

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48A)

as amended at Stage 2

Scottish Biometrics Commissioner Bill

[As amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Scottish Biometrics Commissioner Bill (which was introduced in the Scottish Parliament on 30 May 2019) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

Summary

4. The purpose of the Bill is to establish a new Scottish Biometrics Commissioner ("the Commissioner") who will support and promote the adoption of lawful, effective and ethical practices in relation to biometric data in a policing and criminal justice context. "Biometric data" is a

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relatively broad and evolving concept, encompassing “first-generation biometrics” such as fingerprints, DNA and custody photographs as well as new and emerging technologies (or “second-generation biometrics”) such as facial recognition software, remote iris recognition and behavioural biometrics such as voice pattern analysis.

5. In order to support and promote the adoption of lawful, effective and ethical practices in relation to biometric data in a policing and criminal justice context, the Commissioner will keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by specified bodies: the Police Service of Scotland (“Police Scotland”), the Scottish Police Authority (“the SPA”) and the Police Investigations and Review Commissioner (“the PIRC”). The Commissioner’s range of functions will include preparing and monitoring compliance with a code of practice which will provide information, guidance and rules regarding the standards and responsibilities of Police Scotland, the SPA and the PIRC in relation to biometric data in order to ensure good practice, drive improvement and enhance accountability.

Commentary on sections

Establishment

Section 1: Establishment

6. Subsection (1) of section 1 of the Bill establishes the office of Scottish Biometrics Commissioner. Subsection (2) introduces schedule 1 which makes detailed provision for the status, remuneration, terms of appointment and various matters of an administrative nature in relation to the Commissioner.

Functions and powers

Section 2: Functions

7. Section 2 provides for the Commissioner’s general function. The general function 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 by Police Scotland the SPA and the PIRC. It also allows the Scottish Ministers to amend, by regulations, the list of persons within the Commissioner’s purview by adding, removing or varying

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a person or description of a person. It should be noted that “person” is defined widely in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and includes bodies as well as individuals, whether or not incorporated. However, the Commissioner’s remit is criminal justice and police purposes, so any persons with a range of functions who are added to the list in section 2(1) would fall within the Commissioner’s purview in that regard only.

8. This section goes on to specify that the Commissioner’s general function does not extend to biometric data in relation to which the Commissioner for the Retention and Use of Biometric Material (“CRUBM”) has a function under section 20 of the Protection of Freedoms Act 2012 – under which the CRUBM must keep under review national security determinations, including determinations made under section 18G of the Criminal Procedure (Scotland) Act 1995. A national security determination is made if the chief constable determines that it is necessary for biometric data to be retained for the purposes of national security. The CRUBM must keep under review the uses to which the biometric data retained pursuant to a national security determination is being put. As regards Scotland, the CRUBM has a general function of keeping under review the retention and use of biometric data not subject to a national security determination where the data is collected using powers in the Terrorism Act 2000 or the Terrorism Prevention and Investigation Measures Act 2011.

9. Section 2 also requires that in exercising the Commissioner’s general function, the Commissioner is to keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by Police Scotland, the SPA and the PIRC. The Commissioner is to also promote public awareness and understanding of: the powers and duties of those bodies in relation to biometric data; how those powers and duties are exercised; and how those powers and duties may be monitored or challenged. The Commissioner is also to promote and monitor the impact of a code of practice.

10. The Commissioner’s powers relate to biometric data which is acquired, retained, used or destroyed for criminal justice or police purposes. Although the terms “criminal justice purposes” and “police purposes” are not defined, the latter would include any activities which the police legitimately undertake. This goes beyond just the prevention and

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detection of crime. It would therefore also cover, for example, work the police do to help identify a dead body (even where the death has not been categorised as suspicious). It would also cover work the police do to investigate an act carried out by a child who is below the age of criminal responsibility.

11. Under subsection (4), the Commissioner may carry out, commission or support any research the Commissioner considers appropriate. The Commissioner may also make recommendations concerning any matter relevant to their general function.

12. In exercising the Commissioner's general function, the Commissioner is to have regard to the interests of particular groups – these are children and young people (those aged under 18 years) and vulnerable persons. Vulnerable persons are those who may have difficulty understanding why and how their biometric data is being processed by the police.

Section 3: Power to work with others

13. Section 3 allows the Commissioner to consult, assist or work jointly with a prescribed list of bodies, as well as anyone else the Commissioner considers appropriate, at their discretion. This (like all other sections) is subject to the Commissioner's general function, so that work could only be undertaken if it would further the objectives of the Commissioner.

Section 4: General powers

14. Section 4 permits the Commissioner to do anything which appears to the Commissioner to be necessary or expedient to the carrying out of their functions, such as entering into contracts, acquiring or disposing of land or obtaining advice, assistance or any other service from a third party (such as legal advice from a solicitor). However, this is subject to the caveat that the Commissioner may only pay a person for advice, assistance or for any other service with the approval of the Scottish Parliamentary Corporate Body ("the SPCB"). This gives the SPCB a role in approving the appointment of a person to provide advice or other service to the Commissioner.

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Section 5: Duty to comply with directions

15. Section 5 requires the Commissioner to comply with any direction given by the SPCB in respect of: the location of the Commissioner's office; the sharing of staff, premises, resources or services with other public bodies; and the form and content of the Commissioner's annual report (which will cover relevant issues during the year; the Commissioner's activities during the year and any recommendations arising from that activity). Any such direction is to be published by the SPCB.

16. However, the Commissioner is only subject to possible control by the SPCB to the extent explicitly specified. Aside from these specified matters (which do not infringe upon the core job of having oversight of the use of biometric data for criminal justice and police purposes), the Commissioner is not an agent of the Crown and there is no general obligation to comply with directions. The Commissioner is therefore independent and is not subject to the general control of the Parliament, the Government, or the SPCB.

Section 5A: Complaints procedure

17. Section 5A of the Bill requires the establishment of a procedure by which persons, or their representatives, can make complaints or other representations to the Commissioner in relation to the acquisition, retention, use or destruction of biometric data by or on behalf of Police Scotland or the SPA. The complaint need not be restricted to the person's own biometric data. The Commissioner's complaints procedure is to be available regardless of whether a person's complaint has been or is still being pursued with Police Scotland or the SPA. The Commissioner must, under subsection (3), consult a list of prescribed persons on proposals for the complaints procedure. The Commissioner must also keep the procedure under review and must, under subsection (4), vary it whenever the Commissioner considers it appropriate to do so. Any variation to the procedure may only be undertaken after consultation. Under subsection (5), the Commissioner is required to publicise the complaints procedure and to provide a copy of it on request. Subsection (6) provides that the operation of the complaints procedure does not affect the powers of the Information Commissioner.

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Section 5B: Review of the Commissioner's functions and powers

18. Section 5B of the Bill requires the Scottish Ministers to review the Commissioner's powers and functions within three years of the date of Royal Assent and within five-yearly periods thereafter. As part of any review, subsection (2) requires the Scottish Ministers to consider whether the Commissioner's functions and powers remain appropriate and whether these should be extended beyond the functions and powers set out in section 2(1) for criminal justice and police purposes by Police Scotland and the SPA. In carrying out the review, the Scottish Ministers are to consult such persons as they consider appropriate. Subsection (5) requires the Scottish Ministers to ensure that a report on the review is prepared, published and laid before the Parliament within 12 months of the commencement of each review.

Code of practice

Section 6: Code of practice

19. Section 6 provides that the Commissioner must, in furtherance of the Commissioner's general function, prepare, and may from time to time revise, a code of practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in line with the principles set out in section 6A. The Commissioner's general function 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 for criminal justice and police purposes by specified persons. Anything that the Commissioner does, including preparing the code of practice, should be in furtherance of that general function. This therefore reiterates that the Commissioner must prepare a code that supports and promotes the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data.

20. Subsection (1A) requires that the code of practice must, in particular, make provision for a presumption of destruction of biometric data after the expiry of three years from the acquisition of that data.

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21. Subsection (5) provides that, unless the context requires otherwise, sections 7, 8 and 8B to 10 apply to a revised code of practice prepared under subsection (1) as they would apply to the first code of practice. This means that various rules about the code apply equally to any revised code.

Section 6A: Code of practice: principles

22. Section 6A of the Bill requires the Commissioner to have regard to specific principles when preparing or revising the code of practice, and lists the principles.

Section 7: Effect of the code

23. Section 7(1) states that constables and police staff of Police Scotland, the SPA and the PIRC must comply with the code of practice when exercising functions to which the code relates. Subsection (2) provides that a court or tribunal in civil or criminal proceedings must take the code of practice into account when determining any question to which the code is relevant. Subsection (3) sets out that a failure by any persons listed under section 7(1) to comply with the code of practice does not itself give rise to grounds for any legal action (though it may give rise for grounds for the issuing of a compliance notice under section 17A). Subsection (4) provides an enabling power for the Scottish Ministers to amend, by regulations, the list of persons who must have regard to any code of practice at subsection (1) – by adding, removing or altering a person or description of person. As noted at paragraph 7 above in relation to section 2, the term “person” has a wide meaning and includes bodies as well as individuals. Such regulations are subject to the affirmative procedure under section 25(2).

Section 8: Consultation on the code

24. Section 8(1) lists a set of prescribed consultees whom the Commissioner must consult in preparing a draft code of practice prior to the process for approval of the code proceeding further under section 8A or (in the case of a code that is not the first code) 8B. Subsection (1)(m) also allows the Commissioner to use their discretion to also consult anyone else they consider appropriate. Section 8(2) states that any consultation which was undertaken with consultees remains valid even if such consultation took place before section 8 comes into force. This ensures that, once

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appointed, the Commissioner will be able to begin work on the code straight away.

Section 8A: Further procedure in relation to the first code

25. Section 8A of the Bill sets out the further procedures which will apply in relation to the first code of practice prepared by the Commissioner. Subsection (1) requires the Commissioner to first submit a copy of the draft code of practice to the Scottish Ministers for approval. Having gained the approval of the Scottish Ministers to the code, the Commissioner must then lay the draft code before the Parliament for consideration. Subsection (2) requires the Commissioner to have regard to any representations made to them within 60 days of laying the draft code of practice. Representations can then be made to the Commissioner by anyone though in practice it is likely that the primary source of representations will be parliamentarians. Subsection (3) provides that, in calculating the 60 day period, no account is to be taken of instances when the Parliament is dissolved or is in recess for more than four days. The additional parliamentary scrutiny and procedural steps which apply to the first code of practice under section 8A operate in addition to the requirement that any code can only be brought into effect by the Parliament approving affirmative regulations under section 9.

Section 8B: Approval of the code

26. Subsections (1) to (3) of section 8B of the Bill set out the arrangements for the approval process for the code of practice once the Commissioner has finalised a draft code after undertaking the consultation process set out above. The Commissioner must submit a copy of the draft code to the Scottish Ministers for approval. Should the Scottish Ministers decide not to approve the draft code, they must provide their reasons to the Commissioner. Any modifications made to the draft code by Scottish Ministers require to be agreed with the Commissioner.

Section 9: Bringing the code into effect

27. Section 9 states that any code of practice approved under section 8B(2) has no effect until the day appointed for the code by regulations made by the Scottish Ministers. Such regulations are subject to the affirmative procedure under section 25(2). While the regulations will not contain the code, the Scottish Ministers must lay a copy of the code before the Scottish Parliament at the same time as the regulations are laid. This is

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to ensure that the Parliament has the opportunity to consider the code of practice before approving the regulations that bring the code into effect. Once the date for coming into force has been approved by regulations, the Commissioner must publish the code.

Section 10: Report on the code of practice

28. Section 10 provides that the Commissioner must keep the code of practice under review, prepare and publish a report on its findings, and lay a copy of such a report before the Scottish Parliament. It also provides that the first such report must be laid by the Commissioner before the Parliament no later than three years after the date on which the first code has been brought into effect. Any subsequent reports are to be laid before the Parliament no later than four years after the date on which the last report was laid.

Information-gathering

Section 11: Power to gather information

29. Section 11 provides the Commissioner with the power to require the production of information from Police Scotland, the SPA and the PIRC (or any other person who the Commissioner's functions are expanded to cover) in order to determine whether those persons are complying with the code of practice, or for the purpose of exercising any of the Commissioner's other functions. When seeking information, the Commissioner is to specify: what information is to be supplied; the form the information is to take; the date by which information is due; the place where a person is to supply any information which is to be supplied by personal statement; and the matters to which the information relates. Under subsection (3) a person is exempt from providing information to the Commissioner where, for example, that information would be covered by legal privilege or incriminate that person in a crime. Subsection (4) allows the Commissioner to change their mind and cancel (by notice in writing) an information request. Subsection (5) makes clear that unrecorded information, such as an oral statement, is information for the purposes of section 11. This means that information must be provided even if there is no written record of it.

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Section 12: Failure to comply with an information notice

30. Section 12 enables the Commissioner to apply to the Court of Session where any person to whom an information notice has been given: refuses or fails to comply with the requirement specified in the notice; refuses or fails to answer question asked by the Commissioner; or alters, suppresses, conceals or destroys any information that they have been asked to produce. There is an exemption where there is a reasonable excuse for having done any of these things. The Commissioner may also apply to the Court if they believe a person is likely to do any of these things (without reasonable excuse). After receiving an application and hearing any evidence or representations on the matter, the court may make such an enforcement order as it considers appropriate and/or deal with the matter as if it were a contempt of court. This recourse to the court provides a way (subject to appropriate safeguards) for the Commissioner to obtain information from bodies to which the Commissioner's functions and the code of practice apply.

Section 13: Admissibility of statements in criminal proceedings

31. Section 13 provides that an oral or written statement made by a person required to provide it under section 11 is not admissible in any criminal proceedings against that person. The effect of this is that individuals cannot incriminate themselves when responding to a requirement to provide information.

Section 14: Offence of Commissioner's office disclosing confidential information

32. Section 14 contains a confidentiality provision that covers: the Commissioner (including any former Commissioners); the Commissioner's staff (or past staff); and an agent (or former agent) of the Commissioner. These persons would be guilty of an offence if they knowingly disclose information which has been obtained in the course of the Commissioner's activities, knowing that the information is not at the time of disclosure, and has not previously been, in the public domain. There is an exception under which disclosure is authorised where it is made with the consent of the person from whom the information was obtained, or where it is necessary for the purposes of exercising the Commissioner's functions, or where it is made for the purposes of legal proceedings (whether criminal or civil – and

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including the purposes of the investigation of any offence or suspected offence). A person guilty of an offence is liable to a fine on summary conviction or conviction on indictment. The fine on summary conviction is up to the statutory maximum, which is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 as the prescribed sum under section 225(8) of the Criminal Procedure (Scotland) Act 1995 (currently £10,000). The fine on indictment can be unlimited as section 211(1) of the 1995 Act makes any fine on conviction on indictment unlimited.

Reporting

Section 15: Reports and recommendations

33. Section 15 allows the Commissioner to publish reports and make recommendations on any matter relevant to the Commissioner's functions, including whether persons who are required to do so are complying with the code of practice. The Commissioner must lay a copy of any such published report before the Parliament. The Commissioner can make recommendations about any matter within the scope of their functions, including in relation to or addressed to persons who are not specified under section 2(1). Subsection (4) provides that sensitive information must be withheld in a report. This means information cannot be included where to publish that information would be unlawful, might prejudice criminal proceedings in a particular case, or would otherwise be contrary to the public interest.

Section 16: Requirement to respond to reports

34. Section 16 states that where the Commissioner makes a recommendation to Police Scotland, the SPA or the PIRC in a report (or any other person who the Commissioner is given oversight of under section 2), the Commissioner may also impose a requirement to respond to that recommendation. In such cases, the Commissioner must send a copy of the report to the relevant person, and the person must respond in writing by the deadline set by the Commissioner. The written response must set out the actions which the person has taken, or will take, to respond to the recommendation - or the reasons why the person has decided not to implement the recommendation (in cases where the recommendation is not being implemented either in full or in part).

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Section 17: Publication of responses to reports

35. This section requires the Commissioner to publish any response to a recommendation, and to lay the published response before the Parliament, unless there is a reason it would be inappropriate to do so. In particular, in publishing a response, the Commissioner is (so far as reasonably practicable) to have regard to the same considerations as set out in section 15(4) – namely, the need to withhold information where the Commissioner considers that to include it would or might be unlawful, would or might prejudice the administration of justice, or would not be in the public interest. The Commissioner is also permitted to publicise any failure to respond in a way which the Commissioner considers appropriate.

Compliance notices

Section 17A: Compliance notices

36. Subsection (1) of section 17A enables the Commissioner to issue a compliance notice to a person who the Commissioner considers has failed, or is failing, to comply with the code of practice. Subsection (2) defines what is meant by a ‘compliance notice’: this is a notice requiring the person to whom it is addressed to take specified steps to address the failure to comply. This may be a case of taking steps to remedy the breach or, where the breach is not one that is capable of being remedied, it may be a case of taking steps to avoid a similar future breach.

Section 17B: Content and form of a compliance notice

37. Paragraphs (a) to (f) of section 17B specify the content which must be included in any compliance notice issued by the Commissioner. This will include, crucially, an explanation of why the notice has been issued, the steps the person is to take, and an explanation of the possible consequences if there is not compliance with the notice.

Section 17C: Variation of a compliance notice

38. Subsection (1) of section 17C enables the Commissioner to vary a compliance notice to allow more time for compliance or, with the consent of the person to whom the compliance notice was issued, to change the steps that are required to be taken. Subsection (2) clarifies that a compliance notice can only be varied before the deadline for taking the steps specified in the compliance notice has passed. This prevents a compliance notice

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from being modified retrospectively, after the deadline for compliance with it has already passed. Subsection (3) specifies how in practice the Commissioner can vary a compliance notice.

Section 17D: Revocation of a compliance notice

39. Subsection (1) of section 17D enables the Commissioner to revoke a compliance notice if the Commissioner so wishes. Subsection (2)(a) provides that the revocation of a compliance notice can only take place before the steps specified in the compliance notice have been taken. This prevents a compliance notice from being revoked after completed action has already been taken specifically because the notice required it. Subsection (2)(b) provides that a compliance notice can only be revoked by the Commissioner by giving notice in writing to that effect to the person to whom the compliance notice was issued.

Section 17E: Failure to comply with a compliance notice

40. Subsection (1) of section 17E enables the Commissioner to report a refusal or failure, without reasonable excuse, to comply with a compliance notice to the Court of Session. Subsection (2) allows the court, after hearing evidence or representations on the matter, to make an order to enforce the compliance notice or deal with the refusal or failure to comply with the notice as if it were contempt of court. The court can also do both of these things in relation to a failure or refusal to comply with an information notice.

Accountability

Section 18: Strategic plans

41. Section 18 requires the Commissioner to prepare and publish a strategic plan covering a four year period, and to lay the plan before the Scottish Parliament before the beginning of the said four year period. The first four year period is to commence on 1 April in the year following the coming into force of this section, and then each subsequent period of four years will also be covered by a strategic plan. Section 28(4) includes a power to allow the commencement regulations to amend this section to specify the date on which the first four year period is to begin, so that the section will act as an easy reference point for which year beginning 1 April the first strategic plan began.

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42. The plan must set out the Commissioner's objectives and priorities for the four year period and how they plan to achieve them, what the costs will be, and the timescale applicable. The Commissioner is able to review and revise a plan at any time, and any such revised plan is subject to the same rules on publication and laying. It should be noted that revising a plan will not alter when the four year period begins and ends. Accordingly, a revised plan only needs to contain information relating to the remainder of the four year period in question, but it must cover the same topics. Before publishing a plan or a revised plan, the Commissioner is to consult on a draft on it with the SPCB and anyone else the Commissioner considers appropriate. This gives the SPCB an opportunity to comment on the strategic objectives and priorities of the Commissioner before a strategic plan is published and laid before the Parliament. Who else it will be appropriate to consult will likely depend on the proposals under consideration.

Section 19: Budgets

43. Section 19 requires the Commissioner to prepare a budget before the start of each financial year and seek the approval of the SPCB by such a date as the SPCB determines. Under subsection (2), the Commissioner may seek to revise the budget during the year by submitting revised proposals to the SPCB for approval. When preparing a budget or a revised budget, the Commissioner is required to ensure that resources will be used economically, efficiently and effectively and must, under subsection (4), certify this in any budget or revised budget proposal.

Section 20: Accountable officer

44. This section requires the SPCB to designate either the Commissioner or a member of the Commissioner's staff as the accountable officer. The functions of the accountable officer are set out in subsection (2) and include: the signing of the accounts; ensuring that the finances are kept in good order; and ensuring that resources are used economically, efficiently and effectively. Subsection (3) provides a degree of protection for an accountable officer who is not also the Commissioner should they be required to act in any way which is inconsistent with their responsibilities. Before any such action can be taken, the accountable officer must obtain written authority from the Commissioner and send a copy of the authority to the Auditor General for Scotland as soon as possible. Under subsection

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(4), the accountable officer is directly answerable to the Parliament for the exercise of those functions specified in subsection (2).

Section 21: Accounts and audit

45. Section 21 sets out the accounting and auditing requirements that apply to the Commissioner. The Commissioner must keep proper accounts and accounting records and prepare annual accounts for each financial year. A financial year is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and is a year ending with 31 March. In fulfilling these duties, the Commissioner must comply with any directions given by the Scottish Ministers, who are responsible for such matters under section 19 of the Public Finance and Accountability (Scotland) Act 2000.

46. Under subsection (1)(c) of section 21 of the Bill, a copy of the accounts are to be sent to the Auditor General for Scotland for auditing. The provisions of sections 21 and 22 of the 2000 Act then require the Auditor General to audit the accounts or appoint someone suitably qualified to do so. It also requires the accounts to be sent to the Auditor General not later than 6 months after the end of the financial year in question. Once the accounts have been audited, the 2000 Act makes provision for them to be sent to the Scottish Ministers, whereupon Ministers are required to lay them before the Parliament within 9 months of the end of the financial year in question.

47. Under subsection (3) of section 21 of the Bill, the Commissioner must make a copy of its audited accounts available for inspection, free of charge, to anyone on request.

Section 22: Annual Report

48. Section 22 requires the Commissioner to prepare and publish a report on the Commissioner's activities each financial year, which must include a review of what the Commissioner has done to fulfil each of their functions, a review of issues which have been identified by the Commissioner as being relevant to the use of biometric data in the criminal justice and policing context, and any recommendations in relation to those issues. While not a requirement, it would be open to the Commissioner to also outline work to be undertaken in the following reporting year. The SPCB could direct that the annual report is to include a forward-look, using

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its powers under section 5. The report is to be laid before the Parliament within seven months of the last day of the financial year to which the report relates – meaning by 31 October.

Ethics Advisory Group

49. Section 22A establishes a new Ethics Advisory Group to provide independent advice to the Commissioner on ethical issues relating to the acquisition, use, retention and disposal of biometric data (including the technology that is used), as well as the legal and ethical considerations arising from emerging technological developments. Under subsection (2), the group must meet at least twice a year. Subsection (4) requires the group to produce an annual report for the Commissioner. The group may, as part of any report under subsection (4), propose changes to the code of practice or make any other recommendations the group considers appropriate. Subsection (6) allows the governance, remuneration and membership of the group to be determined by regulations made by the Scottish Ministers. Those regulations may, in relation to those matters, deal with the appointment of members, remuneration, expenses and the publication of reports, as well as such other matters about the functioning of the group (in relation to its governance, remuneration and membership) as Ministers consider appropriate. Subsection (8) requires the Commissioner to appoint the members of the group in accordance with the provision made by regulations. Under subsection (9), the Scottish Ministers must fund the operation of the group as they consider necessary. Subsection (10) requires regulations under this section to be laid within one year of the section coming into force. These regulations would be laid but subject to no procedure.

Meaning of key terms

Section 23: Meaning of “biometric data”

50. This section defines what is meant by the term “biometric data” where it appears in the Bill. For the purposes of this Bill, biometric data means information about an individual’s physical, biological, physiological or behavioural characteristics which may establish the identity of an individual, either on its own or when combined with other information of a biometric or non-biometric nature. The reference to combining information with other information means that something like a partial fingerprint is still treated as biometric data. In addition, because the definition is about “an individual”

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generally rather than the particular individual in question, information such as DNA would be biometric data even where it is taken from an individual who is an identical twin (and whose biometric data is therefore not unique in this regard).

51. Information about a person's physical characteristics would include data that would facilitate facial recognition. Information about a person's biological characteristics would include a DNA profile, which can be derived from blood, saliva, hair etc. Information about a person's physiological characteristics would include vein patterns. Information about a person's behavioural characteristics would include an analysis of that person's gait or speech pattern. A number of examples of biometric data are given in the Bill, but these are examples only and are not exhaustive. It should be noted that the definition covers both the material itself and the information which is derived from it.

Section 23A: Power to change meaning of “biometric data”

52. Section 23A enables the Scottish Ministers to, by regulations, change or clarify the meaning of biometric data in section 23 of the Act. This allows for future-proofing of the definition in an environment where change is fast-paced. This power is subject to the affirmative procedure under section 25(2).

Section 24: Interpretation

53. Section 24 provides the definition of various terms used in the Bill: “code of practice”, “Commissioner” and “Parliamentary corporation”.

Final provisions

Section 25: Regulations

54. Section 25(1) provides that regulations made under the Act may include incidental, supplementary, consequential, transitional, transitory or saving provision and may make different provision for different purposes. Under subsection (2), any regulations made by Scottish Ministers under section 2(6), section 7(4), section 9(1) and section 23A are subject to the affirmative procedure (as to which, see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010). Subsection (3) provides that the procedure for regulations making ancillary provision depends upon whether

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or not the provision made modifies the text of primary legislation. Subsection (4) provides that this section does not apply to commencement regulations under section 28(2).

Section 26: Ancillary provision

55. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with the Bill or any regulations made under it.

Section 27: Application of public authorities

56. Section 27 introduces schedule 2 which amends enactments in order to bring the Commissioner within their provisions.

Section 28: Commencement

57. Subsection (1) of section 28 provides that this section and sections 25 (regulations), 26 (ancillary provision) and 29 (short title) come into force on the day after Royal Assent. Subsection (2) provides that the rest of the Act will come into force on such day as the Scottish Ministers by regulations appoint. Subsection (3) provides that regulations made under this section may include transitional, transitory or saving provision and may make different provision for different purposes. Subsection (4) sets out that commencement regulations may amend section 18(6)(a) so that a date for the beginning of the first four year period for a strategic plan is specified, instead of a description of a date, once the date that the commencement of section 18 is known.

Section 29: Short title

58. Section 29 provides that the short title of the Act this Bill will become, if enacted, is the Scottish Biometrics Commissioner Act 2020.

Schedule 1 – The office of Scottish Biometrics Commissioner

59. Schedule 1 makes detailed provision concerning the appointment, status, disqualification, terms of office and remuneration, pension and subsequent appointments of the Commissioner. It also provides for the ability to fill the role on a temporary basis, as well as the appointment of other staff.

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60. Paragraph 1 of the schedule provides that the Commissioner is not to be regarded as being a servant or agent of the Crown. In addition, the Commissioner's status is that of a juristic person distinct from the natural person holding the office of Commissioner. The Commissioner's staff are not to be regarded as civil servants. Given that the Commissioner is not a Crown servant or agent, it follows that the Commissioner's property belongs to the Commissioner (as Commissioner) and not to the Crown.

61. Paragraphs 2 and 3 state: that the Commissioner will be appointed by the Queen on the nomination of the Scottish Parliament; that a Commissioner may serve only one term of office; and that a person is disqualified from being appointed Commissioner if at the time of the appointment or in the year preceding the appointment, the person is or has been a member of the Scottish Parliament, of the European Parliament, of the House of Commons or of the House of Lords. This is to ensure that the Commissioner is free from political influence given that the role will involve scrutinising laws over which these institutions have control. Provision is also made to disqualify employees, office-holders or members of any body listed under section 2(1) of the Bill. This is to prevent anyone being appointed as Commissioner who currently is (or has recently been) a member, employee or appointee of the bodies which the Commissioner can monitor. These disqualification criteria continue to apply during the Commissioner's time in office (see paragraph 5(1)(b) of the schedule).

62. Under paragraph 4, a Commissioner may hold office for a single term of up to eight years, as determined by the SPCB at the time of appointment. This is consistent with the tenure arrangements set out in the Scottish Parliamentary Commissions and Commissioners etc. (Scotland) Act 2010.

63. Paragraph 5 sets out the circumstances under which a Commissioner's appointment may terminate early. A Commissioner may resign, or may become disqualified from holding office under paragraph 3. The Commissioner can also be removed from office where either the SPCB is satisfied that the Commissioner has breached their terms and conditions of appointment and the Parliament resolves to remove the Commissioner as a result, or where the Parliament resolves that it has lost confidence in a Commissioner's willingness, suitability or ability to perform the Commissioner's functions. A resolution in either scenario requires the

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support of at least two thirds of (normally) the total number of members of the Parliament. However, the number of votes required is based on the number of seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

64. Paragraph 6 provides that the validity of any acts of the Commissioner is unaffected by any procedural defects in the Parliament's nomination or by the Commissioner subsequently becoming disqualified from acting as the Commissioner.

65. Paragraph 7 enables the SPCB to set and pay such remuneration, allowances, pension and gratuities to the Commissioner as it determines. The SPCB has discretion as to whether anything is paid at all, in case there would otherwise be a question as to whether the amount that the SPCB determines could be set at zero. It will therefore be for the SPCB to decide on whether payments are made, and at what level. This will provide maximum flexibility for the SPCB to determine matters as it sees fit. The SPCB must also indemnify the Commissioner for liabilities incurred by the Commissioner in their capacity as such.

66. Paragraph 8 sets out restrictions on subsequent appointments held by a Commissioner once they have left office. Unless permission is granted by the SPCB, a former Commissioner may not, within the specified period, subsequently: be employed by the Scottish Biometrics Commissioner; be a member, an employee or appointee of Police Scotland, the SPA or the PIRC; hold any other office, employment or appointment or engage in any other occupation which that person could not have held under paragraph 9(2)(a) when they were the Commissioner. Paragraph 9(2)(a) covers any specific absolute prohibitions on simultaneous appointments which are contained in the Commissioner's terms and conditions. The restrictions under paragraph 8 run from the date of leaving office until the end of the financial year following the one in which the person ceased to be the Commissioner. Therefore, if the Commissioner left office on 1 December 2021, the restriction would subsist until 31 March 2023. The restriction is in place to avoid an appointment being seen to compromise the independence of the Commissioner. For example, this could arise if a former Commissioner were to become an office-holder of an authority which they would have been able to investigate when in post as the Commissioner. Accordingly, while the restriction under

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paragraph 9(1)(b) currently applies to Police Scotland, the SPA and the PIRC, if the persons over which the Commissioner has functions are changed in future under section 2(6) then this will automatically flow through to this provision.

67. Under paragraph 9, the SPCB may determine the terms and conditions of the Commissioner's appointment insofar as not already set out in the Bill, including prohibiting the Commissioner from holding any other office, employment or appointment – or requiring that the Commissioner first obtain the approval of the SPCB before holding any other office, employment or appointment. Again, this is to avoid an appointment being seen to compromise the independence of the Commissioner.

68. Paragraph 10 makes provision for the appointment of a temporary Commissioner to hold the office either during a period when the post is vacant or where the Commissioner is unable to perform their functions. During that period, the SPCB may appoint a member of the Commissioner's staff or another person who is not disqualified from holding the post under paragraph 3 of this schedule. However, staff are exempted from the normal disqualification provisions to allow for greater flexibility and in recognition of the short-term nature of the appointment. The SPCB will determine the terms, conditions and duration of the appointment and may relieve the individual from the post at its discretion (by notice in writing), or at the request of the individual.

69. Paragraphs 11 and 12 allow the Commissioner to appoint staff, and to determine their terms and conditions subject to the approval of the SPCB.

70. Paragraph 13 allows the Commissioner to pay pensions, allowances and gratuities to current or former members of staff, including the establishment of one or more pension schemes and the payment of allowances or gratuities by way of compensation for loss of employment. Approval for such arrangements must be obtained from the SPCB.

71. Under paragraph 14, while the Commissioner can delegate any function to any person, ultimately the Commissioner remains responsible for the performance of those delegated functions. Having delegated

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functions, the Commissioner is still able to decide to perform those functions personally.

Schedule 2 – Application of public authorities legislation

Scottish Public Services Ombudsman Act 2002

72. Paragraph 1 of schedule 2 adds the Scottish Biometrics Commissioner to the list of authorities in schedule 2 of the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”). The effect is to:

- make the Scottish Biometrics Commissioner open to investigation by the ombudsman (see section 5 of the 2002 Act),
- oblige the Scottish Biometrics Commissioner to have its own complaints handling procedure that complies with the statement of principles published by the ombudsman under section 16A of the 2002 Act,
- permit the Scottish Biometrics Commissioner to be made subject to the further requirement to have a complaints handling procedure that complies with a model complaints handling procedure prepared by the ombudsman, per sections 16B and 16C of the 2002 Act.

Freedom of Information (Scotland) Act 2002

73. Paragraph 2 of schedule 2 adds the Scottish Biometrics Commissioner to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002. This means that the Scottish Biometrics Commissioner will be subject to the requirements which that Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme for the pro-active publication of information it holds.

74. Being a public authority within the meaning of the Freedom of Information (Scotland) Act 2002 also makes the Scottish Biometrics Commissioner a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004 apply.

75. It also means that the Scottish Biometrics Commissioner falls within the definition of a “public body” under section 44 of the Climate Change

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(Scotland) Act 2009. This means that the Commissioner must act in a way calculated to contribute to the delivery of climate change targets and any climate change adaptation programme and in the way that the Commissioner considers is most sustainable. The Commissioner can also be made subject to further climate change duties, including reporting duties.

76. In addition, as a public authority within the meaning of the Freedom of Information (Scotland) Act 2002, the Scottish Biometrics Commissioner is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018 (subject to the power under that section to remove that status not being exercised). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

Public Services Reform (Scotland) Act 2010

77. Paragraph 3(a) of schedule 2 adds the Scottish Biometrics Commissioner to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). This means that it is a body in relation to which an order can be made under section 14 of that Act where it would improve the exercise of public functions, having regard to efficiency, effectiveness and economy. An order under section 14 of the 2010 Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

78. Paragraph 3(b) of schedule 2 adds the Scottish Biometrics Commissioner to the list of bodies in schedule 6 of the 2010 Act. The effect of this is that the Scottish Ministers cannot propose any provision by order under section 14 (the powers to improve the exercise of the

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Commissioner's functions having regard to efficiency, effectiveness and economy discussed above) or section 17(1) (power to remove or reduce burdens) unless requested to do so in writing by the Scottish Parliamentary Corporate Body. It also means that the Scottish Ministers cannot lay any subsequent draft order containing such provision unless the Scottish Parliamentary Corporate Body consents.

79. Paragraph 3(c) of schedule 2 adds the Scottish Biometrics Commissioner to the list of bodies in schedule 8 of the 2010 Act. This means that the Scottish Biometrics Commissioner will be subject to the duties to report after each financial year on:

- expenditure (see section 31 of the 2010 Act), and
- the steps it has taken to promote and increase sustainable growth and improve its efficiency, effectiveness and economy (see section 32 of the 2010 Act).

Public Records (Scotland) Act 2011

80. Paragraph 4 of schedule 2 makes the Scottish Biometrics Commissioner subject to the duties created by the Public Records (Scotland) Act 2011 to produce, implement and keep under review a records management plan.

Procurement Reform (Scotland) Act 2014

81. Paragraph 5 of schedule 2 adds the Scottish Biometrics Commissioner to the list of contracting authorities subject to the duties created by the Procurement Reform (Scotland) Act 2014 regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement.

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Revised Explanatory Notes

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