans

27 June 2022

Dear Convenor,

Re: Criminal Justice Committee meeting 15 June 2022

Thank you for the recent opportunity to appear before the Criminal Justice Committee to discuss the draft Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland. I found it a very helpful session with interesting and well considered questions and observations from members.

I also acknowledge receipt of your letter of 20 June 2022, confirming the support of the Committee for the principles and ethics based approach, and confirming that the draft Code may now advance to the next stage where Ministerial approval will be sought under section 12 of the Act. I wish to thank members of the Committee once again for your support and kind words.

In your letter, you also reference a number of ancillary matters arising during the discussions in the evidence session, including some where the Committee would welcome additional information, reassurance, or seeking my views or advice on a particular matter. I am more than happy to do so, and will deal with each of these points in turn.

Publication of responses to consultation on draft Code
I am happy to confirm that my office will publish responses received to the 3-month closed consultation on version 0.2 of the draft Code which ran between 01 October 2021 and 31 December 2021. These will be published in individual letter form on my website once I have the consent of the individual authors for their responses to be published. This will enable readers to cross tabulate feedback against amendments made in the draft laid before Parliament.

I will also publish a summary single page overview document which lists all bodies who were invited to participate in the closed phase of consultation, including indicating those where a no comment response was received, or where no response was forthcoming. I will also report on how many responses are received to the on-line public phase of consultation on my website.

Scottish Biometrics Commissioner
Coimiseanair Biometrics na h-Alba

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

Antecedent information

Before turning to offer a view on potential options for future extension of remit, I feel it is important to highlight to the Committee the constraining variables arising from the Financial Memoranda (FM) that accompanied the various stages of the Bill. This is important, as in essence the seeds (and constraints) of my current operating model were sown in the various FM's that accompanied the passing of the founding legislation.

Principal amongst these is the way in which information on the office of the Biometrics Commissioner for England and Wales were used to support the financial assumptions presented to Ministers during the legislative phase. For example, the number of projected Scottish Biometrics Commissioner staff in the FM's was derived from comparison with the staffing model in the London office of the Commissioner for England and Wales, albeit that office has a different legal function. As a branch of the Home Office, the office of my counterpart is also provided with central HR, Finance, and ICT provision and therefore does not need to dedicate staff, budget, or personal attention to such matters. Accordingly, sufficient funding was allocated to me to recruit only three members of staff, two of which are now dedicated exclusively to corporate functions.

By contrast, the remuneration level of the England and Wales Commissioner (£125,000 FTE) was not disclosed to Ministers in the same FM as a relevant sector-specific comparator. Instead, the recommendation was to appoint the Scottish Commissioner on the lowest possible officeholder spot salary prevailing at that time resulting in a £55,000 salary differential.[1] This despite the more expansive definition of what constitutes biometric data in the Scottish legislation, and more general powers including a statutory code, public complaints mechanism, and the power in law to do 'anything necessary of expedient' in the discharge of those functions.[2]

I include this antecedent information to make two substantive points. Firstly, to highlight the value attached to the role in Scotland, which in my lived experience does not correlate with the significant levels of personal responsibility and accountability during my first year in office. Secondly, to advise that any future expansion of remit approved by Scottish Ministers will require a properly developed business case supported by additional funding. In such circumstances, I would of course be very happy to assist in that process from the outset.

Potential expansion of remit within SG Criminal Justice Portfolio

<u>Prisons</u>

As indicated in my evidence session, and subject to the foregoing points of caution on both officeholder retention and resourcing, there are obvious opportunities to expand the remit to include other aspects of the criminal justice portfolio in Scotland in future, such as prisons. I do of course acknowledge that such a decision around the extension of functions to another body would be entirely for Scottish Ministers under the provisions of section 2 (7) of the Act.

[1] SP Bill 48-FM, Session 5, 2019: Scottish Biometrics Commissioner Bill Financial Memorandum (parliament.scot)
[2] Section 4 (1) Scottish Biometrics Commissioner Act 2020

Scottish Biometrics Commissioner
Coimiseanair Biometrics na h-Alba

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

As the Committee will be aware, the Scottish Prison Service (SPS) is an executive agency of the Scottish Government tasked with managing prisons and young offenders' institutions in Scotland. In common with the bodies to whom my functions currently extend, the Minister responsible is the Cabinet Secretary for Justice and Veterans.

As discussed in my evidence session, biometric data and technologies (most commonly photographs, fingerprints and CCTV images) are used extensively in Scottish prisons, and such data is commonly shared with the police and criminal justice social work practitioners throughout Scotland for purposes connected with public protection and the management and rehabilitation of offenders. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2012 defined biometric data as …*'biometric data means fingerprints and any other data specified by direction made by Scottish Ministers'*.

Such data is collected from people on remand, sentenced prisoners, and people visiting the fifteen prisons in Scotland, with differences between public prisons and private prisons.[3] Mostly, biometric data will be acquired and used overtly within prisons but sometimes it will be acquired and used covertly under the auspices of the Regulation of Investigatory Powers (Scotland) Act 2000. Such covert use already falls within the oversight of the UK Investigatory Powers Commissioner (IPCO).

There is also an emerging trend within prisons in other UK jurisdictions where live facial recognition technology and other biometrics are deployed to verify the identity of visitors, to assist in managing excluded persons, and to assist in the prevention of drugs and other contraband being smuggled onto the prison estate. It would be interesting for the Committee to ascertain whether any such technologies are currently deployed in Scottish prisons.

From recent discussion with HM Chief Inspector of Prisons in Scotland Wendy Sinclair-Gieben, I can confirm that with the exception of oversight by the ICO on matters connected with data protection, and by the IPCO on covert surveillance, there is no general independent oversight in relation to how biometric data and technologies are overtly used in Scottish prisons. I am advised by HM Chief Inspector that she would welcome the oversight by my office if approved by Scottish Ministers given both the specialist subject nature, and human rights considerations which arise.

I therefore agree with the view expressed by the Committee that it would be appropriate for Ministers to consider whether biometric data and technologies used in Scottish prisons should fall within the remit and functions of the Scottish Biometrics Commissioner and Code of Practice. Should Scottish Ministers wish to explore this possibility in more detail, then I would be more than happy to engage with Scottish Government officials and the Scottish Prison Service in terms of conducting an initial joint feasibility study.

[3] Submission to Scottish Parliament Justice Committee on Scottish Biometrics Commissioner Bill in 2019 by Dr Hannah Graham, Senior lecturer in Criminology, Scottish Centre for Crime and Justice Research (SCCJR), University of Stirling.

Scottish Biometrics Commissioner
Coimiseanair Biometrics na h-Alba

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

UK Wide policing bodies

Discussions are ongoing between Scottish and UK Governments with a view to seeking the authority of Westminster for the National Crime Agency (NCA), British Transport Police (BTP), and Ministry of Defence Police (MDP) coming under my office and the Code of Practice in relation to their overt operations which result in the collection of biometric data from persons arrested in Scotland. As indicated in my evidence session, I have already consulted with these bodies on the draft Code and have the support of their Chief Officers should the section 104 order be approved.

One feature of those discussions is the potential assignation of cross-border jurisdiction to the Scottish Biometrics Commissioner to specifically cater for these bodies sending DNA buccal swabs collected from persons arrested in Scotland to forensic laboratories outside of Scotland for profiling and upload to the UK National DNA Database. This is important as such source biological samples fall within the Scottish definition, but are not sent to the SPA Forensic Services for analysis or profiling.

In terms of sequencing, and assuming that the consent of UK Government can be obtained, then it would make sense to expand my remit to these UK wide policing bodies in the first instance. This will require a proper business impact assessment to be conducted in terms of the expansion of the programme of thematic review work in my strategic plan and the annual programme of compliance assessments in respect of the code. It should not be assumed that such additional responsibilities can simply be absorbed without financial and resource implications.

UK Border Agency

The management and control of the UK border, including at Scottish ports and airports, are reserved and excepted matters within the authority of the UK Parliament and therefore in my view it would not be competent for Scottish Ministers to consider oversight of biometrics in such operations in Scotland without agreement from the UK Government.

My counterpart has no locus in such matters in England and Wales, and the UK Border Agency is not a listed authority to whom his National Security Determination function extends. I am therefore unaware of anyone exercising independent oversight over such specific matters in the UK, other than the Westminster Parliament and the Justice and Home Affairs Committee of the House of Lords.

However, I wish to advise members of the Committee that Police Scotland already has direct access to the Immigration and Asylum Database (IABS) as part of the Home Office Biometrics Programme. In practice, this allows persons arrested by the police and who are suspected of being here illegally, or of being an asylum seeker, to have their fingerprints automatically searched against IABS from the Livescan fingerprint terminal in any Police Scotland custody centre. This is done under the authority given to Constables in the UK Immigration Act 1999.

This real time automated process (also operating *vice versa*) is known as a 'non-verified live search'. If the result of the search is positive, a fingerprint expert from the SPA Forensic Services then examines the optical file to determine whether or not there is a confirmed

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

match between the police record and the immigration record. As this constitutes 'use' of biometric data in Scotland, it is already within the oversight of the Scottish Biometrics Commissioner and will be covered by the Code of Practice and public complaints mechanism.

The Security and Intelligence Services

Notwithstanding their reserved and excepted status, the Security and Intelligence Services (MI5, GCHQ, MI6) operate exclusively in the covert arena. Biometric data can be collected covertly in the UK through numerous means including covert human intelligence sources, directed surveillance, intrusive surveillance, property interference, equipment interference, targeted interception, bulk equipment interference, bulk personal datasets, bulk data interception, bulk acquisition and so on. It can also be collected legally from outside the UK under section 7 of the Intelligence Services Act 1994.

All covert surveillance activity whether law enforcement, security and intelligence services, MOD, or local authorities, falls within the jurisdiction and statutory oversight of the UK Investigatory Powers Commissioner (IPCO). Therefore, there should be no involvement by the Scottish Biometrics Commissioner in such matters.

Advisory Group and Artificial Intelligence (AI) Systems

In your letter of 15 June 2022, there are two specific questions posed as they relate to AI systems. Those questions are firstly 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, and secondly, 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.

On the first of those points, and as discussed with the Committee, there is no specific provision within the Scottish Biometrics Commissioner Act 2020 which compels Police Scotland, the SPA, or PIRC to notify or involve the Commissioner in advance of any decisions relating to the specification or procurement of biometric technologies or AI systems. However, Appendix D to the Code advocates a process for the introduction of a new biometric technology, or new application of an existing technology where ethical challenge can be sought via the Commissioner and the Advisory Group, however this is non-binding. I will return to this point later in this letter when turning to questions from the Committee on areas where the legislation could be strengthened in relation to compliance factors.

As the Committee will also be aware, some of the 12 principles of the draft Code specifically touch on this area. Principle 5 on ethical behaviour for example requires that new technologies must be impact assessed in line with the Public Sector Equality Duty to eliminate discrimination. This principle also requires that systems for staff working with biometric data and technologies should be quality assured to minimise error rates, and/or should be externally validated and accredited.

Similarly, Principle 8 requires that the way that any biometric technology is used or deployed is scientifically valid and reliable, that any algorithms for biometric matching are free from bias and are non-discriminatory on the grounds of race, gender, or any protected characteristic. This Principle also provides that where a technology is provided by private industry (rather than the

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

Home Office) the data controller (Police Scotland, SPA, PIRC) must ensure that the technology complies with all of the provisions of the Code. Therefore, the bodies to whom the Code applies will have a statutory requirement to ensure that private contractors can be held to the same high standards by the contracting body.

Therefore, I can confirm that the Commissioner and the Advisory Group will assess the interactions between all biometric technologies and the Code but on a retrospective basis. Whilst there is currently no obligation in law for the bodies to whom the Scottish Biometrics Commissioner Act 2020 applies to involve the Commissioner or advisory group in advance of procurement decisions, I nevertheless believe that such procurement decisions will be guided by the knowledge that procuring a technology that would breach the Code would be counterproductive.

On the level of human oversight and interaction with AI systems that would be required to ensure the 12 principles are complied with, the draft Code is clear that key decisions are made by humans rather than machines, and that all such decisions can be explained, justified, and challenged. Principle 5 on ethical behaviour states that staff working with biometric data and technologies should be familiar with the concept of unconscious or confirmation bias. It also provides that processes should be in place to acknowledge the limitations of biometric technologies and databases in terms of the potential for automated searches to produce both false positives and false negatives.

The Code also requires that there are policies and procedures in place to acknowledge and minimise error rates resulting from the interaction between humans and technologies and systems of working must be quality assured, and/or externally validated or accredited. As indicated in my evidence session, due to the interaction between humans and technologies, there is no such thing as a 100% reliable biometric technology, therefore key decisions must always be made by humans. This reflects the current position in Scotland. For example, if the automated searching ability within the National DNA database suggests a possible match between a crime scene sample and a criminal justice sample this is always confirmed (or not) by a forensic scientist. The same is true for fingerprints. Similarly, where retrospective facial search is used in Scotland, any potential matches suggested by a machine are ultimately determined by a human.

In my experience there are two essential truths that are relevant to such debates. The first is that there is no such thing as good or bad technology, its rather a question of how people choose to use it. The second is that it is important to remember that crimes and matters involving the identification or verification of human identity are always ultimately determined by people (forensic scientists and police officers) and not by machines.

In relation to the question about the specification, procurement and decisions on AI systems, made at a UK level specifically by NCA, BTP, MDP, should the section 104 order be granted, then any oversight by the Scottish Biometrics Commissioner and compliance with the Code would be confined to data acquired, retained, used, or destroyed in Scotland or to 'Scottish' data regardless of where held. However, as with Police Scotland, the SPA, and PIRC there is nothing in the Scottish Biometrics Commissioner Act which mandates a role for the Commissioner in the specification or procurement of biometric technologies by bodies to whom my functions extend.

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

Finally, on this theme it may assist Committee members to know that Professor Shannon Vallor, who is the Baillie Gifford Chair of the Ethics of Data and Artificial Intelligence at the Edinburgh Futures Institute has recently agreed to join my professional advisory group.

Complaint volumes

As indicated in my evidence session it is impossible to quantify how many complaints might be received in relation to non-compliance with the Code but in respect of Police Scotland, the SPA, and PIRC, my professional judgement is that at least initially complaints volumes would be low.

However, if additional bodies are to be added to my jurisdiction in future then naturally the likely trajectory of complaints volumes will increase accordingly. As discussed, due to the constraints of available budget flowing from the FM's that accompanied the founding legislation, I have only three members of staff. Any complaints received relative to the Code would be investigated by my Operations Manager who is my only external facing member of staff. During periods of leave, my Corporate Services Manager would discharge this function.

As Commissioner, and on receipt of the investigation report and recommendations, I would then determine whether or not there had been a breach of the Code, and if so, whether it was a minor or one or something more substantive which required a report to be published under section 20 (1) of the Act. Should my initial optimism on complaints volumes prove unfounded, or if my functions are extended, then in all such scenarios I will need to prepare a business case for additional funding or resource.

As will be abundantly clear to the Committee, there is very little resilience within a tiny organisation comprising of a Commissioner and only three members of staff, but all of this was determined by the Parliament as informed by the FM's that accompanied the founding legislation.

Retrospective application

I can confirm to the Committee that the Code will apply to all data acquired, used, retained or destroyed by the bodies to whom my functions extend. This includes being applied to data that is currently retained by Police Scotland such as legacy force custody image data and case management systems images data.

It is now nine years since the establishment of Police Scotland and therefore much of the legacy force biometric data such as images of persons arrested but not subsequently charged or proceeded against (and who have no previous convictions) will have been destroyed.

Furthermore, any decision to not destroy such data would represent a purposive decision to retain. Therefore, the Code will apply to all biometric data retained from the point where the Code is given legal effect under regulations made by Scottish Ministers.

Scottish Biometrics Commissioner
Coimiseanair Biometrics na h-Alba

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

Compliance mechanisms

In your letter of 20 June 2022, the Committee indicates that it would welcome my views on whether, going forward, there could be more effective and quicker compliance methods, especially if the remit is expanded to include other organisations.

There are two specific areas where I feel that additional powers would assist in this regard and as part of a 'preventative' approach to avoid unnecessary or unintentional breaches of the Code of Practice. The first of those relates to notification requirements and the second relates to early intervention powers.

On notification, there is currently nothing in the Scottish Biometrics Commissioner Act which requires a body to whom my functions extend to notify me of a substantial data breach involving biometrics, for example the accidental weeding or loss of a large number of biometric data sets (as experienced by the Home Office), and the resultant threat to public safety. Accordingly, I have included this notification requirement within the draft Code.

However, as highlighted by the Committee, there is also nothing in the Act which requires a body to whom my functions extend to notify me that they are in the process of seeking to procure a new biometric technology, or upgrading biometric features within an existing technology. Without such a requirement, it is possible that I might only become aware 'after the event' and potentially as part of a mop-up when something goes wrong. The digital triage devices experience in Scotland is a good example to cite of both the Scottish Police Authority and the Parliament being drawn in retrospectively.

Therefore, this is the first area where I feel that a **'notification requirement'** in respect of an intention to procure a new biometric technology or upgrade an existing technology would strengthen the current legal framework.

The second area relates to early intervention. From my perspective it would be really helpful if the legislation could be strengthened to allow me to issue an **'improvement notice'** in circumstances where my review activity identified an area where action was required to prevent a potential breach of the Code. Such a notice would enable me to specify the required improvement actions to be taken and a realistic timescale for doing so. This approach could be applied on a preventative basis, or in response to very minor technical breaches of the Code.

Both of these suggestions follow a preventative approach and would deliver a quicker and more cost effective means of ensuring compliance with the Code.

Biometrics in other sectors

On the use of biometrics in educational settings the Committee will be aware that this is not part of my remit, but as discussed I will be conducting a thematic review of the acquisition, retention, use, and destruction of biometric data from children and young people in Scotland as part of the criminal justice process in the winter.

The fieldwork is intentionally timed to coincide with the first anniversary of changes to the age of criminal responsibility in Scotland. This work may include the opportunity for some

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

intersectionality including the UN Convention on the Rights of the Child, and the Children's Care and Justice Bill.

More broadly, and on non-criminal justice matters, government obligations on the UN Convention on the rights of the child should seek to ensure that children are not the subject of surveillance by the State that is neither proportionate or necessary. In my view children at school in Scotland should have the freedom to sit in class or take school meals without being watched, recorded, and analysed by a biometric technology.

Oversight of public space CCTV Cameras in Scotland

As mentioned in the evidence session, unlike England and Wales Scotland does not have a Surveillance Camera Commissioner. The gathering, control, storing and use of video images is covered by the 1998 Data Protection Act and independent oversight of such matters is exercised by the UK Information Commissioner (ICO), but importantly only from a data protection perspective. This also caters for biometric enabled facial recognition as biometric data and genetic data are each covered as special category sensitive data under Article 4 (14) of UK GDPR.

In March 2011, Scottish Government produced a National Strategy for Public Space CCTV in Scotland which noted the disjointed local authority landscape within which CCTV operates. The stated aim of the strategy at the time was …'to facilitate a more strategic approach to CCTV development and management, so as to deliver community safety more effectively'. However, that strategy has not been updated in the last eleven years. In 2019, the Scottish Community Safety Network (SCSN) produced a report entitled 'Public Space CCTV in Scotland: The Current Landscape and Future Opportunities'[4] The research found that there are mixed views on the success of the 2011 strategy.

I would therefore suggest that the first step in determining the most appropriate oversight mechanisms for public space CCTV surveillance in Scotland would be the redevelopment of a coherent national strategy. In doing so, it should be recognised that many of the public's concerns about the expansion in state surveillance are not simply about data protection, they are also about broader questions of public confidence and trust. Therefore, regardless of the legal basis for doing so, the acid test for any Scottish framework for overt surveillance technology has to be the extent to which the affected community is prepared to support it, and accept it.

It may be that as part of that work that a political appetite emerges for appropriate public oversight and regulation beyond that already provided by the ICO, potentially including a Scottish Surveillance Camera Code of Practice. I trust that these various comments are of assistance and I would likewise welcome any future opportunities to assist the Criminal Justice Committee in their important work.

[4] Landscape-and-future-opportunities-CCTV-in-Scotland-Exec.pdf (safercommunitiesscotland.org)

Scottish Biometrics Commissioner
Bridgeside House
99 McDonald Road
Edinburgh EH7 4NL

Yours sincerely

Brian Plastow

Dr Brian Plastow
Scottish Biometrics Commissioner
Brian.Plastow@biometricscommissioner.scot