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Our ref: A26843493

17 January 2020

Dear Convener,

SCOTTISH BIOMETRICS COMMISSIONER BILL – STAGE 1 REPORT

Further to my letter to you dated 7 January 2020, I now enclose my Final Response to the Justice Committee's Stage 1 Report, in the attached Annex. For clarity, the numbered headings in the Annex refer to the paragraph numbers from the Stage 1 report. References to "the Commissioner" are references to the proposed Scottish Biometrics Commissioner.

I thank the Committee again for its scrutiny of the Bill and for its detailed conclusions and recommendations in the Stage 1 Report. I believe that the important discussions and debate which have taken place over Stage 1 will result in a better Bill, by providing a sound statutory basis for the new Scottish Biometrics Commissioner.

I will continue to reflect on matters raised at the Stage 1 debate in advance of Stage 2, and I am happy to meet with members of the Committee for bilateral discussions in advance of Stage 2, should they so wish.

Yours sincerely



HUMZA YOUSAF

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SCOTTISH BIOMETRICS COMMISSIONER BILL : FINAL RESPONSE TO JUSTICE COMMITTEE STAGE 1 REPORT

(74) The Committee recommend that the National Crime Agency and the British Transport Police be included in the bodies set out in Section 7(1) of the Bill, in respect of their functions in Scotland. The Scottish Government should bring forward the necessary amendment at Stage 2.

The Scottish Government is working with the National Crime Agency; the British Transport Police; and the Ministry of Defence Police so that they may be included as bodies that would be subject to the oversight of the Scottish Biometrics Commissioner.

These bodies operate UK-wide, and the Scottish Government considers that a section 104 order under the Scotland Act 1998 would be the appropriate mechanism for conferring duties on such bodies - should the Scottish Government and the UK Government agree that such bodies should be subject to the oversight of the Commissioner. Therefore, it would not be possible to include these UK bodies within section 7 through a stage 2 amendment to the Bill.

The Scottish Government are currently liaising with the aforementioned bodies and the UK Government. If a section 104 order is agreed then this order will be laid and debated in the UK Parliament.

(75) The Committee also recommends that the Bill should be amended so that both the National Crime Agency and the British Transport Police be added to the bodies set out in Section 3 of the Bill in terms of the power of the Commissioner to work with others.

We expect that the Section 104 order mentioned above will also include an amendment to Section 3.

(87)The Committee asks the Scottish Government to consider how the lack of debate and transparency on the use of biometrics across Scotland might be addressed, and what role the Scottish Biometrics Commissioner could play in this, as part of its response to this Stage 1 Report.

The Scottish Government considers that the Scottish Biometrics Commissioner as an independent office-holder will, once appointed, be well placed to lead any debate on the level of transparency on the use of biometrics for criminal justice and police purposes by bodies across Scotland. However, it should be noted that other bodies including the Parliament, Scottish Government and policing-related bodies, would also have an important contribution to make to this important debate.

As described below, Sections 2 and 3 of the Bill facilitate the Scottish Biometrics Commissioner participating in a national debate.

Section 3(b) of the Bill allows the Scottish Biometrics Commissioner to work with the Scottish Ministers, and the Scottish Government stands ready to work with the Scottish Biometrics Commissioner should the Scottish Parliament pass the Bill.

Section 3 of the Bill also enables the Commissioner to work jointly with, assist or consult with a wide range of bodies (including the Scottish Parliament and the Information Commissioner) and other persons as the Commissioner considers appropriate, in the exercise of their functions. Therefore, this power may have the effect of facilitating a collaboration with other Commissioners to lead a debate on transparency.

Section 2(3)(b) of the Bill also confers functions on the Commissioner to promote public awareness and understanding of the powers and duties that the bodies listed at section 2(1) have in relation to the acquisition, retention, use and destruction of biometric data; how those powers and duties are exercised; and how the exercise of those powers and duties can be monitored or challenged.

In respect of any wider debate introduced on the use of biometrics beyond criminal justice and police purposes, the Scottish Government would consider that the Commissioner would have a role in advising on and supporting such considerations, based on the Commissioner's experience.

(107) After discussion, the Committee recommends that, as part of the review recommended in paragraph 158 (on the powers of the Commissioner) the Scottish Government also review the effectiveness of the 'have regard to' provision in Section 7(1). The Committee also recommends the Commissioner report on the effectiveness of the 'have regard to' provision in promoting its general function in Section 1, either as part of the reporting powers provided in Section 15, or as part of the Commissioner's annual report to the Parliament under Section 22 of the Bill.

The Scottish Government recognises that the Committee has concerns about the strength of the requirement to "have regard to" the Code of Practice, and has undertaken to review whether any amendment would be appropriate at Stage 2 to strengthen the provision. However, it should be noted that "having regard to" the Code of Practice means that that the Code is to be taken seriously. In practice, any failure to observe it will need to be accompanied by a good reason in order to demonstrate that regard was had to the Code. Any failure to have regard to the Code of Practice carries the risk that the Commissioner will notify such matters to the Parliament, thereby making public the failure to comply. The power of reputational damage should not be under-estimated. Where appropriate, this may also prompt legislative change.

Police Scotland and the SPA have a duty to have regard to the Code, and it should be noted that there are legal consequences – such as judicial review – if they do not. The Bill also provides that a court must take the Code of Practice into account when

determining any question before it to which the Code is relevant – so failure to have regard to the Code would allow the court to reach a different decision than it might have reached if the Code had been considered. If there ever was, for example, a legal challenge against the police in relation to the use of facial recognition technology in a public place, the court will take into account the code of practice when reaching its decision.

The Scottish Government believes that there is no need to include express provision in this Bill for either the Scottish Ministers or the Commissioner to formally review the “have regard to” provision. This is because Government and Parliament can carry out post-legislative scrutiny on the Commissioner’s powers at any time, without any further legislative provision being required. The Commissioner would also be able to prompt post-legislative scrutiny by raising issues in the reports that the Commissioner will prepare under sections 15 and 22 of the Bill. These powers would be more flexible than an obligation to review the Act after a specified period which is determined now but which may not subsequently prove to be the most appropriate time.

The Government believes there is a need to take a flexible and proportionate approach to post-legislative scrutiny so that time and resources are targeted effectively. We also note the work currently being carried out on this matter by the Public Audit and Post-Legislative Scrutiny Committee.

The response to paragraph 158, in relation to the inclusion of a suitable period within the Bill to review the scope of the Commissioner’s remit and powers, is also relevant here.

(112) The Committee recommends that the Commissioner for the Retention and Use of Biometric Material be added to the bodies set out in Section 3 of the Bill in terms of the power of the Commissioner to work with others. The Scottish Government should also consider adding the Forensic Science Regulator and the Surveillance Camera Commissioner to Section 3 of the Bill.

The Scottish Government will add the Commissioner for the Retention and Use of Biometric Material to section 3 of the Bill. However, further consideration is required in respect of adding the Forensic Science Regulator and the Surveillance Camera Commissioner to section 3 of the Bill.

(119) The Committee appreciates that it will be for the Commissioner to determine their relationship with the UK Information Commissioner. Given the potential for confusion about the roles, the Committee would recommend a memorandum of understanding between the organisations, and that this clearly signposts the complaint mechanisms available to the public.

The Scottish Government would be supportive of the creation and implementation of a memorandum of understanding between the Scottish Biometrics Commissioner and the UK Information Commissioner.

Section 3(h) of the Bill allows the Scottish Biometrics Commissioner to work with the UK Information Commissioner. The Scottish Government, however, recognises the independence of both offices, and therefore the entering into of such a memorandum and the detail of it will be for the Scottish Biometrics Commissioner and the UK Information Commissioner to agree. The Information Commissioner's Office has already signalled its willingness to consider such a memorandum of understanding.

(132) The Committee notes that the recommendation of HMICS that the Scottish Government works with Police Scotland and the Scottish Police Authority to consider legislative provision in relation to the retention and use of photographic images by the police has not been implemented. This represents a legislative gap.

Since the publication of the 2016 HMICS review of the use of the Facial Search functionality within the UK Police National Database (PND), Police Scotland has successfully delivered a new national custody episode management system which enables custody images to be automatically weeded from that system when the corresponding image is similarly deleted from the Criminal History System (CHS).

Under the legacy systems of the former eight police forces, there was no policy or process for sending or weeding images. A national image solution now securely sends images from custody centres around the country to record departments which, after upload to CHS, are thereafter weeded. The current custody system is in the process of having images removed and legacy custody systems being decommissioned.

No image taken in custody is directly entered onto PND. Image retention on CHS and PND is linked so that any image held or otherwise removed on CHS is correspondingly held or removed on PND. Police Scotland's retention of images is clearly stated within the Recording, Weeding and Retention of Information on Criminal History System (CHS) document which is accessible to the public. In this document it states: "9.1 : Images will be retained where the photograph is part of an on-going pending case and/or where the photograph is of the same date or newer than the oldest case which resulted in a conviction or Absolute Discharge".

The Scottish Government notes the concerns expressed by the Committee about a legislative gap in relation to retention periods for photographic images held by Police Scotland. The Scottish Government will consider the need for legislation regarding retention periods for images as part of the review that it has already committed to undertake in respect of the current law on retention periods for biometric data more widely.

(133) The Committee asks the Scottish Government to set out the areas of legislation that it would expect to be prioritised by the Commissioner for review as part of its response to this Stage 1 report.

The Scottish Government considers that the Scottish Biometrics Commissioner as an independent office-holder will, once appointed, be well placed to recommend any relevant areas of legislation that should be prioritised.

Section 3(b) of the Bill allows the Scottish Biometrics Commissioner to work with the Scottish Ministers, and the Scottish Government stands ready to work with the Scottish Biometrics Commissioner should the Scottish Parliament pass the Bill.

(143 and 144) The Committee believes that an ethics advisory group which is established to support the Commissioner must be independent from Government, and that its membership should be a matter for the Commissioner. The Committee asks the Scottish Government to set out its views on this as part of its response to this Stage 1 report.

The Scottish Government fully supports the formation of an Ethics Advisory Group (EAG) and will honour the public commitment that it made to establishing such a Group.

However, the Committee's reasons for wishing to establish the EAG in primary legislation are unclear. The proposals to place the EAG on a statutory footing and for it to be appointed by the Scottish Biometrics Commissioner for the purpose of supporting the Commissioner, are not what the Independent Advisory Group on Biometrics (IAG) recommended in 2018. Moreover, the Biometrics & Forensics Ethics Group for England & Wales (BFEG) which the Committee's Report and the IAG both reference, is not a statutory group. The Scottish Government considers that statutory provision in primary legislation should not be made without good reason. It also considers that making statutory provision in this area would be premature and would not allow the level of flexibility that may be needed.

The Scottish Government is open to considering wider views on the remit and membership for this Group, and to whom the Group should report. The IAG called for a consultation to explore the options - and this is what the Scottish Government intends to do. It is important that the remit is scoped to ensure relevance - and that its members have the appropriate skills and experience. The Scottish Government's preference would therefore be to take the time to secure a broad range of views on these matters to allow proper discussion. Scottish Government officials are in touch with BFEG to obtain useful insights to inform remit and membership considerations.

The Scottish Government also wishes to see if there are lessons that can be learned from the establishment and operation of the new Emerging Technologies Advisory Group (ETAG) whose formation was announced last summer. It is expected that the remits of the two Advisory Groups will be broadly similar – with the ETAG being

established in early 2020 and the Ethics Advisory Group approximately 12 months later. Depending on timings, there may be an option for the ETAG to become the Ethics Advisory Group in due course. Thereby, the Ethics Advisory Group might benefit from retaining the knowledge gained by the ETAG. This option might not be available were the Ethics Advisory Group to be established on the face of the Bill.

(158) The Committee recommends that the Scottish Government include a suitable period within the Bill, to review the scope of the Commissioner's remit and powers.

The Scottish Government recognises that the Justice Committee wishes to ensure that the Commissioner is equipped with the necessary powers and has a suitable remit - and that the powers and remit are reviewed periodically. The Scottish Government is mindful that Government and Parliament can carry out post-legislative scrutiny on the Commissioner's powers at any time, without any further legislative provision being required. The Commissioner would also be able to prompt post-legislative scrutiny by raising issues in the reports that the Commissioner will prepare under sections 15 and 22 of the Bill. These powers would be more flexible than an obligation to review the Act after a specified period which is determined now, but which may not subsequently prove to be the most appropriate time. Therefore, the Scottish Government believes that there is no need to include express provision in this Bill for a review of the Commissioner's remit or powers.

(159) As part of the review, the Scottish Government should consult on whether other public sector bodies should be included within the scope of the Bill, for example the Scottish Prison Service, parole e-monitoring and local government CCTV systems.

The Scottish Government is clear that it may be appropriate in future to extend the Commissioner's oversight role to cover other criminal justice-related matters. It is for that reason that the Bill includes a power to amend the resulting Act in that regard (sections 2(6) and 7(4)). The Scottish Government will consider a consultation in due course about including further persons or bodies with criminal justice-related functions within the scope of the Scottish Biometrics Commissioner in relation to those functions. This would be taken forward once sufficient time has passed, to allow the current oversight provisions to bed in.

(160) The Bill should recognise the role the Commissioner will need to undertake to interact with private sector users of biometrics, as well as private sector technology developers whose work drives the development of new biometrics data.

The Scottish Government recognises the potential for the Scottish Biometrics Commissioner to engage with private sector users of biometrics as well as private

sector technology developers in pursuance of the Commissioner's functions under the Bill.

In the exercise of the Commissioner's functions, sections 3(j) and 8(m) of the Bill allow the Commissioner, if the Commissioner considers it appropriate, to work jointly with, assist or consult such private sector bodies.

The response to paragraph 161 is also relevant here.

(161) The Committee asks the Scottish Government to set out in its response to this Stage 1 report, how it expects the Commissioner will assess the scope of biometrics being used for criminal justice and policing purposes in Scotland, which are provided by the private sector, and the oversight regime required to achieve this.

Section 2(3)(a) of the Bill confers functions on the Scottish Biometrics Commissioner to keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by persons acting on behalf of bodies subject to the Commissioner's oversight and listed under section 2(1) of the Bill. This provision was intended to provide the Commissioner with the means of engaging with private sector bodies who provide biometric-related services to any of the bodies who are subject to the Commissioner's oversight under section 2(1). Information is also likely to be available from Police Scotland and the Scottish Police Authority in cases where those bodies contract with the private sector.

While private sector bodies would not currently be subject to direct formal oversight by the Commissioner, it is open to the Code of Practice to make recommendations about when or how bodies listed under section 2(1) of the Bill enter into contracts with private sector bodies and what assurances should be given in those contracts. If that is done, private sector bodies providing biometric-related services to bodies listed under section 2(1) of the Bill could effectively be required to have regard to all or some aspects of the Code of Practice as a term of their contract, and the relevant bodies to whom they provide these services could, in terms of the Code, be tasked with ensuring that this was happening.

(171) The Committee is concerned that the powers of the Commissioner do not include oversight of biometric data collected by the police service in Scotland, that is then retained on UK-wide police databases outwith Scotland. The Committee asks the Cabinet Secretary to provide clarity on this issue in his response to the Stage 1 Report, with a view to addressing this at Stage 2 if required.

In respect of the oversight of Scottish data on UK databases, section 2(3) of the Bill confers functions on the Scottish Biometrics Commissioner and one of those is to keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by or on behalf of bodies subject to the Commissioner's oversight and listed under section 2(1) of the Bill. It is for Police Scotland and the SPA to effectively manage the data which they have allowed to be

uploaded onto UK databases, ensuring that records management is effectively carried out in accordance with the law in Scotland. Should they fail to do so, then the matter may be taken up with them by the Scottish Biometrics Commissioner.

(172) The Committee recommends that the Scottish Government seek agreement with the UK Government that the Scottish Biometrics Commissioner be a member of any strategic boards overseeing the development of new UK wide police databases.

The Scottish Government considers that the Scottish Biometrics Commissioner as an independent office-holder will, once appointed, be best placed to identify the strategic boards the Commissioner would wish to become a member of and to make such formal representations to the appropriate body for membership. The Scottish Government has begun to make some initial enquiries to test the willingness of relevant strategic boards to extend membership to the Scottish Biometrics Commissioner.

(181) The Committee recommends that the Scottish Government includes a complaint mechanism within the Bill, to enable the public to refer issues to the Scottish Biometrics Commissioner on the use of biometrics by Police Scotland and the SPA, or on their lack of compliance with the Code of Practice.

Data protection legislation, the subject-matter of which is reserved, requires the Information Commissioner to deal with complaints from individuals about the processing of their personal data by data controllers. To give the Scottish Biometrics Commissioner a similar function to deal with complaints about biometric data, which can be personal data, could duplicate the role of the Information Commissioner set out in data protection legislation.

The Scottish Government considers that the Scottish Biometrics Commissioner should concentrate on broader systemic issues in the criminal justice and policing context, rather than on individual cases. This means that members of the public wishing to complain about how their biometric data has been handled by bodies subject to the Scottish Biometrics Commissioner's oversight should continue to make such a complaint to the ICO.

The Scottish Government considers that the focus of ICO activity is largely driven by complaints from the public, whereas the Scottish Biometrics Commissioner's oversight will be driven by a systematic review of Police Scotland and the SPA's activities as these relate specifically to biometric data. The comparative remits of the ICO and the Commissioner for the Retention and Use of Biometric Material in England & Wales appear to be well understood by the public.

The Scottish Government would however envisage that the Scottish Biometrics Commissioner may wish to develop a fully comprehensive communications strategy, which would help the public understand the Commissioner's role.

The Bill therefore seeks to ensure that the Scottish Biometrics Commissioner's scope, powers and functions align with other existing provisions at a UK level and in a way which delivers a positive outcome that strikes the right balance between community safety and the rights of the individual.

The Commissioner's role is deliberately intended to be one of strategic oversight rather than resolution of individual complaints. The Information Commissioner has a statutory function to deal with individual complaints in relation to personal data, and to duplicate that complaints mechanism would be unnecessary and could potentially cause confusion.

The response to paragraph 119, in relation to the potential relationship between the Scottish Biometrics Commissioner and the ICO, is also relevant here.

(199) The Committee agrees that there should be a statutory Code of Practice. The Committee recommends that the Bill establish a statutory basis for the existence and application of the Code, and that the specific details of the Code, and any future revisions, be provided for by subordinate legislation.

The Scottish Government is clear that, by being established under statute, the Code of Practice is already being put on statutory footing. The Bill includes a number of statutory provisions about the Code. For example, it requires the Commissioner to prepare a Code and to review it; it requires there to be consultation on the content of the Code; it requires specified policing bodies to have regard to the Code; it provides for how the Code is to come into effect; it provides for how the Code is to be treated by the courts. The Bill therefore already delivers on the Committee's recommendation that the Bill should establish a statutory basis for the existence and application of the Code.

While the content of the Code is not specified in the Bill, this is to allow for flexibility and future-proofing and to ensure that the Commissioner can act independently in preparing the Code. The Independent Advisory Group's report supported the content of the Code not forming part of the Bill or subordinate legislation and stated that "The detail of the Code need not appear in legislation."

The Scottish Government recognises in the Committee's recommendation an acknowledgement of the need for flexibility in the Code to allow it to align with technological advances as they occur. The Scottish Government welcomes this.

It should be noted that under section 9 of the Bill, the Parliament will be able to scrutinise the code of practice and decide whether it should be brought into effect. Section 9 requires the code of practice to be laid alongside regulations appointing a day for the coming into force of the code. The regulations will be subject to affirmative procedure. The format of the code may not lend itself to being put into regulations, and the Scottish Government would not want to constrain the accessibility and format of the Code by requiring that it be contained in regulations. The effect of laying the code of practice at the same time as laying regulations is the same as putting the code into the regulations – Parliament will be able to consider

the contents of the code before deciding to bring the code into force by approving the regulations.

(200) Furthermore, the Committee calls on the Scottish Government to re-examine the draft Code of Practice already prepared and consulted on by the IAG. If the Government is of the view that draft Code meets the principles set out for the Code in the Policy Memorandum (and which the Committee has recommended be placed on the face of the Bill) we ask the Government to consider amending the Bill to bring that draft Code into force at the same time the Commissioner takes up office. We comment further on the approval mechanism for the Code later in the report.

(225) The Committee recommends that the Bill establish the Code of Practice, which has already been consulted on, as an interim Code which should come into force at the same time as the Commissioner takes up their role. This would ensure there is no hiatus between the Commissioner coming into post and the application of a Code of Practice on the collection, use, retention and disposal of biometrics for criminal justice and policing purposes. Furthermore, the Committee recommends that the Bill include a requirement for the Commissioner to review the interim Code as soon as possible and lay a full revised draft Code of Practice before the Parliament for consideration in the manner set out in paragraphs 223 and 224.

The draft Code of Practice was drafted by the Independent Advisory Group in 2018 and the Scottish Government recognises the thought which went into its preparation. It was an effective way of generating discussion for the purposes of the consultation. However, as a working document to guide Police Scotland and the SPA on standards, ethics and good practice, the Scottish Government believes that the Code needs further work. Police Scotland and the SPA are also of that view. The Scottish Government therefore does not favour the draft Code being reflected on the face of the Bill or being used as an Interim Code.

Equally importantly, the Scottish Government firmly believes that any Code should be drafted and consulted upon by the Commissioner in accordance with their functions under this Bill. Including the detail of a Code of Practice before the Commissioner is appointed would undermine the Commissioner's independence and circumvent the need to consult the broad range of stakeholders specified in the Bill - many of whom did not participate in the 2018 consultation.

In addition, it would be inconsistent with the policy aim of creating an impartial Commissioner if Scottish Ministers - or indeed anyone else - were to specify the content of the Code. The provisions around the Code of Practice are aimed at ensuring an impartial oversight function right from the start.

On a practical level, the Scottish Government observes that it could be challenging for the new Commissioner to be taking forward the implementation of the Interim Code at the same time as preparing a new one, during their first year in post.

While the Scottish Government recognises that the good intention behind the Committee's recommendation was to avoid a hiatus between the Commissioner coming into post and the application of a Code of Practice, the Government is concerned that the Committee's proposal undermines the impartiality of the oversight function and circumvents the requirement for statutory consultation. These are important principles which should not be compromised.

The Scottish Government believes that a better solution would be to let the Commissioner undertake the process of preparing the Code in the way which the Bill specifies, so that the Code is fully fit for purpose, current and has been informed by the views of all relevant parties.

(206) The Committee recommends that the principles underpinning the Commissioner's role and the purpose of the Code of Practice in promoting and protecting human rights, privacy and public confidence must be enshrined in the Bill. The principle of delivering community safety, as set out in the Policy Memorandum, should also be included in the Bill.

The Bill is clear in section 2(1) that the Commissioner's function is to 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 police purposes. Human rights are of course part of lawfulness. That overarching general function feeds through to everything that the Commissioner does, including the preparation of the Code of Practice. However, we will consider whether additional wording could be inserted, and will make an amendment at stage 2 if appropriate.

(207) As recommended by the IAG, the Code of Practice must include a presumption of deletion of biometric data after the expiry of prescribed minimum retention periods. This presumption, however, should not impede the power of the Chief Constable to apply for the retention of biometrical data for a given period of time, as operational needs require.

The Scottish Government recognises the importance of upholding the principle of a presumption of deletion of biometric data after the expiry of prescribed minimum retention periods. However, it is important that the Commissioner has discretion to use their own judgement and take account of the views of consultees on what they think should be included in the Code of Practice. The Scottish Government does not wish to undermine the Commissioner's position.

(223) The Committee recommends the Bill be amended to empower the Commissioner to lay the draft Code of Practice before the Parliament, following agreement with the Scottish Ministers, for consideration and approval. This process should allow enough time for the Parliament, and its committees, to consult on the draft Code and report back before final approval.

As noted above in response to the recommendation at paragraph 199, the Bill already makes provision for Parliamentary scrutiny. However, the Scottish Government has no objection to enhancing the provision to allow further time, within reason, for consideration and consultation. The time period is discussed further below in response to paragraph 224.

(224) We note the recent views of the Delegated Powers and Law Reform Committee on possible timescales for instruments considered under the super-affirmative procedure and consider that a period of 60 days would be a suitable timeframe for consideration of an initial draft Code of Practice. Subsequent modifications of the Code could be achieved via regulations subject to the affirmative instrument procedure.

As noted above in response to the recommendation at paragraph 199, the Scottish Government will consider alternative procedures for Parliament to approve any initial draft Code of Practice or revised Code. An amendment will be brought forward at stage 2 should it be considered that an alternative procedure is appropriate. The Scottish Government agrees that 60 days would be an appropriate period for parliamentary consideration.

(229) The Committee is content with the powers set out in Sections 11 to 14, but as has been previously stated, notes the apparent mismatch between these powers in these sections, and the lack of powers provided to enforce the Code of Practice.

The Scottish Government notes the Committee's comments.

The Scottish Government's view is that the powers are as strong as they need to be. The information-gathering power is the critical power because without information on which to base the Commissioner's reviews, those reviews would be worthless. Once that information has been obtained, the Commissioner will be able to provide meaningful analysis which will be able to drive political or legislative change if that proves necessary.

There is a need to ensure that the functions of the Biometrics Commissioner do not duplicate the enforcement functions of the Information Commissioner in relation to the processing of personal data under data protection legislation. Accordingly, the functions of the Commissioner in the Bill have been drafted to facilitate, within the regulatory regime of data protection legislation, the fulfilment by bodies (subject to the Commissioner's oversight under section 2(1) of the Bill) of their own functions of policing in a manner that is lawful, ethical and effective – and which respects fundamental rights, including data protection rights. The Scottish Government considers that the support provided by the Commissioner could include promoting good practice, identifying deficiencies, and providing transparency, which will promote confidence in policing and the criminal justice system.

(233) These sections help provide for the ‘name and shame’ mechanism open to the Commissioner to promote compliance with the Code of Practice. While the Committee is content with these provisions, as previously stated these should operate as part of a wider set of enhanced powers for the Commissioner in terms of compliance with the Code by the police and SPA.

The Scottish Government notes the Committee’s recommendation and welcomes the Committee’s statement that it is content with the reporting provisions.

In relation to the reference made to the recommendation made elsewhere, as well as “naming and shaming”, the Scottish Government considers that it would also be within the power of the Commissioner to explore procedural changes with the bodies under its oversight, or to recommend to the Scottish Government (or indeed to the Scottish Parliament’s Justice committee) that they bring forward legislation, should the Commissioner believe that measures to ensure observance of the Code of Practice should be strengthened.

The Scottish Government also highlights the Commissioner’s functions under section 22 of the Bill to prepare an annual report to the Scottish Parliament which could in turn give rise to Parliament calling bodies to account.

Therefore, the Commissioner’s “name and shame” enforcement powers are not the only means of improving performance and transparency, as further actions may flow from the “naming and shaming”.

(236) The Committee would expect the Commissioner to make regular reference to the adequacy of the resources provided to the SPCB by the Scottish Government for the operations of their office, as well as any additional resourcing needs which may be required if the role of the Commissioner expands over time.

The Scottish Government would agree that the Scottish Biometrics Commissioner as an independent office-holder should make reference to the adequacy of resources provided by the Scottish Government to the Scottish Parliamentary Corporate Body in connection with the Commissioner’s functions.

(265) The Committee recommends the SPCB and Scottish Government review the resourcing provision for the Office of the Commissioner at the end of Financial Year 2021/22 (the estimated first full financial year from which the Commissioner will be funded from SPCB resources). The Commissioner should also report on any resourcing pressures they faced as part of the annual reporting process to the Parliament.

The Scottish Government would agree that the Scottish Biometrics Commissioner as an independent office-holder should report on any resourcing pressures the office faces as part of any annual reports provided to the Scottish Parliament under section 22 of the Bill.

The Scottish Government will also consider any representations made by the Scottish Parliamentary Corporate Body in respect of the resourcing provision for the Office of the Commissioner following the financial year 2021/22 as part of the annual budget setting process. Please also see the response to paragraph 266.

(266) Furthermore, the Government must undertake to provide sufficient resources to the SPCB to support the work of the Commissioner if their role increases in response to Government policy or legislation, or the expansion of the number of organisations to which the Code of Practice applies.

The Scottish Government will continue to review the budgetary position concerning the Scottish Biometrics Commissioner's functions as the Bill undertakes its parliamentary passage. The Scottish Government will consider any representations for further funding made by the Scottish Parliamentary Corporate Body should the role and oversight function of the Commissioner be expanded as part of this Bill and/or once any Bill agreed by the Parliament is enacted and implemented. The provision of further resources will be subject to wider public spending pressures, and will be considered as part of the annual budget setting process. The Scottish Government gave a commitment during the Stage 1 debate to carefully consider any expansion of the Commissioner's role should there be any future concerns around resourcing.

(239) In light of the evidence taken from numerous witnesses on the need for maximum flexibility in the Bill, so as to respond to the rapid pace of change in the field of biometrics, we ask the Scottish Government to reflect on this and set out in its written response to this Stage 1 report how the definition in Section 23 could keep pace with future developments in biometrics.

The Scottish Government considers that the definition within section 23 of the Bill is broadly drawn for future-proofing purposes. The Scottish Government is, however, content to bring forward an amendment which would allow the definition to be adjusted by regulations in future.

(270) We draw the attention of the Delegated Powers and Law Reform Committee to the recommendations made in relation to regulation making powers around the Code of Practice in Section 6 and Section 9, and on Section 23 on the meaning of biometric data.

The Scottish Government notes this comment.

(272) The Justice Committee draws its conclusions and recommendations on the Bill to the attention of the Parliament and recommends that the general principles of the Bill be agreed to.

The Scottish Government thanks the Justice Committee for its scrutiny of the Bill to date and welcomes the Committee's recommendation that the principles of the Bill be agreed to.