

## JUSTICE COMMITTEE

### SCOTTISH BIOMETRICS COMMISSIONER BILL

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##### Highlights

- There is a need for a two-tier structure of governance as too complex and broad a role for just one Commissioner to fulfil effectively.
- A broadly accepted and detailed Code of Practice is vital, but so too are powers to enforce compliance with the Code.
- The governance structure ought to be expanded to cover private, and other State agencies.
- There is a need to define key governance/oversight principles with a provision to systematically assess these principles.

##### Abstract

A response to Scottish Biometrics Commissioner Bill: the written evidence addresses areas where the Bill on independent oversight of the Scottish biometrics regime may be improved.

##### Questions

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

Establishing independent oversight of the police use of biometric data is a key governance principle and is now necessary in order to maintain the integrity of policing. The introduction of the role of Scottish Biometrics Commissioner should therefore be vigorously pursued. The contribution of the England/Wales (EW) Biometrics Commissioner, while more limited in scope, demonstrates that this role is important in ensuring that the retention and use of biometrics is necessary, proportionate and transparent.

Whilst the role of the Commissioner is important, it will not be effective if working in isolation. The role therefore should be complemented or supported by a **top-tier oversight board** or a **lower-tier advisory board** with representations from all relevant stakeholders. The Board may focus on the 'policy and strategy aspects' of the biometrics regime whilst the Commissioner will be responsible for the 'operational aspects' of the regime such as enforcement of codes of practice (COP), compliance monitoring and effectiveness evaluation. The two-tier oversight arrangement may ensure that both public security and human rights interests are adequately weighted in decision making. This is important because the current Biometrics Commissioner role appears to be human rights (privacy) focused: 'The Commissioner will focus on ethical and human rights considerations arising from the use of biometric data'.<sup>1</sup> Is it

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<sup>1</sup>See para 6. Scottish Government, 'Scottish Biometrics Commissioner Bill Policy Memorandum' (Scottish Parliamentary Corporate Body 2019)

to be assumed that the police will make representations for public security arguments and the Commissioner role is in effect, to be a counterbalance? This is a rather myopic view of the role which potentially should inform how best to enact a biometric regime to satisfy public security outcomes at the same time as securing human rights and maintaining public trust and confidence. As envisaged in the Bill, it appears the role will be relatively limited, but to make the most of the opportunity the creation of this role presents, the role will be multi-faceted and they will need considerable external support and advice, as well as information and data analysis. Without making the role unmanageable, we would therefore suggest the two-tier structure of governance as the most ideal.

In addition to the above, any governance structure must be properly resourced, and given sufficient powers to enable them to undertake their duties assiduously. The Bill suggests compliance to the COP is voluntary with no or very limited enforcement powers for the Commissioner. This framework may be detrimental to the aims of the role and the challenges of the Forensic Science Regulator should be considered (See question 2 - Enforcement of Code of Practice).

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

**Scope of regulated Agencies:** It is good that there is a broad definition of 'biometrics' (s.23) and an attempt to 'future-proof' legislation has been made by not limiting the definition to biometrics already in use. However, then stating that this legislation only covers use by the Police Service of Scotland (PSS) and the Scottish Police Authority (SPA) in a 'policing or criminal justice context'<sup>2</sup> leaves a lot of room for the use of biometrics in other 'law enforcement' situations or environments that may not directly come under the remit of the PSS or SPA, or 'criminal justice system' as conventionally understood. It also does not allow for any future developments in terms of policing, or the use of biometrics by other agencies that then later become involved in a 'criminal justice context'. There are many State agencies that may utilise biometrics (i.e. immigration, customs, but also other agencies may use them for identity verification) that may somehow later be used in a 'criminal justice context'. Thus, biometrics may be collected and retained for use by other State agencies (e.g. the health service), but these agencies will not be covered by the legislation. Conversely, other agencies may wish to use policing data, for example, in England and Wales, forensic DNA profiles can be provided to the Dept. for Work and Pensions under an MOU. Will multi-agency exchanges of biometrics data across the public sector be governed by this regime? (See later also concerns about jurisdictional issues).

There must also be considerations of how this legislation will govern private sector agencies that may provide or become a source of biometric data or intelligence for policing purposes. This is important in view of the emergence of police use of commercial genealogy databases that were initially built for non-policing purposes. This is important because the data of individuals held by non-policing or private

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<[https://www.parliament.scot/S5\\_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48PMS052019.pdf](https://www.parliament.scot/S5_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48PMS052019.pdf)> accessed 27 August 2019.

<sup>2</sup> See S.2 (1) (a) (b). Scottish Government, Scottish Biometrics Commissioner Bill 2019.

agencies may be exposed to *function creep* without consent. **We comment on this further in relation to the Code of Practice.**

**Meaning of key principles:** The Bill specifies the adoption of lawful, effective and ethical practices (S2 (1)). These principles have been identified as part of the key principles that should govern biometrics regimes.<sup>3</sup> However, the Bill lacks clarification about these principles and how these will be systematically assessed/measured by the Commissioner, particularly effectiveness and the ethical compliance of the regime. The Bill may be improved by defining these principles. Further, the functions/roles of the Commissioner should include the systematic assessment of the effectiveness of the regime in achieving the specified policing or criminal justice goals and compliance with ethics (including the ‘societal choice’ of the public and views of relevant issue-publics). These considerations will help ‘*drive improvement and enhance accountability in this area.*’

**Enforcement of Code of Practice:** S.7(1) states that the PSS and SPA must ‘*have regard*’ to the COP. However, this duty to ‘have regard’ means that there may be ‘*specific circumstances of a case that mean that compliance is not practicable or prudent.*’<sup>4</sup> It must be clearly delineated within any COP what ‘practicalities’ may permit breaching of the Code, or when ‘prudence’ will prevent adherence to the COP. It will be vital that these two justifications are interpreted as narrowly as possible, to make the COP effective. If ‘practicalities’ or ‘prudence’ are given broad interpretations it may be that the police come to view the COP as simply advisory or merely aspirational, and can be easily circumvented. Likewise, if : S.7(3) *Failure to have regard to the code of practice does not of itself give rise to grounds for any legal action*, then the Commissioner’s power to demand information or act upon any recommendations, appears entirely voluntary. The lack of guidelines on compliance enforcement powers will defeat the purpose of the COP. There must be adequate measures to ensure compliance with the COP.

At this time, there is a requirement that the PSS and SPA (or other relevant body) give a response to reports, or justify their refusal to respond to recommendations. There probably ought to be consideration given to the additional provision for prohibition notices in cases of breaches of the COP. The lack of enforcement/sanctioning powers limits the overall purpose of the Commissioner’s role and COP. If the PSS and SPA are permitted to circumvent the Code, the Commissioner will (rightly) be publicly viewed as having no powers to prevent the unethical/ disproportionate use of biometrics, and the role will command no public respect. The police may also lose public confidence and trust in their use of biometrics. The gaps identified with the Forensic Science Regulator (FSR) role should be considered.<sup>5</sup> Following failings and challenges in ensuring the quality of forensic services, the FSR is currently advocating

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<sup>3</sup> Aaron Opoku Amankwaa and Carole McCartney, ‘The Effectiveness of the UK National DNA Database’ (2019) 1 Forensic Science International: Synergy 45; Carole I McCartney, Tim J Wilson and Robin Williams, ‘Transnational Exchange of Forensic DNA: Viability, Legitimacy, and Acceptability’ (2011) 17 European Journal of Criminal Policy and Research 305.

<sup>4</sup> See para 19 of Scottish Government, ‘Scottish Biometrics Commissioner Bill Explanatory Notes’ (Scottish Parliamentary Corporate Body 2019).

<sup>5</sup> Carole McCartney and Emmanuel Amoako, ‘The UK Forensic Science Regulator: A Model for Forensic Science Regulation?’ (2018) 34 Georgia State University Law Review 945.

for statutory powers to ensure compliance to the FSR Codes of Practice and Conduct. Without these powers to enforce the Codes, the role is merely persuasive.

It is also critical that the Commissioner has some remit to govern the unethical and/or unlawful use of biometrics by private organisations that may come to be used in a criminal justice context later, in order to maintain public confidence and trust. If the PSS/SPA can simply sidestep the COP by using 'private' biometrics, then this will be illegitimate. Similarly, if it becomes the case that the PSS/SPA are too constrained by the COP that they are unable to use biometric technologies for policing purposes, this may frustrate the police (and public), if private organisations are allowed free rein to use biometrics as they see fit. The PSS/SPA may then be motivated to allow private organisations to gather biometric data that they can then utilise later, circumventing the entire governance regime established under this Bill.

Further, it is critical that the effectiveness of biometrics can be established, and monitored, and the Commissioner must use their powers to either commission, or authorise such research. This must be a priority. 'Effectiveness' is key in determining whether a technique/technology is necessary/proportionate, ethical, and acceptable. Without the means to gauge, and demonstrate effectiveness meaningfully, all other determinations become groundless and unjustifiable. As seen in the UK debate on automatic facial recognition, if the technology is flawed or largely ineffective, then its proportionality is easily challenged: "Why are the police using a highly invasive technology when it does not even work?"

**Additional comment:** There must be a very clear delineation of roles *vis a vis* the EW Biometrics Commissioner. This is not spelt out in the legislation but will need to be formalised. This may be more complex than the current documents suggest. The EW Commissioner will therefore need to be closely involved in the establishment of the role to ensure no overlaps/ gaps in governance.

### **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?**

#### **Relevance of the COP:**

*Standardisation of the introduction of biometric technology:* The Biometrics Commissioner role must be able to scrutinise police policy decisions *prior* to their operationalisation. We have seen in England and Wales, the operationalisation of second generation biometrics, which has prompted legal challenges. The decision to deploy a biometric technique/technology, should be one that is taken in consultation with the Commissioner, rather than the Commissioner being seen as a safeguard that can act as a 'check' on powers and their use *post-hoc*. The COP will be vital for police determining, prior to operationalising any biometric technologies, whether it will adhere to the COP standards. The COP must therefore be seen as the tool for the police to use in their policy decision-making from the earliest juncture, rather than simply something that a Commissioner will use to check up on them (maybe) at some point in the future.

*Practical guidance:* The COP is vital to address practice because nothing in the legislation gives specific guidance as to the proportionate, effective and ethical use of biometrics. If the COP is well drafted, this will prevent issues arising that would necessitate use of any non-compliance procedures (were they to be introduced). As such, a well drafted COP is vital if trying to ensure that the daily practices of those working within the area governed are able to conduct their work within the parameters that are deemed to represent what is 'proportionate, effective and ethical'. It affords the opportunity for far greater specificity and practical guidance than can be achieved with the over-arching legislation. A well drafted COP will be essential as the vague or abstract legal concepts in the Bill will be insufficient to effectively steer those working at the coal-face.

*Flexibility:* The COP should also offer a more flexible mechanism to navigate challenges arising from implementation of the law, operation of biometric systems and new technology/ new applications. In order to ensure this flexibility however, the COP will require regular review and updating. There also needs to be adequate account given within any Code of **important criteria** that will indicate whether the taking, retention and use of biometric data remains necessary and proportionate and is being undertaken in an ethical, and socially acceptable manner.

At the same time, the COP will need to be as comprehensive as possible, to prevent any technologies, practices or applications falling outside of a narrowly drawn COP. Regular reviews and updates should enable any confusions to be remedied, or lacunae to be closed. However, there will need to be attention paid to whether there are too many 'overlaps' with other governance mechanisms, to avoid discrepancies and/or over-regulation. Any COP will also need to be underpinned by enforceable powers. Without such powers to make compliance obligatory, it will be difficult to monitor, and act upon, transgressions. At the moment, it appears that the Bill contains little, if any, enforcement powers to give the Commissioner any mechanism to make the COP anything other than advisory. This risks making the Commissioner a paper tiger, and this legislation, a wasted opportunity. To whom the COP will apply will also be an important consideration, as previously detailed.

**Consultation on the code:** The relevance of the COP demands that it is written in close consultation with a representative sample of diverse stakeholders, including the public. The Commissioner under this Bill will be able to consult bodies/persons of their choice, and it will be vital that this choice takes into consideration groups and individuals with expertise in ethics and policing, and civil liberties organisations. Additionally, where relevant, the views of the public should be assessed to determine the acceptability of policies that impact upon their security and civil liberties.

*The principle of acceptability as a requirement:* There should be a clear requirement that 'public acceptability' is borne in mind at all times. Whilst the COP should assure the acceptable use of biometrics, it is important that drafters of the COP try as far as possible to ensure that these principles will indeed secure a governance structure that accords with public views on biometrics. This will be an ongoing process if the COP is to remain 'flexible' and retain comprehensive applicability. If the public lose trust in biometrics and their use, it will be very difficult to regain or retain credibility. If the

governance regime does not have support, then the enthusiasm for adhering to the 'rules' will quickly wane. Similarly, if the COP (and the Commissioner) are seen as ineffective, or not protecting human rights and ensuring ethical use of biometrics, then the public will not support this governance, nor the police in their use of biometrics. Note the broad rejection of Automated Facial Recognition and its legal challenges in England and Wales. The path of the UK National DNA Database is also a lesson in point in what can happen when public support is lost.<sup>6</sup> Conversely, if the PSS/SPA believe that the COP is frustrating their ability to pursue policing goals, then they may publicly explain their lack of effectiveness on the constraints they are under with the COP, utilising public concern on law and order to criticise the Commissioner and governance regime.

**Regulation of private sector and non-policing agencies:** While the writing of an effective COP is essential, there should be similar or the same coverage for the private sector, as well as all of the public sector on *how and when such data sources may be used for policing, intelligence or criminal justice purposes*. This is crucial because biometric data from the private sector or non-policing agencies may be used without consent of data subjects under such circumstances. Secondly, data from these sources may not be of sufficient '*validity and reliability*' for law enforcement or criminal justice purposes. Issues emerging from the Golden State Killer case in the United States indicate the police could, and do, access private commercial databases though the data in such databases are not collected for such purposes.<sup>7</sup> If the COP is not comprehensive then there will be significant 'gaps' left for questionable practices. There will be little point in a COP that can be neatly side-stepped by simply undertaking practices under the auspices of a body/organisation that sit outside of the governance structure (say, by claiming that they are not operating within a 'criminal justice context').

The 'voluntariness' of this governance structure then requires close consideration. As has been seen with the introduction of regulation/ accreditation in the provision of forensic science services, aims and objectives will only be partially achieved if compliance is voluntary and only applies to certain sectors. It can create mistrust, confusion and resentment among those who must comply, and raises the question of whether the governance is required at all, if some are able to continue to operate outside of it without censure or sanction.

**Trans-national or –jurisdictional matters:** Further, there will need to be close consideration of the operation of the legislation/ COP beyond the Scottish border. There could be difficulties if biometric data leaves the jurisdiction/ is collected or 'used' outside the jurisdiction etc. It is proving difficult to keep data permanently contained or

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<sup>6</sup> Aaron Opoku Amankwaa and Carole McCartney, 'The UK National DNA Database: Implementation of the Protection of Freedoms Act 2012' (2018) 284 *Forensic Science International* 117; Carole McCartney, 'Of Weighty Reasons and Indiscriminate Blankets: The Retention of DNA for Forensic Purposes' (2012) 51 *The Howard Journal of Criminal Justice* 245; Aaron Opoku Amankwaa, 'Forensic DNA Retention: Public Perspective Studies in the United Kingdom and around the World' (2018) 58 *Science & Justice* 455.

<sup>7</sup> Chris Phillips, 'The Golden State Killer Investigation and the Nascent Field of Forensic Genealogy' (2018) 36 *Forensic Science International: Genetics* 186.

'static', and thus the COP will have to engage directly with rules governing biometrics coming in/leaving the jurisdiction of Scotland as well as important issues such as whether the guidance applies to visitors/ non-residents etc. Will a tourist visiting Scotland benefit from the same governance? Will Scottish citizens be afforded the same protections when returning home if their data was collected overseas? These issues will all need to be clarified.

**COP and balance of interests:** The sourcing and consideration of validated evidence to support the utilisation of biometrics should ensure objectivity in determining proportionality between public and private interests. The determination of an adequate balance to date has been difficult due to lack of statistical evidence. Calibrating the 'effectiveness' of biometrics (the public 'good' achieved) against any negative consequences (e.g. loss of privacy) is however, notoriously complex and may not even be conceptually very helpful (even were we to have sufficient evidence of effectiveness). It would be good if this idea of 'balancing' public and private interests were properly interrogated, and a clearer vision of what a 'balance' (if that term still retains any utility) looks like. It should be borne in mind at all points that security benefits do not necessarily have to entail encroachments on human rights. Privacy can still be protected at the same time as furthering security aims. It should not be assumed that privacy will always need to be 'sacrificed' for the sake of security.

**COP and the principle of effectiveness:** Identifying 'best practice' within the COP will be beset by difficulties. What is 'best practice' is transitory, contentious, and legally and culturally specific. Most obviously, measurements of 'effectiveness' which ought to underlie such 'best practices' are notoriously absent, (as well as mature and sophisticated (correct?) answers to legal and ethical questions). While the COP should address these issues, it will be vital to assess, prior to formalisation of the COP, how effectiveness will be measured. Given the paucity of information currently available on the effectiveness of biometrics, and the critical role that the question of effectiveness plays in equations of 'balance' (thus necessity and proportionality), it is vital for there to be greater detail on the public 'goods' that are to be achieved, and how these will be measured (by whom, how, and when) as well as a requirement that data and research is undertaken publicly and transparently.

#### **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?**

**Expertise and 'expert support' for Commissioner:** The Commissioner will be expected to 'improve standards and enhance performance': Through the proposed statutory Code of Practice, the Commissioner is expected to deliver greater transparency around performance, while their role in advising on working practices is likely to have a positive impact on the standard of service delivered on behalf of the public. The Commissioner's expertise in relation to biometric data and techniques will also support innovation and Scotland's engagement and reputation on an international level.' It will need to be clarified how this will be achieved and measured. Will the Commissioner have a role in setting technical or quality standards? Again, there may be overlap here with the Forensic Regulator role, or the Surveillance Commissioner, which will need to be clarified.

This element of the role may limit the opportunities to have a broad range of interested candidates for the role, as it will require technical expertise, as well as legal/ ethical expertise. Given the breadth of the role as envisaged, if the Commissioner is expected to set standards and 'enhance quality and performance' in biometrics, as well as assessing legal and ethical issues, it may be that the Commissioner will require substantial external advice/support to fulfil all of these requirements. In this regard, the **two tier-model of independent oversight** may be more robust (see earlier).

To locate an individual with sufficient expertise across all of the broad areas (technical/legal/ethical/policing etc.) may make the process of appointing a Commissioner that will command respect across all these fields, difficult. Thus, the person appointed ought to be given generous consideration when they are requesting external assistance, consulting external bodies or commissioning research.

**Resourcing and auditing of Commissioner's role:** As stated, the role will be ineffective if not properly resourced. It has taken several years of lobbying for the EW Biometrics Commissioner to get an uplift in budget that has enabled the appointment of support staff so that he can undertake his duties satisfactorily (likewise the Forensic Regulator). The funding and resourcing of the office should be kept under review to ensure that the Commissioner's role is carried out appropriately.

In addition to the set out functions, appointment and accountability arrangements, the Commissioner should be subject to periodic and regular independent audits. This will assure the public and parliament of: 1) the effectiveness of the role – in terms of value for money/benefits and contribution; 2) the accuracy of reports and true picture of the state of affairs; 3) efficiency of the overall system and the biometrics governance framework; 4) balance between the benefits derived from the office versus costs of running the office.