

# Scottish Biometrics Commissioner Bill

[As amended at Stage 2]

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## Supplementary Delegated Powers Memorandum

### Introduction

1. This Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.10 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Scottish Biometrics Commissioner Bill ("the Bill"). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were introduced to the Bill or amended at Stage 2.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. This supplementary memorandum should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

### Provisions conferring power to make subordinate legislation introduced, removed or amended at stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48A) as amended at Stage 2

## **Section 9 – Bringing the code of practice into effect**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

**Revised or new power: revised (the power itself has not changed, other than to update a cross-reference in light of another amendment, but the procedure attached to it has been supplemented).**

### **Provision**

4. The power in section 9 has not changed, other than to update a cross-reference in light of another amendment. As it did at introduction, section 9(1) continues to provide that any code of practice has no effect until the day appointed for the code by regulations made by the Scottish Ministers. Section 9(2) continues to provide that, when laying draft regulations before the Parliament to bring the code into effect, the Scottish Ministers must also lay a copy of the code before the Parliament. Section 9(3) continues to provide that the Commissioner must publish the code as soon as reasonably practicable after the regulations are made.

5. However, in terms of procedure, section 9 is now subject to a new precondition in section 8A which applies to the first code of practice.

6. Section 8A provides for an enhanced scrutiny procedure in relation to the first code of practice. In relation to it, the Commissioner must, with the consent of the Scottish Ministers, lay a draft code before the Parliament for consideration. The Commissioner must have regard to any representations about the draft code made to them within 60 days of laying it. Representations can be made to the Commissioner by anyone, including MSPs or members of the public. In calculating the 60 day period, no account is to be taken of any time during which the Parliament is dissolved or in recess for more than four days.

7. This procedural step in relation to the first code is in addition to the existing requirement that the code can only be brought into effect by the

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Parliament approving affirmative regulations under section 9. The procedure contained in section 8A will not apply to subsequent versions of the code of practice.

### **Reason for taking power**

8. The reason for taking the power has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

### **Choice of procedure**

9. The affirmative procedure continues to be considered appropriate for this power for the reasons set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

10. It is considered appropriate to include additional procedure and provide for enhanced parliamentary involvement in relation to the first code as it is likely that subsequent revisions will simply build on the foundations of what is already there. The first code is also the most important in terms of setting the tone for the establishment of this new office. The additional procedure is considered appropriate because it will guarantee a longer period of time for MSPs to consider the first code, while still endeavouring to avoid causing undue delays in the finalisation of it. It will also provide a direct mechanism for Parliament to engage with the first code at an earlier stage. This additional procedure in relation to the first code is what the Justice Committee sought in its Stage 1 report.

### **Section 22A – Ethics Advisory Group**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** none

**Revised or new power:** new

### **Provision**

11. Section 22A establishes a new Ethics Advisory Group to provide independent advice to the Commissioner on the promotion of ethical

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considerations in the acquisition, retention, use and disposal of biometric data, as well as the legal and ethical issues arising from emerging technological developments. The Group must meet at least twice annually and must make an annual report to the Commissioner. An annual report may propose changes to the code of practice or make any other recommendations the Group considers appropriate. Scottish Ministers must fund the operation of the Group to the extent they consider necessary to support the Group's operation.

12. The governance, remuneration and membership of the Group may be determined by Scottish Ministers through regulations. Regulations must be laid within one year of the section coming into force. It is then for the Commissioner to appoint the members of the Group in accordance with the regulations.

### **Reason for taking power**

13. The Group will report to the independent Commissioner. As the Commissioner's office has not yet been established, it is not possible for the Commissioner to be consulted on the precise details of how the Group should operate and for suitable provision to be made in this regard just now. It is also possible that any provision that is made about the Group once the independent Commissioner is in office will need to change over time, depending on the preferences of the person who is appointed as the Commissioner at any given time as well as changing circumstances. Taking a power to provide for these matters to be dealt with in regulations later is therefore one method of allowing these matters to be provided for while recognising that it would not be possible to make suitable provision now.

### **Choice of procedure**

14. The power to make regulations under section 22A(6) is not currently subject to any procedure. The Scottish Government does not consider this to be appropriate. Amendments adjusting this will be brought forward at Stage 3. It is anticipated that further amendments may be brought forward by the Member who lodged the original amendment but, if not, the Scottish Government would bring forward amendments to address this. However, it may be that, rather than making the power subject to procedure, it is considered appropriate to remove the regulation-making power altogether and, instead, allow matters relating to the group to be determined by the Commissioner or the Scottish Parliamentary Corporate Body (SPCB)

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directly. This is because the Commissioner is to be an independent office-holder which is accountable to the SPCB rather than the Scottish Ministers, and so regulations which are instigated by Ministers may not be the most appropriate approach to take here. Any amendments would ensure that the SPCB had suitable oversight of the details of the functioning of the Group.

## **Section 23A – Power to change the meaning of biometric data**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative procedure**

**Revised or new power: new**

### **Provision**

15. Section 23A inserts a power for Scottish Ministers to, by regulations, change or clarify the meaning of biometric data in section 23 of the Act.

### **Reason for taking power**

16. This power allows the definition of biometric data in the Bill to be changed without the need for further primary legislation. This will allow the definition to be updated relatively quickly in an environment where methods and technologies used to collect and extract different types of biometric data, as well the things which constitute biometric data, can evolve quickly and unpredictably. It was also a recommendation of the Justice Committee in its Stage 1 report that thought should be given to how the definition in section 23 could keep pace with future developments in biometrics, noting that there was, at that point, no regulation-making power which would allow the definition to be amended should circumstances require this in the future.

### **Choice of procedure**

17. Given that the regulations will make amendments to primary legislation, it is appropriate that the regulations be subject to affirmative procedure. Furthermore, changing the definition of biometric data could

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have an impact on those bodies subject to scrutiny by the Scottish Biometrics Commissioner under section 2(1), and could also lead to additional bodies being inserted into section 2(1) (using the existing power to do so under section 2(6)). This is because any change to the definition could have the result of, in practice, broadening the Commissioner's remit, general function, and how that function is discharged under section 2(3). It is therefore appropriate that any change of this nature should be subject to full scrutiny and consideration by Parliament under the affirmative procedure.



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