

## JUSTICE COMMITTEE

### SCOTTISH BIOMETRICS COMMISSIONER BILL

#### SUBMISSION FROM HER MAJESTY'S INSPECTORATE OF CONSTABULARY IN SCOTLAND

I refer to the recent call for evidence on the above Bill by the Justice Committee as part of its stage one scrutiny process, and now provide the following response from HMICS. As requested, my comments and observations are structured to align directly with the key consultation questions as published on the parliamentary website.

#### **Q1: What are your views on the establishment of a Scottish Biometrics Commissioner?**

HMICS fully supports the need for the establishment of a Scottish Biometrics Commissioner.

The Justice Committee will be aware that in January 2016, HMICS published an audit and assurance review of the use of the facial search functionality within the UK Police National Database (PND) by Police Scotland. The review followed on from questions directed to the Scottish Government in 2015 relative to the police use of facial recognition technologies in Scotland, and a related request from the then Cabinet Secretary for Justice for HMICS to consider scrutiny of this area in our 2015/16 programme of work.

In our 2016 report, HMICS concluded that Police Scotland had been making very limited yet proportionate and necessary use of the facial search functionality within PND, but we also identified a need for improved legislation and better independent oversight around the police use of biometrics in Scotland. Our 2016 report contained four recommendations, including the establishment of a Scottish Biometrics Commissioner to address the issues of ethical and independent oversight over biometric databases and records held in Scotland, with flexibility to embrace future technologies and relevant codes of practice.

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

In May 2017, the Scottish Government established an Independent Advisory Group (IAG) on the use of biometric data in Scotland chaired by solicitor advocate John Scott QC. The expert advisory group comprised of a broad range of subject experts including both strategic representation and technical input from HMICS. In March 2018, the report of the Independent Advisory Group was published. That report contained nine recommendations to Scottish Government for improvement, including endorsing those previously made by HMICS for the establishment of a Scottish Biometrics Commissioner and an associated Code of Practice.

<https://www.gov.scot/publications/report-independent-advisory-group-use-biometric-datascotland/pages/6/>

Since the publication of both reports, biometric technologies and their use in policing continues to advance at pace, further endorsing the need for both legislative clarity and public reassurance through independent and ethical oversight. The Police Scotland and Scottish Police Authority 'Policing Strategy to 2026' for example includes plans to invest in both digital forensics and new

cyber technologies. Digital Forensics, or digital forensic science, encompasses the recovery and investigation of material found in personal digital devices by overcoming the encrypted security of certain types of devices, some of which are protected by biometric identification access control software such as fingerprint, facial or iris recognition. Thus, the broader debate around the police 'use' of biometrics is no longer one confined solely to conventional biometrics such as fingerprints, photographs and DNA captured as part of the criminal justice process following arrest. The Justice Committee has already engaged with the detail of such debates in relation to the use of cyber-kiosks by Police Scotland and has commented publicly on the need to clarify the legal basis under which such technologies may be lawfully deployed.

In a broader UK context, the Biometrics Commissioner for England and Wales has recently commented on the 'chaotic' police use of facial recognition technologies in England and Wales and has called for greater safeguards around the use of intrusive technologies by the police<sup>1</sup>. Accordingly, there is clear evidence that the various legal, ethical and human-rights issues which arise from the use of biometric data in policing, and associated matters of public confidence, would be enhanced through the establishment of independent oversight mechanisms.

As highlighted in our 2016 report<sup>2</sup>, a Scottish Biometrics Commissioner could also build capacity and resilience within Scotland to explore emerging human rights and ethical considerations around the application of automated biometric technologies by other public agencies most notably public space CCTV surveillance systems. Clearly new and emerging technologies escalate the value and possibilities around the use of biometric data and when combined with the development of underpinning codes of practice, my view is that the creation of an independent Scottish Biometrics Commissioner could both safeguard and futureproof what will undoubtedly continue to be a fast and evolving scientific landscape.

## **Q2: Views on proposed role, responsibilities and enforcement powers of the Scottish Biometrics Commissioner?**

HMICS is content that the proposed role, responsibilities and enforcement powers of the Scottish Biometrics Commissioner are appropriate, workable and achievable and that they will 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 other policing purposes.

There are however three areas that I would wish to highlight to the Justice Committee as worthy of further reflection both as part of the analysis of written responses and subsequently as part of more detailed verbal evidence sessions. The three areas I wish to highlight are (a) The potential to extend the provisions of paragraph 2 (5) of the Bill to ensure that the Commissioner must also have particular regard to protected characteristic groups, (b) a persisting gap in the law in Scotland in relation police powers when photographing people in custody, (c) the meaning of 'biometric data' as set out in paragraph 23. My comments on these areas are as follows:

### **(a) Protected Characteristic Groups**

In paragraph 2 (5) of the Bill, the Scottish Biometrics Commissioner is required to have 'particular regard' to the interests of children and vulnerable persons. Vulnerable person is defined in the Bill as '...an individual who, by reason of their personal circumstances or characteristics, may have

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<sup>1</sup> Watchdog criticises 'chaotic' police use of facial recognition, The Guardian 27 June 2019:

<https://www.theguardian.com/uknews/2019/jun/27/watchdog-criticises-chaotic-police-use-of-facial-recognition><sup>22</sup> Paragraph 52.

difficulty in understanding matters relating to the acquisition, retention, use and destruction of their biometric data. HMICS supports these important safeguards, however from our inspections of adult support and protection I simply observe that the definition of 'vulnerable person' can often be problematic. It can apply to those who meet the "three-point test" under the Adult Support and Protection Act 2007, but it is also interpreted loosely as someone who is going through a crisis or situation that makes them temporary vulnerable. The definition in the Bill does cater for personal circumstances, so on that basis it should also cater for situations where an individual is temporarily at risk and otherwise vulnerable.

However, as the Committee will be aware, The Equality Act 2010 and The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 require public authorities, in the exercise of their functions, to have due regard to the need to: eliminate unlawful discrimination, harassment and victimisation and other prohibited contact.

The Committee will also be aware that several UK police forces, outside of Scotland, have been publicly criticised by academics, regulators and the media for the use of automated biometric technologies which contain algorithms delivering unintended racial and gender bias in the results delivered by automated search transactions. This has led to some facial recognition systems used by the police in England and Wales being described in the popular media as 'dangerously irresponsible'<sup>2</sup>.

There is also a wealth of international research pointing to various equalities considerations with regards to biometric data and policing, and I therefore suggest that there is an opportunity for paragraph 2 (5) of the Bill to be expanded to also require the Scottish Biometrics Commissioner to have particular regard to issues pertaining to all protected characteristic groups in Scotland.

### **(b) Power to take Custody Photographs**

In our 2016 report, HMICS highlighted a legal gap in Scotland where there is currently no enabling legislation giving the police powers to photograph persons brought into police custody following arrest. This led to a recommendation (Recommendation No 1) that Scottish Government should work with Police Scotland and the Scottish Police Authority to consider legislative provision in relation to custody photographs.

In the 2018 report of the Independent Advisory Group on biometric data, it was further recommended (Recommendation No 5) that there should additionally be a review of the rules of retention for biometric data as set out in sections 18 to 19C of the Criminal Procedure (Scotland) Act 1995.

Whilst there is obvious merit in the participation of the Scottish Biometrics Commissioner in the more holistic review of the current legislation as recommended by the IAG, it is important to highlight to the Committee that the specific legislative gap identified by HMICS in 2016 persists, and that there is currently no legislation in Scotland giving authority to the police to photograph persons brought into police custody in Scotland. This is an ongoing risk requiring careful management.

### **(c) The meaning of 'biometric data'**

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<sup>2</sup> Use of facial recognition tech 'dangerously irresponsible', BBC News: 13 May 2019: <https://www.bbc.com/news/technology48222017>

The term 'biometric data' has not previously been defined in Scottish criminal law. In a policing context, the most commonly used forms of biometric data are fingerprints, photographs and DNA. The main biometric databases used in UK policing as part of the criminal justice process are the National UK DNA Database (NDNAD) for DNA profiles, the UK Police National Database (PND) for photographs, and the UK Fingerprint Database (IDENT1) for fingerprints. Each of these UK systems contain automated searching software to enable comparison with existing biometric records held on file.

Importantly, 'biometric data' does not exist on physical items such as a crime scene samples, however following specific technical processing (for example chemical analysis of a blood sample) it may be possible to analyse the source biological materials to create a biometric record such as a DNA profile. The distinctiveness of 'biometric data' in a policing context therefore is that it must be understood as being computerised data that has been created as a result of specific technical processing. This includes biometric data created as a result of specific technical processing by the police (fingerprints, photographs, DNA) or other forms of biometric data arising from specific thirdparty technical processing to encrypted software within digital devices that may potentially be recovered or accessed by the police, through for example the use of digital forensic technologies.

In addition to the main UK policing biometric databases, Police Scotland also has a Criminal History System (CHS) and a National Custody System (NCS). Further technical information on these systems can be obtained from our 2016 report.

HMICS is content with the meaning of 'biometric data' as set out in Section 23 of the Bill. The definition is sufficiently broad as to cater for both biometric data records created by the police as part of the criminal justice process, and also for other biometric data which the police may acquire through other routes such as digital forensics. The provisions of Section 23 (2) (c) make the appropriate linkage between biometric data and corresponding source materials, and empower the Scottish Biometrics Commissioner to ensure that the retention regimes applying to an individual biometric data record, also apply to biological or other source evidential materials to which that specific biometric data record corresponds.

**Q3: What are your views on the provisions in the Bill for the drawing up of a Code of Practice by the Commissioner, and how compliance with the Code is monitored and reported on?**

HMICS is fully supportive of the provisions outlined in the Bill for the drawing up of a Code of Practice by the Commissioner, and the proposals as outlined for ensuring compliance and monitoring and reporting. There will also be opportunities for other regulators such as HMICS and PIRC to identify pertinent issues arising from inspection and investigation activity to the Commissioner to assist them in discharging their statutory function.

**Q4: What are your views on the appointment process for the Commissioner and the funding being provided to enable them to carry out their role?**

HMICS is equally supportive of the appointments process as set out in the Bill. The appointment of the Commissioner by Her Majesty on recommendation of the Scottish Parliament will ensure the appointment of an authoritative individual with the independence to meaningfully discharge their statutory functions. The funding and other arrangements as outlined in the Bill appear entirely appropriate.

**Q5: Do you have any other comments regarding the Bill?**

HMICS has no other specific comments other than to welcome the provisions of the Bill. As highlighted in this response, our 2016 report and subsequent membership of the Independent Advisory Group has enabled us to work closely with Scottish Government and other key stakeholders with an interest in biometric data and policing.

As acknowledged by the Committee, the use of biometric data raises a range of ethical and humanrights considerations and balancing the protection of the public from harm against state intrusion is particularly difficult. However, it is for these reasons that I welcome the Scottish Government proposals to create a Biometrics Commissioner for Scotland.

I trust that this consultation response will be of assistance to the Justice Committee, and I can confirm that I will be more than happy to participate in future evidence sessions to assist the Committee in its scrutiny of the Bill.