

JUSTICE COMMITTEE

SCOTTISH BIOMETRICS COMMISSIONER BILL

SUBMISSION FROM LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland is the professional body for around 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law and Privacy Committees welcome the opportunity to consider and respond to the Call for Evidence in respect of the Scottish Biometric Commissioner Bill (the Bill). We have the following comments to put forward for consideration.

General

Question 1: What are your views on the establishment of a Scottish Biometrics Commissioner as a new body to scrutinise the police?

We welcome the Bill with its aims that are generally to address a number of ethical and human rights issues in Scotland in terms of the approach to the collection, use, retention and disposal of biometric data in the context of policing and criminal justice.

We supported the proposal¹ to create a Scottish Biometrics Commissioner (the Commissioner). This follows the earlier English and Welsh approach where a Commissioner for the Retention and Use of Biometric Material (the English Commissioner) has already been appointed. The English Commissioner has a very similar role in terms of oversight and decision-making powers regarding the retention and use of biometrics. There is therefore an opportunity to take lessons from the experience of the English Commissioner to date.

¹ Our response to the Consultation on enhanced oversight of biometric data for justice and community safety purposes
https://www.lawscot.org.uk/media/361148/crim-priv_1ss-response_enhanced-oversight-of-biometric-data-for-justice-and-community-safety_october-2018.pdf October 2018

A number of initial issues have been articulated in the English Commissioner's recent Annual Report² which we reflect in our response to this call for evidence. Two issues may be especially informative when considering the Scottish Bill:

1. Futureproofing of the Bill regarding the scope of the term "biometric data" which we discuss in our answer to Question 5.
2. Being responsive to changes in legislation and policing practice. We note that the English Commissioner's report is critical of statistics gathering. This may be pertinent when scrutinising the sections of the Bill regarding the reporting obligations.³ We also note that there is a national DNA Database Strategy Board⁴ to which members of the devolved administration may be invited. How would the Commissioner's role be involved with that organisation?

We have no comments on the preferred appointment process selected for the Commissioner as set out in Sections 1- 5 and Schedule 1 of the Bill. However, we note that a robust and transparent process for the first appointment of the Commissioner is vital to ensure public confidence as the new role develops, especially as the initial appointment may last up to eight years.

Question 2 What are your views on the proposed role, responsibilities and enforcement powers of the Scottish Biometrics Commissioner?

It is not clear from the Bill or supporting documents how the Commissioner will interact with the English Commissioner. That is slightly surprising as is the absence from section 3 of the Bill.⁵ We would have anticipated that there may be provisions specified for the Commissioner to work jointly with, assist or consult the English Commissioner. This section is merely advisory and not mandatory so the Commissioner would be expected to liaise at least at the start of their role. That would recognise that there needs to be consistency in approaches to be adopted across the UK, particularly given the international dimension to crimes, especially those in relation to terrorism and serious organised crime.

Further consideration may also need to be given to the implications of Brexit⁶ in terms of data sharing and police cooperation to ensure that criminal behaviour can be tackled effectively. That

² Published in March 2019 - see Annual Report 2018 Commissioner for the retention and use of biometric material https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812352/Biometrics_Commissioner_AR_2018_Web_Accessible.pdf

³ Section 10, 15 and 22 of the Bill all refer to various reporting requirements.

⁴ It provides governance and oversight over the operation of the National DNA Database (NDNAD) and the national fingerprint database. <https://www.gov.uk/government/groups/national-dna-database-strategy-board>

⁵ Power to work with others

⁶"This year I have discussed at greater length the need for new legislation to allow for the development of new biometrics by the police. In normal times this might have been subject to more public and Parliamentary discussion than has been the case and I might not have devoted so much space to the topic. Whilst such discussion has been happening in Scotland the all dominating Brexit focus of Westminster has marginalised this among many other issues". The English Commissioner https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812352/Biometrics_Commissioner_AR_2018_Web_Accessible.pdf

would include the international recognition of biometric data and specifically, on European exchanges and cooperation. Exactly how that planning is taking place would be useful to support the Bill in its progress through the Scottish Parliament. In the longer term we consider that the Commissioner may have a role to play in terms of developing wider international cooperation

There are implications too in relation to section 1(2) of the Bill. Paragraph 28 of the Bill's Policy Memorandum indicates to avoid duplication that the Commissioner's functions should not extend to biometric data in relation to which the English Commissioner has a function under section 20 of the Protection of Freedoms Act 2012.⁷ We wonder if this is perhaps too simplistic a view. There is no suggestion nor is it competent that the Commissioner should take over that function. However, there is a need to consider how the overlap and join up of their respective functions are to work. We would not have thought that the Commissioner should have responsibility for such information, but they should surely have a role to discuss and co-ordinate with the English Commissioner. We would seek more information on how these arrangements are envisaged to work. It is doubtful that detailed provision needs to be included within the Bill. It is much more likely that it would be included within the "yet to be seen" Code of Practice. Our view is that the face of the Bill should recognise the need for formal engagement in the respective roles.

There is no mention of the Counter-Terrorism and Border Security Act 2019 (2019 Act) which received Royal Assent on 12 February 2019. The biometric provisions contained in the 2019 Act have not yet come into force as work is ongoing through the Home Office who is required to take guidance through Parliament to reflect the operational changes in process that are needed by the police. Does the Bill need to take account of these provisions?

We consider that the function set out under section 2(3) of the Bill which is to "promote and monitor the impact of the Code of Practice" is very important.

Being aware of the appointment of the Commissioner and their role is fundamental but thereafter the way that the day to day business is to operate will be contained in the future Code of Practice. That will govern the best practice in collecting, using, retaining and disposing of biometric data in the context of policing, criminal justice and security. Monitoring and maintaining flexibility to make appropriate changes to the Code of Practice as well as upholding transparency for all involved must be part of the function of the Commissioner.

We note under section 2(2) of the Bill regard is to be had to children, young persons and vulnerable persons. Though we recognise the difficulties in defining "vulnerable" in this context, we consider that providing guidance within the Code of Practice would be helpful. We would expect that this guidance would include as "vulnerable" all those falling within the "protected

⁷ 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

characteristics”⁸ but it may need to go further. Similarly, regarding children and young persons, there are a number of policy areas of work which may have implications for the Bill that include:

- Consultation on enhanced oversight of biometric data for justice and community safety purposes⁹
- Review on the Mental Health (Care and Treatment) (Scotland) Act 2003¹⁰
- the implementation of the Age of Criminal Responsibility (Scotland) Act 2019.

Question 3 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?

Sections 6-10 of the Bill deal with the Code of Practice.

We support the introduction of a Code of Practice as a “one stop shop” which should provide comprehensive and accessible guidance on retention and use of data to organisations tasked with compliance and data subjects themselves. Once in force, publicity is required to ensure all are aware of its provisions as well as transparency regarding how such data is to be handled.

However, until such time as the details of the Code of Practice are available, we cannot make much by way of comment on its content. Though we understand why the Bill refers to the Code of Practice, the draft Code of Practice needs to be seen to ascertain if the observations made in our consultation response ¹¹ have been fully taken account of and are incorporated. In that response to the initial consultation, we set out a number of observations and suggestions regarding the proposed Code of Practice, including:

- Consolidation of good practice as it exists at present.
- Its scope must cover the safety of the public interest and reflect the definition of biometric data.
- Timing when the provisions come into effect as biometric data may be obtained at the outset of investigation before there is any report made to Crown Office and Procurator Fiscal Service.
- Its status when it is being applied on a voluntary basis, for example, by public authorities and the private sector. Can it be adopted in part or in full?
- The extent of security provisions in the event of breaches as the consequences of the loss of biometric data can be significant. Enhancing the requirement for security should be undertaken without comprising the functionality or acquisition of biometric data.
- Requirements of data protection regarding privacy by design are to be fully respected.

⁸ Equality Act 2010

⁹ <https://www.lawscot.org.uk/media/363186/19-05-08-crim-consultation-equally-safe-converted.pdf>

¹⁰ <https://news.gov.scot/news/review-of-the-mental-health-act>

¹¹ Our response to the Consultation on enhanced oversight of biometric data for justice and community safety purposes https://www.lawscot.org.uk/media/361148/crim-priv_1ss-response_enhanced-oversight-of-biometric-data-for-justice-and-community-safety_october-2018.pdf October 2018

- Inclusion of a robust appeals mechanism

We have no comment on the compliance or otherwise of the systems of reporting on the Code of Practice. Three years as a maximum period seems quite a long period for a report to be made.

Question 4 What are your views on the appointment process for the Commissioner and the funding being provided to enable them to carry out their role?

We have no comment on this question.

Question 5 Do you have any other comments regarding the Bill?

We welcome the definition of “biometric data” in section 23 of the Bill. We highlighted previously the need for careful drafting to ensure that the definition is sufficiently flexible to respond to changes in the future such as those being made through the advances in technology. This seem to have been satisfactorily achieved. However, we suggest that the following amendments would further improve the clarity of the drafting of 23(2)(b): inserting “any” after “or” and inserting “or part of an individual’s body” at the end so the new sub-paragraph would read “a photograph or any other recording of an individual’s body or part of an individual’s body.”

We recognise that developments in biometric data are fast moving and need to take account of a range of experts’ views to ensure that the definition is not only relevant for today but for the future too. The use too of biometric data is wider¹² than just the Scottish justice system as it will include biometric data obtained in a disaster where there is a need to identify individuals involved.

Further consideration may need to be given to the police usage of new types of biometric data and whether the approach taken to the regulation of more “traditional” biometric data should be applied to newer techniques and “newer” data which are sometimes referred to as the first¹³ and second¹⁴ generation biometric data. It may be helpful to provide a regulatory framework for:

- experimental trials or development of new technologies to ensure that they are conducted in such a way as to support operational choices by the police about the methods to use and biometric data to be obtained and
- to support the police development of artificial intelligence or machine-based learning through application of data analytics to biometric data, for example, technology used for facial recognition or intelligence gathered from the analysis of behavioural data.

¹² Section 2(1) of the Bill will include such biometric data as it will have been obtained in connection with the “police purposes.”

¹³ The criminal justice system in Scotland has used some forms of biometric data in the detection and prosecution of crime for many years, such as fingerprints, DNA and custody photographs. This form of data is often referred to as first-generation biometrics.

¹⁴ However, with rapid advances in science and technology over the last 25 years, new forms of biometrics are now available. This include data such as facial recognition software, remote iris recognition and behavioural biometrics such as voice pattern analysis. These are often referred to as second-generation biometrics.

There may also be a need for clearer rules around inter-governmental access to biometric data held in relevant databases.

A consistent theme to consider in the Bill is the difficulty that there is in keeping up with the pace and implications of developments and that it remains viable in the face of constant technical change. We note in its 10-year strategy Policing 2026¹⁵ that Police Scotland recognise that there is a need to invest in their forensic capacity as:

“the nature of criminality changes, this will impact on the relevance of some types of forensic science. These changes will also challenge us all to get the best from science and technology in order to support the effectiveness of policing and the delivery of justice in Scotland.”

This investment by Police Scotland will be vital in securing the success of the appointment and role of the Commissioner undertaking their functions as highlighted above.

There are public benefits in ensuring that new biometrics and data analysis support the rule of law within our society. However, evaluation of any new technology must be carried out to a robust scientific standard providing evidence on which informed decisions can be made and to support the public confidence to ensure that there is a balance maintained between the effect on individual privacy and the public benefit.

¹⁵ <https://www.scotland.police.uk/assets/pdf/138327/386688/policing-2026-strategy.pdf>