Thank you for the opportunity to make a follow-up submission to the Sub-Committee’s Inquiry considering how policing in Scotland makes use of facial recognition technology (FRT), and whether any such use is lawful, ethical, proportionate and transparent. In this submission, we briefly outline some of our preliminary findings from our New Zealand Law Foundation funded research into how this technology has been used, and is regulated, in New Zealand.

Law enforcement agencies in New Zealand have, to the best of our knowledge, been somewhat cautious in using facial recognition surveillance. Unlike in England and Wales, the technology has not been used by police for public space surveillance. However, police in New Zealand have shown some interest in FRT. Concerns were raised in 2018 when New Zealand Police were looking to update their surveillance capabilities. Reports have also indicated that Police were interested in the potential of accessing live camera feeds from the Auckland Transport network. Other Government agencies in New Zealand are also using the technology. For example New Zealand customs uses SmartGate technology to eliminate the need for people to interact with an immigration officer at the border.

The regulatory environment in New Zealand shares some common features with that of the UK. Much like the Data Protection Act 2018, the Privacy Act 1993 controls how ‘agencies’ collect, use, disclose, store and give access to ‘personal information’. It sets out twelve foundational principles, and some (if not all) of these are relevant for the use of FRT. The Office of the Privacy Commissioner, responsible for monitoring the operation of the Privacy Act 1993, is aware of potential harms arising from FRT and has proactively developed a guidance document for agencies considering use.

The use of FRT has not yet been challenged in New Zealand courts. However, New Zealand courts have had to grapple with their obligations to determine the scope of ‘reasonable expectations of privacy’ where new technologies are used for public surveillance purposes. In Hamed, the Supreme Court of New Zealand held that, for the purposes of section 21 New Zealand Bill of Rights Act 1990 (which protects against unreasonable search or seizure), monitoring by video surveillance of

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1 Tom Hunt “Police eyeing up newer, smarter CCTV facial recognition technology” Stuff (18 April 2018).
3 See Privacy Act 1993
individuals traversing public space does not constitute a ‘search’. Thus, individuals hold no reasonable expectation of privacy from this form of observation. Moreover, in Lorigan, the Court of Appeal held that the legality of covert surveillance video surveillance lay in the residual freedom of state officials to pursue their legitimate objectives by doing anything for which there is no statutory or common law prohibition and “it would not have been unlawful for a citizen to do the same thing.” However, this residual freedom does not extend to activities that do violate an individual’s section 21 rights, and in both Hamed and Lorigan the courts suggested that individuals might hold a reasonable expectation of privacy in circumstances where the form of video surveillance used to monitor public space does more than merely enhance the visibility of the individual. This leaves the possibility that public surveillance through FRT, which processes biometric information, may contravene the section 21 rights of the individual where its use is unreasonable. Added to this, the Law Commission has raised legitimate concerns that this residual regulatory framework may be too broad and insufficiently prescribed to afford adequate protection to the privacy interests of those subject to facial recognition technology surveillance in public spaces.

FRT can be used by public authorities and private bodies in New Zealand, as long as this use is reasonable and compliant with the Privacy Act 1993, which sets out quite exacting conditions for use. However, there is some uncertainty on the exact parameters of lawful use of facial recognition in New Zealand, and there is no specific guidance or codification of acceptable and unacceptable uses of FRT, by police or other private or public bodies. We do not endorse this as a model to follow, particularly as the technology is being used before questions surrounding its appropriate limits in a democratic society have been adequately considered. However, New Zealand’s police use of facial recognition is limited. Its more cautious approach to testing and using the technology, particularly in public spaces, is preferable to the approach of police forces in other common law jurisdictions, such as England and Wales, that have rolled out facial recognition technology quite expansively, and have trialled the technology at large public gatherings.

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5 Hamed v R [2011] NZSC 101 at [167].
6 Lorigan v R [2012] NZCA 264 at [29].
7 Lorigan v R [2012] NZCA 264 at [25].