

SCOTTISH BIOMETRICS COMMISSIONER BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Scottish Biometrics Commissioner Bill introduced in the Scottish Parliament on 30 May 2019.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 48–EN).;
 - a Financial Memorandum (SP Bill 48–FM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP 48–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The Scottish Government's vision for a just, safe and resilient Scotland identifies the need to live in safe, cohesive and resilient communities as a priority outcome. The biometrics field is evolving rapidly and offers great potential in the detection, prevention and prosecution of crime and, thereby, the delivery of community safety. However, the use of biometric data and technologies raises a range of ethical and human rights considerations. Therefore, the Scottish Ministers want to ensure that the approach to the collection, use, retention and disposal of biometric data in the context of policing and criminal justice is lawful, effective and ethical. Their ultimate goal is to keep communities safe while respecting the rights of the individual and improving the accountability of the police.
5. "Biometric data" is a relatively broad and evolving concept. It encompasses what is often referred to as "first-generation biometrics" such as fingerprints, DNA and custody photographs which have been commonly used for identifying individuals in policing for many years. It also includes new and emerging technologies (or "second-generation biometrics") such as facial recognition software, remote iris recognition and other behavioural biometrics such as voice pattern analysis. For the purposes of this Bill, biometric data is defined as information about an individual's physical, biological, physiological or behavioural characteristics which is capable of being used, on its own or when combined with other information, to establish the identity of an

individual, and it falls within the remit of the Bill where it is being used by Police Scotland or the Scottish Police Authority (SPA) in a policing or criminal justice context in Scotland. This is a broad definition which is intended to capture data which is, for example, collected at police stations, analysed at laboratories, and which is recorded on databases for the purposes of detecting and preventing crime.

6. The Scottish Government considers that an independent Commissioner would lend valuable support to the proportionate and effective use of biometric data, and would maximise the benefits of biometric technologies. The Commissioner will focus on ethical and human rights considerations arising from the use of biometric data. The increasing use of biometric data and technology – not only in the areas of policing and criminal justice but in the wider public sector and private sector – is now generating increased public concerns about privacy, security and mis-handling.

7. While biometric data may be captured by a range of private companies and public bodies, there are a number of reasons why biometric data used for criminal justice and police purposes merits a special approach. In particular, biometric data used by justice agencies can be taken without the individual's consent, meaning that oversight is even more important. Also, unlike biometric data held by health or education agencies which is not used for justice purposes (for example, DNA samples held for research), the validity and reliability of the data needs to stand up to scrutiny in a criminal court and may give rise to criminal convictions or exonerations.

8. Therefore, the Scottish Ministers wish to put in place arrangements for independent oversight of the collection, use, retention and disposal of biometric data by Police Scotland and the SPA to ensure public confidence in current and future uses of biometric data in the context of policing and criminal justice. In creating a new Scottish Biometrics Commissioner, the Scottish Ministers are also responding positively to the recommendations made in three independent reports from recent years – as described in the next section of this Memorandum.

9. The Scottish Government recognises that it is important that those who use biometric data do so with regard to the law, human rights and ethical considerations. It is also important that scrutiny arrangements are taken forward by a body which operates independently of the Scottish Ministers and law enforcement organisations.

10. The purpose of the Bill therefore is to make provision for independent oversight arrangements through the creation of a new Commissioner and a code of practice to promote good practice and consistent standards in relation to biometric data. These are important elements in maintaining public and professional confidence in the use of biometric data in the context of policing and criminal justice.

11. In particular, the Bill will:

- Establish a new Scottish Biometrics Commissioner, accountable to the Parliament, to keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data for policing and criminal justice purposes;
- Require the Commissioner to prepare, promote and monitor the impact of a new code of practice that is expected to provide information and guidance about the

responsibilities of specified bodies and recognised standards in relation to biometric data. The Commissioner will prepare the code in consultation with a prescribed list of stakeholders (including Police Scotland, the SPA, the Information Commissioner, the Scottish Human Rights Commissioner, etc.) and anyone else the Commissioner considers appropriate. This is to ensure that any code being proposed has been shaped by key stakeholders as well as the Commissioner, to ensure that it is comprehensive and workable. The Commissioner will then monitor the impact of the code through use of the Commissioner’s information-gathering powers, and will report accordingly.

12. In establishing independent oversight of the acquisition, retention, use and disposal of biometric data for policing and criminal justice purposes, the Bill will provide for an effective, proportionate and ethical approach to the use of biometric data. The Bill will therefore contribute towards the realisation of the Scottish Government’s vision for justice of “a just, safe and resilient Scotland”. The Bill also links to the Scottish Government’s justice outcome, “we live in safe, cohesive and resilient communities”, and to the National Performance Framework Values to respect the rule of law and to act in an open and transparent way.

13. The Bill will also contribute to the following National Outcomes which are¹:
- We live in communities that are inclusive, empowered, resilient and safe.
 - We respect, protect and fulfil human rights and live free from discrimination.
 - We grow up loved, safe and respected so that we realise our full potential.

BACKGROUND

14. In June 2017, the then Cabinet Secretary for Justice, Michael Matheson MSP, tasked an Independent Advisory Group (IAG), chaired by Solicitor Advocate John Scott QC, to consider the taking, use and retention of biometric data in policing. The recommendations² made by the IAG were consistent with the previous findings of Professor Jim Fraser in 2008³ and Her Majesty’s Inspectorate of Constabulary in Scotland (HMICS) in 2016⁴. The IAG called for:

- Legislation to create an independent Scottish Biometrics Commissioner. The Commissioner should be answerable to the Parliament, and report to the Parliament. The Commissioner should keep under review the acquisition, retention, use and disposal of all biometric data by the police, SPA and other public bodies. The Commissioner should promote good practice amongst relevant public and private bodies, and monitor compliance with the code of practice.
- Legislation to establish a code of practice covering the acquisition, retention, use and disposal of DNA, fingerprints, facial and other photographic images (including custody images) and all existing, emerging and future biometrics for Police Scotland, the Scottish Police Authority and other bodies working in the field of law enforcement.

¹ <https://nationalperformance.gov.scot/national-outcomes>

² <http://www.gov.scot/Resource/0053/00533063.pdf>

³ <https://www2.gov.scot/Publications/2008/09/22154244/15>

⁴ <https://www.hmics.scot/publications/audit-and-assurance-review-use-facial-search-functionality-within-uk-police-national>

15. In its response⁵ to the IAG's report, the Scottish Government accepted the recommendations and committed to bringing forward legislation on biometrics in the current Parliamentary session. In order to facilitate consultation on the proposals, the Scottish Government drafted an initial outline code of practice⁶, along with a concept of operations⁷ for the role of the Commissioner.

16. The Scottish Government's consultation ran from 13 July to 1 October 2018, generating 89 written responses.⁸ Respondents were broadly supportive of the proposals (with 83% of respondents supporting the need for a code of practice and 89% being in favour of the establishment of a Scottish Biometrics Commissioner).

17. The provisions of the Bill therefore seek to address the issues raised in the independent reports issued by Professor Fraser, HMICS and the IAG – as well as responding positively to the views expressed in the recent consultation.

CURRENT LEGISLATION REGARDING BIOMETRIC DATA

18. The Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') is the primary Scottish legislation allowing the collection and retention of fingerprints and other biometric samples from a person arrested by the police. Sections 18 to 19C stipulate the conditions under which samples may be taken by the police, as well as rules for retention and specification of the purposes of use of samples. It should also be noted that Section 18G permits biometric data to be retained for national security purposes. The existing law may be summarised as follows:

- fingerprint and DNA data from convicted persons can be retained indefinitely. This legal entitlement applies on the basis of a single criminal conviction for any type of offence, regardless of gravity;
- data taken from a person arrested for an offence (and who has no previous convictions) must be destroyed as soon as possible following a decision not to institute criminal proceedings against the person or the acquittal of a person following such proceedings (subject to the final bullet point below);
- data from children dealt with through the Children's Hearings System may be retained only where the grounds for referral are established (whether through acceptance by the child at such a hearing or a finding in court) in relation to a prescribed sexual or violent offence. Such data can only be retained for three years unless the police apply for, and are granted, an extension by a sheriff. For less serious offences, where grounds are not established, or where the child is under the age of criminal responsibility, there is no retention in relation to children;
- data from individuals who accept an offer from the procurator fiscal may be retained for three years in relation to a prescribed sexual or violent offence, with the chief constable able to apply to the sheriff court for further two-year extensions (there is no

⁵ <https://www2.gov.scot/Resource/0053/00533027.pdf>

⁶ <https://www2.gov.scot/Resource/0053/00538315.pdf>

⁷ <https://www2.gov.scot/Resource/0053/00538314.pdf>

⁸ https://consult.gov.scot/safer-communities/use-of-biometric-data/consultation/published_select_respondent and <https://consult.gov.scot/safer-communities/use-of-biometric-data/results/biometricsdata-finalconsultationanalysis.pdf>

limit on the number of two-year extensions that can be granted in respect of a particular person's data);

- data may be retained for two years in relation to non-sexual or non-violent offences which are the subject of an accepted offer from the procurator fiscal or a fixed penalty notice from the police; and
- data from individuals prosecuted for, but not convicted of, certain sexual and violent offences may be retained for three years, with the chief constable able to apply to the sheriff court for further two-year extensions (there is no limit on the number of two-year extensions that can be granted in respect of a person's data).

19. It is important to recognise that while Police Scotland are responsible for the collection of biometric data under the 1995 Act, the Scottish Police Authority (the SPA) also play a significant role in the management, use and deletion of biometric data as provider of forensic services to support operational policing in Scotland. One of the central tenets of the Police and Fire Reform (Scotland) Act 2012 is that Forensic Services are not under the direction and control of the chief constable. Instead these services are managed and delivered by the SPA – ensuring a suitable degree of independence and impartiality. The SPA's Forensic Services include forensic and fingerprint capability and scene of crime officers.

KEY PROVISIONS OF THE BILL

Scottish Biometrics Commissioner

Establishment, governance and accountability

20. As discussed at paragraphs 4 to 13 above, the Scottish Government considers that an independent Commissioner would be a valuable support to the proportionate and ethical exercise of police powers regarding biometric data, and to maximising the benefit of biometric technologies. The Commissioner will play a central role in setting and promoting working standards surrounding the use of biometrics in a policing and criminal justice context. The Commissioner will also play an important part in informing the views of policy and law makers responsible for making the law within which Police Scotland and the SPA operate. To do this in a way which commands the confidence of the public, governance arrangements for the Commissioner must be, and be seen to be, transparent, accountable and free of any undue influence. Therefore, the Bill provides that the Commissioner be appointed by Her Majesty the Queen, on the nomination of the Parliament – and be accountable to the Parliament. A parliamentary appointment is also consistent with arrangements for other independent scrutiny bodies. While other models were considered, these were discounted for the reasons set out at paragraphs 35 to 42 below.

21. The Scottish Parliamentary Corporate Body (the SPCB) will take forward the appointment process for the Commissioner. The Commissioner will serve a single term of a maximum of eight years' duration, which is in line with the terms and conditions of other parliamentary commissioners. This flexible approach allows the SPCB to determine at the time of appointment how long the term will last. For example, it may be the case that a relatively long period of appointment may be considered appropriate for the first Commissioner, to allow sufficient time to establish the office in the start-up period as well as creating and embedding its practices. Whereas,

a different term of appointment may be chosen by the SPCB for the subsequent Commissioners, in light of experience. It is also a sufficiently long maximum period to allow the SPCB the flexibility to ensure that an appointment does not come to an end at a time that the Parliament is in recess or dissolved, while ensuring the Commissioner's independence through the one-off nature of the appointment.

22. A phased approach will be taken to start-up. It is expected that the SPCB will commence the recruitment process for the Commissioner once the Bill has passed Stage Three of its parliamentary passage. The Commissioner would then appoint their own staff, on such terms and conditions as are approved by the SPCB.

23. The Commissioner will be accountable to the Parliament for compliance with the Commissioner's statutory duties. The Commissioner will prepare a strategic plan at four yearly intervals, setting out their objectives and priorities for that period along with the associated estimated costs. The Commissioner must also prepare and publish an annual report on their activities each year, including a review of relevant biometrics issues and the activities undertaken by the Commissioner in fulfilling the Commissioner's functions, together with any recommendations arising. The annual report is to be laid before the Parliament. This reporting is in addition to the reports that the Commissioner can prepare on individual matters under section 15 of the Bill throughout the year.

24. The Scottish Ministers will pay for the set-up costs and the first year's operating costs incurred by the office of Scottish Biometrics Commissioner – estimated at £184,000 and £333,000 respectively. Thereafter, the ongoing running costs to the Parliament will be considered as part of the annual Scottish Government budget process. The Commissioner will report on its spend each year within its annual accounts which will be audited by the Auditor General for Scotland.

25. The Scottish Ministers estimate that the Commissioner's post will be part-time (0.6 full-time equivalent) and that the staffing complement will be three full-time equivalents (FTEs). This is on the basis of a comparison with the Office of the Commissioner for the Retention and Use of Biometric Material (CRUBM) who has a similar oversight role in respect of police use of biometric material in England and Wales. The CRUBM is currently a 0.6 FTE post and his staffing complement is four FTEs. The CRUBM's remit covers all 43 police forces in England & Wales but only in respect of fingerprints and DNA – whereas, the remit of the Scottish Biometrics Commissioner's functions will include all current biometric data and any new or emerging data. The terms and conditions of the Commissioner will be determined by the SPCB in due course. The staffing complement will be a decision for the Commissioner, subject to approval by the SPCB.

General Functions

26. The Commissioner's general function will be 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 Police Scotland and the SPA. In particular, the Commissioner will keep under review the practice, processes and standards adopted by Police Scotland and the SPA. The effective use of biometric data and techniques can play a critical role in responding to criminal activity and thereby improving the wellbeing of communities. The establishment of an independent expert in the form of the Commissioner to

advise on and monitor the effective use of biometric data would therefore also aid the work already being undertaken by Police Scotland and the SPA to drive improvement in this area.

27. In summary, in fulfilling their general function, the Commissioner will:

- Promote adherence to an independently established framework of standards against which to assess whether police systems and practices are lawful, effective, ethical and human-rights based. Those standards would be set out through a code of practice relating to the handling of biometric data.
- Review law, policy and practice in relation to the use of biometric data in a policing and criminal justice context, with a particular focus on protecting the rights of children, young people and vulnerable people. The Commissioner may make recommendations to bodies on any matter relevant to the Commissioner's remit.
- Play a significant public education and public engagement role to ensure that the public are provided with clear information to help them understand the powers of Police Scotland and the SPA in relation to biometric data, and how those powers can be challenged.
- In undertaking the Commissioner's functions, the Commissioner may work jointly with, assist or consult the Parliament or specified bodies/office holders including Scottish Ministers, the chief constable of Police Scotland, the Board of the SPA, HMICS and the Police Investigations and Review Commissioner (PIRC).
- Either as part of that joint work (which includes the ability to work with the Scottish Human Rights Commission) or independently, the Commissioner will be able to submit, as appropriate, reports to international human rights and other relevant bodies pursuant to Scotland's international obligations.
- The Commissioner will also be able to commission research and collaborate more broadly in academic research as appropriate.
- It is expected that the Commissioner will foster close working relationships with other relevant bodies and office holders, in Scotland and beyond, whose function might offer insights into biometric data use. These would include, for example, HMICS, PIRC, the Information Commissioner, the Scottish Human Rights Commission, the Commissioner for Children and Young in Scotland, and the Commissioner for the Retention and Use of Biometric Material (an independent advisor to the UK Government regarding the use and retention of biometric data by that government).

28. In order to avoid duplication, the Scottish Biometrics Commissioner's functions do not extend to biometric data in relation to which the Commissioner for the Retention and Use of Biometric Material has a function under section 20 of the Protection of Freedoms Act 2012. Under that section the Commissioner for the Retention and Use of Biometric Material 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 Commissioner for the Retention and Use of Biometric Material 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 Commissioner for the Retention and Use of Biometric Material 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.

29. Importantly, complaints from individuals would continue to be dealt with by the UK Information Commissioner's Office under data protection legislation.

Code of Practice

30. The code of practice provided for in the Bill will be prepared by the Scottish Biometrics Commissioner in order to provide detailed information and guidance for police bodies on the achievement of recognised standards in relation to the acquisition, retention, use and destruction of biometric data. It is anticipated that the code will reflect the need for transparency, accountability and the observance of the rule of law. The code is also likely to provide guidance in relation to good practice particularly as regards children, young people, vulnerable individuals and groups with certain protected characteristics. To ensure that this broad range of interests is included in the code, the Commissioner will be required to consult specified bodies. The Commissioner will also be required to gain the approval of the Scottish Ministers before the code is finalised. Any changes to the code would be made by the Commissioner following consultation.

31. The code will fill a gap in the current biometrics landscape in Scotland, which lacks a commonly recognised set of working standards. Codes of practice have proven beneficial in providing guidance and oversight within other areas of Scottish policing, including stop and search. The code will also complement the work of other bodies – such as the UK Information Commissioner.

32. The code will apply to Police Scotland and the SPA so as to provide independent oversight of how the police are using their powers in relation to the collection, retention and use of biometric data – including material collected and processed by Police Scotland and the SPA on behalf of PIRC and the Crown Office and Procurator Fiscal Service (COPFS). The code will not apply to other bodies who collect, use, retain or dispose of biometric data more generally, such as the National Health Service (NHS), unless and until that data is passed to Police Scotland or the SPA. Medical professionals are bound by their own protocols in respect of the handling of biometric data samples. However, were the police to ask NHS staff to act on their behalf in dealing with biometric data, then the police are bound by the code of practice and it will be for them to ensure that proper regard is being had to the code.

33. The Commissioner will monitor whether Police Scotland and the SPA have regard to the code. The Commissioner will be able to publish reports containing recommendations if they believe that improvements are required in the way a body deals with biometric data. The Commissioner can require the relevant body to respond to any recommendations, with the resulting responses being laid before the Parliament.

34. The code of practice will be brought into force once the Commissioner has completed the consultation and approval process, subject to final approval by the Parliament.

ALTERNATIVE APPROACHES

Options for the new public body

35. The policy of the Scottish Ministers is that the number of new public bodies should be kept to a minimum, and that a rigorous assessment should be undertaken to assess the need for a new public body before consideration is given to developing formal proposals for establishing such a body. Therefore, a full options appraisal was carried out in May 2018 to identify the optimal delivery vehicle for the independent oversight of biometric data for policing and criminal justice purposes. The options included: extending the functions of an existing policing body; extending the functions of an existing parliamentary commissioner; establishing a new Commissioner appointed by the Scottish Ministers or by the Parliament; and the status quo.

36. The options were appraised through an assessment of:

- their ability to deliver the benefits associated with a Scottish Biometrics Commissioner (i.e. the ability to provide greater support to Ministers in realising national outcomes; strengthened oversight and accountability of public services; alignment with Scottish Government Economic Policy; impact on working practices and organisational standards; robust governance; ability to scrutinise the biometrics regulatory framework; enhanced public awareness and confidence around the use of biometric data);
- the strategic risks associated with any change (i.e. lack of available funding; lack of specialist knowledge to realise the benefits; lack of coherence in police scrutiny activity);
- the main financial costs (i.e. the Commissioner's remuneration; staff salary costs; accommodation).

37. The main findings around the status quo were that it scored the lowest in terms of overall benefit realisation and did not support further public services reform. In addition, it did not offer any added value in ensuring a proportionate and effective approach to biometric data or any additional capacity to support world class innovation, research and development. Finally, it did not offer the means to improve working practices and organisational standards or the capacity to enhance public awareness.

38. The findings around extending the remit of an existing body/existing parliamentary commissioner were that it would support enhanced delivery of outcomes and improvements in setting, monitoring and enforcing standards adopted by bodies involved in the delivery of criminal justice. In addition, it offered added value in ensuring a proportionate and effective approach to biometric data and additional capacity to support world class innovation, research and development. While it also offered the means to improve working practices and organisational standards and capacity to enhance public awareness, it would, however, be unlikely to realise overall benefits as it did not have the remit or expertise to effectively advise on and scrutinise all aspects of the regulatory framework surrounding biometrics.

39. Other existing policing-related bodies were considered – Her Majesty's Inspectorate of Constabulary in Scotland (HMICS) and the Police Investigations & Review Commissioner

(PIRC). While both HMICS and PIRC are well established in their respective areas of expertise, they do not currently have a remit across all areas of biometrics. The required widening of their focus could lead to a loss of focus, negatively impacting on their perceived authority and so their credibility to advise not only on biometrics, but also on those issues for which they currently have responsibility. In addition, any decision to extend the remits of HMICS or PIRC to provide oversight of biometrics use across the wider justice system would represent a fundamental shift in their purpose. A broadening of focus and increasingly complex structures could impact on their effectiveness in terms of their current scrutiny role. In this context it is also worth noting the IAG's conclusion that such a change could negatively impact HMICS's perceived level of authority and competence, delivering the opposite effect to that which is intended. These arguments apply equally to the PIRC and other parliamentary commissioners who, while having a valuable role to play in informing the debate around biometrics, do not currently possess the requisite skills and expertise to deliver the functions that are being proposed in respect of the Scottish Biometrics Commissioner.

40. The findings on a new parliamentary commissioner were that it would support improvements in setting, monitoring and enforcing standards adopted by bodies involved in the delivery of criminal justice. This option scored highest for benefits realisation, particularly around strengthened oversight and accountability of public services. It also offered added value in ensuring a proportionate and effective approach to biometric data and additional capacity to support world class innovation, research and development. While offering the means to improve working practices and organisational standards, it also offered capacity to enhance public awareness. Importantly, a new parliamentary commissioner would function independently, without any perception of undue influence from policing-related bodies.

41. The advantage of a parliamentary appointment over a Ministerial appointment is that the parliamentary appointment would provide a more independent oversight arrangement and is therefore the option most likely to inspire the greatest public confidence in its independence due to its governance falling to the Parliament rather than to Scottish Ministers. In addition, where a public body is being tasked with safeguarding rights and, in pursuing this objective, commenting on the role and behaviour of other public bodies including the Scottish Government, the Scottish Ministers will often opt to establish that role through a parliamentary appointment. An example of this is the Scottish Human Rights Commissioner. Therefore, this approach would most closely align with the requirements of the proposed Scottish Biometrics Commissioner. The recent public consultation indicated broad support for the Commissioner to be appointed by and accountable to the Parliament.

42. The Scottish Ministers' conclusion was that a new Commissioner appointed by the Parliament offered the most benefit and posed the least strategic risk associated with change (such as lack of available funding, lack of specialist knowledge to realise the benefits, lack of coherence in police scrutiny activity). Most notably, this option provided for the specific expertise required to realise the full range of benefits. It also provided the highest level of perceived openness and transparency through full independence from Government, both in terms of the Commissioner's appointment and in the officeholder's reporting processes and structures.

Extending the remit of the Scottish Biometrics Commissioner and the Code of Practice

43. Some respondents to the public consultation suggested extending the scope of the code and the role of the Commissioner beyond justice matters, to include other public authorities (such as the National Health Service and schools) and the private sector. The Scottish Government has chosen to maintain the position that the scope of the code and role of the Commissioner should only apply to relevant law enforcement agencies and biometric data when used in a policing or criminal justice context.

44. This decision is based on a number of factors – firstly, that a code of practice and Commissioner to cover biometric data collected and used for non-justice related purposes (for example, by the private sector) was not specifically part of the Scottish Government consultation proposals. Any move to extend the Commissioner’s role or to create a parallel role for other sectors would require the development of a substantive case for change, supported by an appropriate evidence base and public consultation. To tie the current proposals to such a process would risk significantly delaying the introduction of appropriate and widely-welcomed oversight arrangements in the handling of biometric data for policing and criminal justice purposes. It should be noted that a remedy already exists for any complaints about private sector use of personal data through the UK Information Commissioner who has the remit for this. Therefore, it was important not to duplicate those regulatory arrangements.

45. In addition, the Scottish Government believes that there are a number of distinctive aspects of biometric data collected and used for policing or criminal justice purposes which merit a divergent approach, namely:

- Unlike biometric data captured by private companies (such as fingerprints to unlock smartphones), biometric data captured by Police Scotland is sometimes taken without an individual’s consent, meaning that it is all the more important to ensure that there is adequate protection of rights and independent oversight of police powers in this respect.
- Unlike biometric data held by non-policing organisations (such as DNA samples used for research), the validity and reliability of data used in the prosecution of crime needs to be sufficiently robust for a criminal trial. Therefore, the data holders must be able to justify the method used to extract the data and the validity of those findings, in order to prevent any miscarriages of justice or infringement of human rights.

CONSULTATION

46. The consultation on the proposals for the Bill ran from 13 July to 1 October 2018. The Scottish Government arranged meetings with four groups of stakeholders (a stakeholder symposium; equalities groups; police workforce; and the Scottish Youth Parliament Justice Committee) to promote a national debate on the issues. The consultation generated 89 written responses.⁹ The largest number (88%) were from individuals, with a small number from public sector organisations (7%); third sector organisations (4%) and a professional body (1%).

⁹ https://consult.gov.scot/safer-communities/use-of-biometric-data/consultation/published_select_respondent

47. Respondents were broadly supportive of the proposals (with 83% of respondents supporting the need for a code of practice and 89% being in favour of the establishment of a Scottish Biometrics Commissioner). Most of the small number of respondents who opposed the proposals did so on the grounds that they wanted the government to go further – to extend the scope of the oversight. Others who opposed the proposals did so on the grounds that the Commissioner should have stronger enforcement powers. However, these respondents can also be understood as being supportive of the principles which underpin this Bill, namely that greater oversight (with the required independence) is required and welcome.

48. An analysis of written responses was published on 26 November 2018.¹⁰ The Scottish Government response to the consultation was published on 29 January 2019.¹¹

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

49. An Equality Impact Assessment has been carried out in respect of the proposals contained in the Bill. It found that the proposals do not discriminate on the basis of age, gender, race, sex, religion, disability or sexual orientation. Indeed, the anticipated inclusion of good practice and recognised standards in the code of practice in relation to the collection, use and retention of biometric data is likely to benefit protected groups as it will create more transparency.

Human rights

50. As recommended by the Council of Europe, the introduction and use of new technologies should take full account of, and not contravene, fundamental principles such as the inherent dignity of the individual and respect for the human body, the rights of the defence and the principle of proportionality in the provision of criminal justice.¹² The Commissioner may choose to have oversight of standards of validation being applied to new biometric techniques which Police Scotland and the SPA might propose to adopt, in order to guard against the use of unreliable technologies.

51. The Bill's provisions are compatible with rights under the European Convention on Human Rights (the Convention). The intention is that the creation of the code of practice and greater independent oversight in relation to the collection, use and retention of biometric data will help improve the protection of rights under the Convention. The use of biometric data, in facial recognition software for example, engages a person's right to respect for their private life. The code could provide guidance on the collection and use of such biometric data in a manner that protects a person's right to respect for their private life under Article 8 and maintains the quality of evidence presented at trial, thereby protecting a person's right to a fair trial under Article 6. Whether such rights are being secured without discrimination, as required under Article 14 of the

¹⁰ <https://consult.gov.scot/safer-communities/use-of-biometric-data/results/biometricsdata-finalconsultationanalysis.pdf>

¹¹ <https://consult.gov.scot/safer-communities/use-of-biometric-data/>

¹² <https://www.coe.int/en/web/data-protection/convention108-and-protocol>

Convention, could be kept under review by the Commissioner. In supporting and promoting the adoption of lawful, effective and ethical practices in relation to biometric data, the new Commissioner will contribute to a human rights-based approach to the use of biometric data in the context of policing and criminal justice.

Island communities

52. The Bill has no differential impact on island or rural communities. The provisions will apply equally to all parts of Scotland.

Local government

53. The Bill makes no provision for the code of practice to apply on a statutory basis to local government or any other community bodies, nor for them to be subject to oversight by the Commissioner. However, it might be possible for local authorities to choose to adopt the code of practice on a voluntary basis – for example, in respect of their use of CCTV cameras.

Sustainable development

54. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

55. The Bill supports the United Nations Sustainable Development Goal 16: to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. By promoting human rights in relation to police use of biometric data, and by raising public awareness of police powers and duties and how those powers and duties may be challenged, the new Commissioner is contributing to Target 16.10: ensuring public access to information and protecting fundamental freedoms, in accordance with national legislation and international agreements.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

SCOTTISH BIOMETRICS COMMISSIONER BILL

POLICY MEMORANDUM

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