

## JUSTICE COMMITTEE

### SCOTTISH BIOMETRICS COMMISSIONER BILL

#### SUBMISSION FROM THE SCOTTISH HUMAN RIGHTS COMMISSION

---

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

---

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to contribute to the Justice Committee Stage 1 consideration of the Scottish Biometrics Commissioner Bill (the Bill).
2. The Commission welcomes the direction of travel the Scottish Government is taking. In particular, the recognition on the face of the Bill that there is a need for an ethical and human rights based approach to the collection, use, retention and disposal of biometric data. This is a pre-cursor to the delivery of justice and essential to the realisation of other human rights. The Scottish Government's aspiration to do this in a lawful, effective and ethical manner is positive.
3. The Commission was a member of the Independent Advisory group (IAG) led by John Scott QC that produced a report in March 2018 . The Commission's human rights analysis was included in the report and was adopted by the IAG. The report made nine recommendations in order to advise Ministers on how to establish the framework itself drawing upon the 2016 HMICS Audit and Assurance Review of the facial search functionality within the UK Police National Database (PND) (the HMICS report), and the recommendations from that report to Scottish Government which in turn formed the basis for the terms of reference for the IAG on Biometric Data. The HMICS report referenced the 2008 Fraser report which considered Biometric Data. The IAG report detailed domestic and international jurisprudence on the issue.
4. The Biometrics Commissioner Bill is an opportunity to support and prepare Scottish institutions, judiciary and citizens for the use of biometrics and forensic technology in an ethical and rights-compliant manner. The combination of contributions and consultations in the IAG report make it authoritative and preeminent as a source for knowledge and advice on how to proceed on this issue. The Commission recommends the adoption of all of the recommendations in the IAG report and has concerns where there are significant departures from these recommendations. Where the proposals diverge, explanations should be given in the interests of transparency and

accountability. Appendix 1 contains a comparison between the IAG report and the Scottish Biometrics Commissioner Bill.

5. For the sake of brevity, the Commission considers that the IAG report containing our Human Rights analysis and the HMICS report can be read alongside our submission for reference.

### **Response to Consultation questions:**

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

6. The Commission considers that the definition of Biometrics in the bill is novel in that it is not based on a prior existing definition. The definition was devised by the IAG with a view to encompassing future technologies and developments that may be regulated in this way. Parliament should be aware that this may result in future legislation requiring to be interpreted consistently with this definition. Parliament may wish to consider a mechanism to regularly review this definition.
7. The Commission welcomes the establishment of a Scottish Biometrics Commissioner. However the draft bill does not principally define the Commissioner as a body with powers to scrutinise the police but rather with the general function to support and promote the adoption of lawful, effective and ethical practices with regard to biometric data. This is problematic as it detracts from the primary role of promoting and investigating compliance against a Code of Practice for the collection, use, retention and disposal of biometric data in the policing and criminal justice system in Scotland.
8. It is correct to say that the Commissioner will, in the course of their work, be monitoring compliance with the Code of Practice by the police and the wider criminal justice system. It is solely through this avenue that any scrutiny will occur. There should be adequate scrutiny and accountability mechanisms in respect of all police functions, including Biometrics. The casting of the Biometrics Commissioner as a scrutiny body must be done with reference to other existing scrutiny bodies in order to precisely establish jurisdiction.

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

9. We make reference to the Terms of reference and the recommendations of the IAG. Both of these state that the Code of Practice should have a statutory footing. It is this Code of Practice that should address the ethical and human rights issues around biometrics. The Commission conducted detailed human

rights analysis as part of the IAG establishing the appropriate vehicle for the Biometrics regime.

10. By placing responsibility for developing and monitoring the Code of Practice with the Commissioner, the Bill ignores the thorough analysis of both HMICS and the IAG. It is incumbent for those bringing it forward to explain the departure from the recommendations why the role of the Commissioner has been cast in this manner as opposed to the manner in which progress was recommended, namely as an independent oversight mechanism investigating compliance with the Code of Practice
11. The IAG consulted extensively and included a draft code of conduct in its report. The mechanism exists to have this code established as a statutory code. It is regrettable that the Code of Practice was not included for consultation within the present bill as explicitly recommended in the IAG report. A robust Code of Practice established on a statutory footing would provide the most determinative guidance to all of those operating in the field as well as those regulating it.
12. In order to be transparent and ensure fairness, it is appropriate to separate the establishment of the Code of Practice from its administration. The Code of Practice must be focussed on a consistently ethical and human rights based legal framework designed to endure the changes in technology. Technical and operational matters can be delegated within the bill or the Code itself to the Commissioner.
13. The HMICS report endorsed the findings of the 2008 Fraser Report and called for the establishment of independent oversight in this area. The HMICS report directly compared the Scottish context to others in the UK. In particular England and Wales operate a Biometrics Commissioner, a CCTV Surveillance Camera Commissioner, and a Forensic Science Regulator for England and Wales. The overall context in which the Commissioner proposed in this bill will be operating should be given consideration and should be the subject of consultation.
14. There is concern that the Commissioner would be hindered by the processes of accountability outlined in the bill. Principally, the Commissioner has no independent sanction mechanism to incentivise and enforce cooperation from those that the Code of Practice applies to. The Commissioner has two powers: the power to request information and the power to make recommendations. Neither of these powers are attached to an independent sanction regime.

15. The methodology of applying to the Court of Session is cumbersome and delegates responsibility for interpreting and enforcing a breach of the Code of Practice to the judiciary. It would be preferable that the Commissioner held an independent sanctions mechanism and that the courts maintained their existing review role. The methodology of reporting a failure to implement recommendations is similarly cumbersome and may serve to hinder the Commissioner's progress in holding parties to account.
16. Both the IAG report and the HMICS Audit and Assurance Review of the use of the Facial Search functionality within the UK Police National Database (the Audit) are clear that it is not solely the police who require regulation and scrutiny on this issue. There are third party agencies whose activities engage duties in relation to biometric data. Their practicing frameworks are usually enshrined in commercial contracts. The Commissioner should be able to scrutinise any person or body who deals with biometric information on any basis. The human rights issues engaged will apply to all parties and a consistent approach to regulating them should be ensured. The draft bill anticipates the development of new technologies. It is important therefore that its implementation should anticipate further changes in the technological landscape and codify the ethical and human rights based approach to be taken in these matters by all parties.
17. The Commission is concerned that the role, functions and powers reflected in the draft bill differ significantly from the recommendations of the IAG. Our primary concern is that the Commissioner would be responsible for drawing up the Code of Practice From p13 (Recommendation 2) we quote as follows:

**Legislation should 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. The legislation should outline matters relating to review of the Code by the Scottish Parliament.**

We would recommend that the Bill be amended in order to align with the recommendation in the IAG report.

**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?**

18. The Commission has already recommended that a statutory Code of Practice be drawn up following detailed consultation by the Scottish Parliament per the IAG report (recommendation 2) The provisions for monitoring and reporting upon the code contained at paragraph 11 may be adequate as they align with those recommended by the IAG. Consideration should be given to the effect of monitoring in establishing transparency under the Code. More frequent monitoring offers more regular opportunities for scrutiny of the services being supervised by the Commissioner and for ongoing effectiveness of the Code and of the office of the Commissioner. As iterated above, the Bill contains minimal accountability measures and no enforcement powers. In the absence of those, the only strength that the Bill provides is that of monitoring to increase transparency and this will require to be rigorous if other bodies are to carry out necessary enforcement action in a timely manner. The Commission also notes that the Scottish Government commissioned analysis of responses to their consultation on Enhanced Oversight of Biometric Data for Justice and Community Safety Purposes wherein it was detailed that a large majority of respondents expressed agreement with the proposal for a statutory code of practice.

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

19. It is appropriate that the appointment and funding of the Commissioner be independent of government control and the Commission agrees broadly with the provisions contained in the Bill. Consideration should be given to amending paragraph 3 of Schedule 1 of the Bill to extend the disqualification period. This would be with the aim of ensuring true effective practical independence of the Commissioner and their secretariat. The same consideration should be given to paragraph 8 of schedule 1.

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

20. The Commission is disappointed that the Bill departs from the recommendations of the IAG so fundamentally. In its current form the bill:

- Removes effective accountability and enforcement mechanisms
- Deviates from the recommendation for a statutory Code of Practice to be consulted upon in parallel proposals for the Commissioner to one developed by the Commissioner for government approval
- Does not make provision for the extensive national debate and parliamentary consultation recommended by the IAG
- Does not make any provision for the Ethics Advisory Group recommended by the IAG

The human rights analysis that was contributed to the IAG report was delivered in the context of an extensive examination of the landscape of Biometrics and deliberation amongst the other experts within the group. The Commission is concerned the the Bill departs from these recommendations so significantly without detailing the reasons for doing in the interests of transparency and accountability.

**Scottish Human Rights Commission**

**August 2019**

## Appendix 1

### Comparison with key recommendations of the IAG

#### **Recommendation 1**

**There should be national debate to improve public understanding of, and confidence in, the retention and use of biometric data in Scotland for policing, law enforcement and other public protection purposes. Ideally, this should start before and continue during the Scottish Government's public consultation, as well as featuring in ongoing discussion after consultation.**

This Bill precludes this recommendation entirely. In line with the PANEL principles, participation in rights is a way to ensure compliance with ethical and human rights principles. The consulting body would be accountable for how they respond to the consultation outcomes. An open national consultation would be more likely to register diverse views. It is paramount that a wide range of individuals are involved in the debate and given access to resources to empower their understanding of the issues relating to Biometrics. Knowledge and awareness of the area should not remain the reserve of those with a technical, scientific, political or legal background. An increase in public understanding and confidence in the system for managing this data is helpful for the public bodies involved

#### **Recommendation 2**

**Legislation should 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. The legislation should outline matters relating to review of the Code by the Scottish Parliament.**

A statutory Code of Practice would enshrine the Human Rights obligations of all parties using Biometric Data at the most authoritative level. This sets out a rights compliant process to ensure that the highest standards are upheld and are accessible to all parties.

#### **Recommendation 3**

**The Code of Practice should be the subject of detailed consultation. It should contain relevant human rights and ethical principles, address the implications of any presumption regarding retention and specify relevant procedures for applications from private citizens for deletion of biometric data. It should contain specific reference to validation of biometric technologies.**

The bill does not make provision for this consultation, nor does it make explicit the terms of any consultation that the Biometric Commissioner may undertake in order to draft the Code of Practice. Detailed consultation is necessary given the complex nature of Biometric data; the expertise required to analyse it and the broad base of stakeholders who could conceivably be affected by the Code of Practice. We repeat our concern that the bill does not provide for a statutory Code of Practice but substitutes this with a Code established by the proposed Biometrics Commissioner.

#### **Recommendation 4**

**Distinct policies should be formulated for the acquisition, retention, use and disposal of the biometric data of children aged between 12 and 17. In each case involving a child, consideration should be given to the proportionality and necessity of obtaining biometric data for the purposes of recording on the biometric databases, ensuring that the best interests of the individual child are taken into account in the decision-making process. Where the decision is to obtain and retain biometric data, the reasons should be recorded and subject to review and scrutiny. Appropriate consideration should be given, and adaptation made, in the treatment of the data of those (children and adults) with specific vulnerabilities.**

The Bill does not satisfy the recommendation by the general direction given to the Commissioner to have regard to the interests of Children and Young Persons contained in s5(a). A greater degree of detailed analysis and discreet policies should be enacted to bring the bill in line with this recommendation

#### **Recommendation 5**

**There should be a review of the rules on retention of biometric data in sections 18 to 19C of the Criminal Procedure (Scotland) Act 1995, considering all questions of proportionality and necessity. The review should be research led and consider not only the gravity of the offending but also the value of biometrics in the investigation of certain offences, re-offending rates relating to different crimes, the escalation of offending, and the value that biometric retention has in the investigation of this escalation. It should be informed by any developments in the law in Scotland, England and the European Court of Human Rights.**

The Bill does not respond to this recommendation in any meaningful way. Given that the recommendation is for a review of an existing statutory basis it would be appropriate for this review to be carried out by a parliamentary body as opposed to an appointed commissioner.

#### **Recommendation 6**

**There should be a presumption of deletion of biometric data after the expiry of prescribed minimum retention periods.**

#### **Recommendation 7**

**Evidence should be gathered from which continuing assessment can be made about appropriate periods of retention of biometric data. Public consultation should include specific questions on retention periods.**

The Bill does not respond to these recommendation. This is regrettable as the IAG report devoted detailed analysis to the basis upon which these recommendations were founded. The recommendation would lead to clarity and objective certainty regarding the retention of Biometric Data as well as providing a clear review procedure where deletion was not appropriate.

#### **Recommendation 8**

**There should be legislation to create an independent Scottish Biometrics Commissioner. The Commissioner should be answerable to the Scottish 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.**

The Bill establishes the Role of a Biometrics Commissioner. However the proposed functions of the Biometrics Commissioner differ significantly from those suggested within the IAG Report. The Bill removes any statutory basis for the Code of Practice and the relevant accountability mechanisms. In the context of the report, the Biometrics Commissioner is to monitor compliance with a statutory Code of Practice that has already been consulted on by parliament. The Commission views this as the most effective way to ensure that the Rights based framework for Biometric Data is fundamentally established while being subject to review by an empowered and accountable Public Body. The proposed Commissioner's role is one of a general function to support and promote the adoption of lawful, effective and ethical practices with regard to biometric data. This is problematic as it detracts from the primary role of promoting and investigating compliance against a Code of Practice for the collection, use, retention and disposal of biometric data in the policing and criminal justice system in Scotland.

#### **Recommendation 9**

**An ethics advisory group should be established as part of the oversight arrangements. This group should work with the Commissioner and others to promote ethical considerations in the acquisition, retention, use and disposal of biometric technologies and biometric data.**

The Bill makes no provision for this. This is regrettable as the IAG report rationalised the need for such a group quite clearly. They drew on evidence of the success of the Biometrics and Forensic Group in England and Wales and provisionally tasked the group as follows:

*This Group can support, test and challenge the Commissioner and other relevant bodies. Liaising with others working in relevant areas of ethics, the Group will offer advice on options as to how, or whether, to proceed with proposed developments in technology. We see considerable scope for liaison with the BFEG, possibly to include observers from each Group attending meetings of the other.*