

JUSTICE COMMITTEE

SCOTTISH BIOMETRICS COMMISSIONER BILL

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Section 2(1)(2) of the draft SBC Bill provides that ‘the Commissioner’s general function does not extend to biometric data in relation to which the Commissioner for the Retention and Use of Biometric Material has a function under section 20 of the Protection of Freedoms Act 2012.’ This limiting provision demarcates responsibility, and maintains jurisdictional borders, in accordance with s.29 of the Scotland Act 1998. However, as will be demonstrated, interactions between the two commissions are apt to be more complex than the current bill allows, and thus deserve close scrutiny. Beginning with the CRUBM, Section 20 of the Protection of Freedoms Act 2012 allows for the creation of the commission, whose functions relate to the use and retention of two distinct categories of biometric material;

1. Samples collected and used in relation to criminal investigations.
2. Samples collected and used in relation to national security issues.

In respect of the first category, the Commissioner is tasked with the function of keeping under review the retention and use of fingerprints [Section 20(6)(a)(i)], and DNA samples [Section 20(6)(a)(ii)], collected in England and Wales in accordance with sections 63A and 63D to 63T of the Police and Criminal Evidence Act 1984. Thus, under PACE S.63D(1)(a) and (b), the CRUBM function is exercisable in relation to a limited category of biometric samples, comprising fingerprints and DNA profiles derived from samples taken from a person under any power conferred by PACE, or those taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police in England and Wales.

The equivalent power to take biometric samples in Scotland is conferred under Section 19C(2)(c) and (d), of the Criminal Procedure (Scotland) Act 1995. The CRUBM has no powers, or responsibilities, in relation to samples collected,

used, and retained, by Police Scotland in accordance with s.19 (unless there is a national security dimension under anti-terror legislation, *supra*). Therefore, the majority of biometric samples collected in Scotland will come under the aegis of the SBC alone, under Section 2(1) of the draft SBC Bill, which gives the SBC a broad supervisory responsibility in respect of biometric data (not limited to fingerprints and DNA samples), collected for police purposes by (a) the Police Service of Scotland, and (b) the Scottish Police Authority.

Such provision is uncontroversial for the most part. DNA samples are routinely loaded onto the Scottish DNA database, for use within the local jurisdiction, and will be monitored by the SBC. Similarly, fingerprints are regularly collected by Police Scotland, and retained locally. However, it must be remembered that copies of DNA profiles are also loaded onto the National DNA Database. Furthermore copies of fingerprints (known as 'Tenprints') are also uploaded to the UK IDENT1 database. It has been demonstrated (*infra*) that the CRUBM has no responsibility in respect of these samples, since they were not collected under PACE. Therefore, Section 2(2) of the proposed SBC Bill does not come into operation to extinguish the SBC's Section 2(1) responsibility in respect of these samples. Thus, it may be inferred that the SBC Bill creates a delegated function, which extends to England & Wales. It is posited that the creation of such a function serves to open the draft SBC Bill to challenge under s. 29(1) and (2) of The Scotland Act 1988.

In counterpoint, the provisions relating to the second category of biometric material (samples collected and used in relation to national security issues) retain jurisdictional clarity.

Section 20(8) POFA 2012 states that, in relation to Scotland, a foregoing reference [in subsection (6)(b) POFA 2012] to use of material, or copies of material, in accordance with paragraphs 20A to 20J of Schedule 8 to the Terrorism Act 2000 includes a reference to use of material, or copies of material, in accordance with section 19C(2)(c) and (d) of the Criminal Procedure (Scotland) Act 1995. Further, a reference, [in subsection (6)(d)] to use of material, or copies of material, in accordance with paragraphs 5 to 14 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011

is to be read as a reference to use only for a purpose mentioned in paragraph 13 (1)(a) or (b) of that Schedule to that Act. Thus, for this category of copied biometric data, the CRUBM retains an unambiguous responsibility. However, given the above, it may be posited that the provisions proposed in the draft Bill do not meet the need for a workable regulatory and legislative framework, as recommended in the 2018 report of the Independent Advisory Group on the Use of Biometric Data in Scotland (see page 9), and would potentially lead to the creation of an unnecessarily variegated, and uneven, regulatory environment, whose lawfulness is open to challenge.