

Criminal Justice Committee

26th Meeting, 2022 (Session 6), Wednesday, 26 October 2022

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following affirmative instrument:
 - [The Scottish Biometrics Commissioner Act 2020 \(Code of Practice\) \(Appointed Day\) \(Scotland\) Regulations 2022 \[draft\]](#)

Introduction

2. The above instrument was made in exercise of the powers conferred by section 13(1) of the Scottish Biometrics Commissioner Act 2020.
3. **The purpose of the instrument is to specify the day appointed for the coming into effect of the code of practice (the Code) prepared by the Scottish Biometrics Commissioner (the Commissioner) under section 7 of the Scottish Biometrics Commissioner Act 2020 (the 2020 Act), and approved by the Scottish Ministers under section 12(2)(a) of the 2020 Act.**
4. A [copy of the Code](#) has been laid alongside the instrument.
5. Further details on the purpose of the instrument can be found in the policy note attached in **Annex A**.

Correspondence received

6. The Committee considered the draft code at its [meeting of 15 June 2022](#). Following that meeting the Committee received follow up correspondence from the Biometrics Commissioner and the Minister for Community Safety:
 - Letter from the Scottish Biometrics Commissioner of 27 June responding to follow up question put to him in writing on the draft Code following his appearance before the Committee on 15 June 2022.

- Letter from the Minister for Community Safety of 19 August responding to issues raised by the Committee in relation to the draft Code and the evidence session on 15 June.

7. Copies of both of these letters are set out in **Annex B** for information.

Delegated Powers and Law Reform Committee Consideration

8. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 20 September 2022. The DPLR Committee agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Criminal Justice Committee Consideration

9. **The Committee is required to report to the Parliament by 1 November 2022.**

10. Motion S6M-05906 has been lodged proposing that the Committee recommends approval of the instrument. The Cabinet Secretary for Justice and Veterans is due to attend the meeting on 26 October to answer any questions on the instrument and to move the motion for approval.

11. **It is for the Committee to decide whether to agree to the motion, and then to report to the Parliament. Thereafter, the Parliament will be invited to approve the instrument based on the Committee's recommendation.**

12. **The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

Clerks to the Committee
October 2022

Annex A

Policy Note

The Scottish Biometrics Commissioner Act 2020 (Code of Practice) (Appointed Day) (Scotland) Regulations 2022

SSI 2022/XXX

The above instrument was made in exercise of the powers conferred by section 13(1) of the Scottish Biometrics Commissioner Act 2020. The instrument is subject to affirmative procedure.

Purpose of the instrument. The purpose of the instrument is to specify the day appointed for the coming into effect of the code of practice (the Code) prepared by the Scottish Biometrics Commissioner (the Commissioner) under section 7 of the Scottish Biometrics Commissioner Act 2020 (the 2020 Act), and approved by the Scottish Ministers under section 12(2)(a) of the 2020 Act. A copy of the Code has been laid alongside this instrument.

Policy Objectives

These Regulations give effect to the first Code produced by the Commissioner in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland.

The Code provides information and guidance regarding the responsibilities of Police Scotland, the Scottish Police Authority (SPA) and the Police Investigations and Review Commissioner (PIRC). The Code seeks to promote good practice, transparency and accountability by setting out an agreed framework of standards for professional decision-making which strikes the right balance between the needs and responsibilities of policing and the criminal justice system, and the fundamental obligation to guarantee the basic human-rights, privacy, and freedoms of individual members of the public.

Consultation

Consultation on a draft Code was initially undertaken with the professional Advisory Group maintained by the Commissioner under Section 33 of the 2020 Act. This group included representatives from bodies to whom the Commissioner's functions extend.

Section 10 of the 2020 Act required the Commissioner to consult a list of bodies (including those bodies who are subject to the Code). A closed consultation on a draft Code was undertaken by the Commissioner from 1 October to 31 December 2021. The Commissioner has confirmed that all of these bodies have been consulted on a draft Code and had indicated their support.

A public consultation on a draft Code was also undertaken by the Commissioner during April and May 2022. This attracted no responses however the Commissioner has also engaged with the public through online discussions forums and commissioned a public attitudes and awareness survey on the use of biometrics in a policing context which has informed the preparation of the Code.

Section 11(1) of the 2020 Act required that, in relation to the first Code prepared, the Commissioner obtained the consent of the Scottish Ministers to lay the draft Code before the Parliament. Following consent from the Scottish Ministers, a draft version of the Code was laid by the Commissioner in Parliament for the requisite scrutiny period of 60 days. Following an evidence session with the Commissioner on 15 June 2022, the Scottish Parliament's Criminal Justice Committee gave its consent to the draft Code being brought into force. The Scottish Ministers subsequently gave their consent in August 2022 to approve the draft Code in terms of Section 12(2)(a) of the 2020 Act, without modification and for a final version to be laid in Parliament alongside these regulations.

Further information about the consultation on the Code is published on the Commissioner's website at:

<https://www.biometricscommissioner.scot/publications/code-of-practice/>.

Impact Assessments

An Equality Impact Assessment (EQIA) and a Children's Rights and Wellbeing Impact

Assessment (CRWIA) were previously published by the Scottish Government as part of its proposal to introduce legislation which, amongst other matters, required the Commissioner to prepare the Code. The links below show the relevant documentation:

EQIA – <https://www.gov.scot/publications/scottish-biometrics-commissioner-bill-equality-impact-assessment-egia-results/>.

CRWIA - <https://www.gov.scot/publications/scottish-biometrics-commissioner-bill-child-rights-wellbeing-assessment-crwia/>.

Impact Assessments on the Code have subsequently been prepared by the Commissioner and are published on the Commissioner's website at:

<https://www.biometricscommissioner.scot/publications/code-of-practice/>.

The Commissioner is satisfied that the measures outlined in the Code actively promote equality, human rights and also the protection of children, young people, and vulnerable adults. The Scottish Government is therefore satisfied that such relevant considerations have been taken into account by the Commissioner in preparing the Code.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) on the Code has been prepared by the Commissioner and is available from the Commissioner's website at: <https://www.biometricscommissioner.scot/publications/code-of-practice/>.

The Commissioner's assessment is that no additional costs will be generated as a result of bodies being required to comply with the Code.

The Cabinet Secretary for Justice and Veterans confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Safer Communities Directorate
September 2022

Annex B

Letter from the Scottish Biometrics Commissioner

27 June 2022

Dear Convenor,

Re: Criminal Justice Committee meeting 15 June 2022

Thank you for the recent opportunity to appear before the Criminal Justice Committee to discuss the draft Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland. I found it a very helpful session with interesting and well considered questions and observations from members.

I also acknowledge receipt of your letter of 20 June 2022, confirming the support of the Committee for the principles and ethics based approach, and confirming that the draft Code may now advance to the next stage where Ministerial approval will be sought under section 12 of the Act. I wish to thank members of the Committee once again for your support and kind words.

In your letter, you also reference a number of ancillary matters arising during the discussions in the evidence session, including some where the Committee would welcome additional information, reassurance, or seeking my views or advice on a particular matter. I am more than happy to do so, and will deal with each of these points in turn.

Publication of responses to consultation on draft Code

I am happy to confirm that my office will publish responses received to the 3-month closed consultation on version 0.2 of the draft Code which ran between 01 October 2021 and 31 December 2021. These will be published in individual letter form on my website once I have the consent of the individual authors for their responses to be published. This will enable readers to cross tabulate feedback against amendments made in the draft laid before Parliament.

I will also publish a summary single page overview document which lists all bodies who were invited to participate in the closed phase of consultation, including indicating those where a no comment response was received, or where no response was forthcoming. I will also report on how many responses are received to the on-line public phase of consultation on my website.

Antecedent information

Before turning to offer a view on potential options for future extension of remit, I feel it is important to highlight to the Committee the constraining variables arising from the Financial Memoranda (FM) that accompanied the various stages of the Bill. This is important, as in essence the seeds (and constraints) of my current operating model were sown in the various FM's that accompanied the passing of the founding legislation.

Principal amongst these is the way in which information on the office of the Biometrics Commissioner for England and Wales were used to support the financial assumptions presented to Ministers during the legislative phase. For example, the number of projected Scottish Biometrics Commissioner staff in the FM's was derived from comparison with the staffing model in the London office of the Commissioner for England and Wales, albeit that office has a different legal function. As a branch of the Home Office, the office of my counterpart is also provided with central HR, Finance, and ICT provision and therefore does not need to dedicate staff, budget, or personal attention to such matters. Accordingly, sufficient funding was allocated to me to recruit only three members of staff, two of which are now dedicated exclusively to corporate functions.

By contrast, the remuneration level of the England and Wales Commissioner (£125,000 FTE) was not disclosed to Ministers in the same FM as a relevant sector-specific comparator. Instead, the recommendation was to appoint the Scottish Commissioner on the lowest possible officeholder spot salary prevailing at that time resulting in a £55,000 salary differential.¹ This despite the more expansive definition of what constitutes biometric data in the Scottish legislation, and more general powers including a statutory code, public complaints mechanism, and the power in law to do 'anything necessary of expedient' in the discharge of those functions.²

I include this antecedent information to make two substantive points. Firstly, to highlight the value attached to the role in Scotland, which in my lived experience does not correlate with the significant levels of personal responsibility and accountability during my first year in office. Secondly, to advise that any future expansion of remit approved by Scottish Ministers will require a properly developed business case supported by additional funding. In such circumstances, I would of course be very happy to assist in that process from the outset.

Potential expansion of remit within SG Criminal Justice Portfolio

Prisons

As indicated in my evidence session, and subject to the foregoing points of caution on both officeholder retention and resourcing, there are obvious opportunities to expand the remit to include other aspects of the criminal justice portfolio in Scotland in future, such as prisons. I do of course acknowledge that such a decision around the extension of functions to another body would be entirely for Scottish Ministers under the provisions of section 2 (7) of the Act.

¹ SP Bill 48-FM, Session 5, 2019: [Scottish Biometrics Commissioner Bill Financial Memorandum \(parliament.scot\)](https://www.parliament.scot)

² Section 4 (1) Scottish Biometrics Commissioner Act 2020

As the Committee will be aware, the Scottish Prison Service (SPS) is an executive agency of the Scottish Government tasked with managing prisons and young offenders' institutions in Scotland. In common with the bodies to whom my functions currently extend, the Minister responsible is the Cabinet Secretary for Justice and Veterans.

As discussed in my evidence session, biometric data and technologies (most commonly photographs, fingerprints and CCTV images) are used extensively in Scottish prisons, and such data is commonly shared with the police and criminal justice social work practitioners throughout Scotland for purposes connected with public protection and the management and rehabilitation of offenders. The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2012 defined biometric data as ...'*biometric data means fingerprints and any other data specified by direction made by Scottish Ministers*'.

Such data is collected from people on remand, sentenced prisoners, and people visiting the fifteen prisons in Scotland, with differences between public prisons and private prisons.³ Mostly, biometric data will be acquired and used overtly within prisons but sometimes it will be acquired and used covertly under the auspices of the Regulation of Investigatory Powers (Scotland) Act 2000. Such covert use already falls within the oversight of the UK Investigatory Powers Commissioner (IPCO). There is also an emerging trend within prisons in other UK jurisdictions where live facial recognition technology and other biometrics are deployed to verify the identity of visitors, to assist in managing excluded persons, and to assist in the prevention of drugs and other contraband being smuggled onto the prison estate. It would be interesting for the Committee to ascertain whether any such technologies are currently deployed in Scottish prisons.

From recent discussion with HM Chief Inspector of Prisons in Scotland Wendy Sinclair-Gieben, I can confirm that with the exception of oversight by the ICO on matters connected with data protection, and by the IPCO on covert surveillance, there is no general independent oversight in relation to how biometric data and technologies are overtly used in Scottish prisons. I am advised by HM Chief Inspector that she would welcome the oversight by my office if approved by Scottish Ministers given both the specialist subject nature, and human rights considerations which arise.

I therefore agree with the view expressed by the Committee that it would be appropriate for Ministers to consider whether biometric data and technologies used in Scottish prisons should fall within the remit and functions of the Scottish Biometrics Commissioner and Code of Practice. Should Scottish Ministers wish to explore this possibility in more detail, then I would be more than happy to engage with Scottish Government officials and the Scottish Prison Service in terms of conducting an initial joint feasibility study.

UK Wide policing bodies

³ Submission to Scottish Parliament Justice Committee on Scottish Biometrics Commissioner Bill in 2019 by Dr Hannah Graham, Senior lecturer in Criminology, Scottish Centre for Crime and Justice Research (SCCJR), University of Stirling.

Discussions are ongoing between Scottish and UK Governments with a view to seeking the authority of Westminster for the National Crime Agency (NCA), British Transport Police (BTP), and Ministry of Defence Police (MDP) coming under my office and the Code of Practice in relation to their overt operations which result in the collection of biometric data from persons arrested in Scotland. As indicated in my evidence session, I have already consulted with these bodies on the draft Code and have the support of their Chief Officers should the section 104 order be approved.

One feature of those discussions is the potential assignment of cross-border jurisdiction to the Scottish Biometrics Commissioner to specifically cater for these bodies sending DNA buccal swabs collected from persons arrested in Scotland to forensic laboratories outside of Scotland for profiling and upload to the UK National DNA Database. This is important as such source biological samples fall within the Scottish definition, but are not sent to the SPA Forensic Services for analysis or profiling.

In terms of sequencing, and assuming that the consent of UK Government can be obtained, then it would make sense to expand my remit to these UK wide policing bodies in the first instance. This will require a proper business impact assessment to be conducted in terms of the expansion of the programme of thematic review work in my strategic plan and the annual programme of compliance assessments in respect of the code. It should not be assumed that such additional responsibilities can simply be absorbed without financial and resource implications.

UK Border Agency

The management and control of the UK border, including at Scottish ports and airports, are reserved and excepted matters within the authority of the UK Parliament and therefore in my view it would not be competent for Scottish Ministers to consider oversight of biometrics in such operations in Scotland without agreement from the UK Government.

My counterpart has no locus in such matters in England and Wales, and the UK Border Agency is not a listed authority to whom his National Security Determination function extends. I am therefore unaware of anyone exercising independent oversight over such specific matters in the UK, other than the Westminster Parliament and the Justice and Home Affairs Committee of the House of Lords.

However, I wish to advise members of the Committee that Police Scotland already has direct access to the Immigration and Asylum Database (IABS) as part of the Home Office Biometrics Programme. In practice, this allows persons arrested by the police and who are suspected of being here illegally, or of being an asylum seeker, to have their fingerprints automatically searched against IABS from the Livescan fingerprint terminal in any Police Scotland custody centre. This is done under the authority given to Constables in the UK Immigration Act 1999.

This real time automated process (also operating *vice versa*) is known as a 'non-verified live search'. If the result of the search is positive, a fingerprint expert from the SPA Forensic Services then examines the optical file to determine whether or not there is a confirmed match between the police record and the immigration record. As

this constitutes 'use' of biometric data in Scotland, it is already within the oversight of the Scottish Biometrics Commissioner and will be covered by the Code of Practice and public complaints mechanism.

The Security and Intelligence Services

Notwithstanding their reserved and excepted status, the Security and Intelligence Services (MI5, GCHQ, MI6) operate exclusively in the covert arena. Biometric data can be collected covertly in the UK through numerous means including covert human intelligence sources, directed surveillance, intrusive surveillance, property interference, equipment interference, targeted interception, bulk equipment interference, bulk personal datasets, bulk data interception, bulk acquisition and so on. It can also be collected legally from outside the UK under section 7 of the Intelligence Services Act 1994.

All covert surveillance activity whether law enforcement, security and intelligence services, MOD, or local authorities, falls within the jurisdiction and statutory oversight of the UK Investigatory Powers Commissioner (IPCO). Therefore, there should be no involvement by the Scottish Biometrics Commissioner in such matters.

Advisory Group and Artificial Intelligence (AI) Systems

In your letter of 15 June 2022, there are two specific questions posed as they relate to AI systems. Those questions are firstly whether the Advisory Group will assess the potential interactions between the Code and decisions by Police Scotland, the SPA and PIRC on the specification, procurement and operation of AI systems in managing biometric data, and secondly, the level of human oversight and interaction with AI systems that would be required to ensure the 12 principles in the draft Code are complied with.

On the first of those points, and as discussed with the Committee, there is no specific provision within the Scottish Biometrics Commissioner Act 2020 which compels Police Scotland, the SPA, or PIRC to notify or involve the Commissioner in advance of any decisions relating to the specification or procurement of biometric technologies or AI systems. However, Appendix D to the Code advocates a process for the introduction of a new biometric technology, or new application of an existing technology where ethical challenge can be sought via the Commissioner and the Advisory Group, however this is non-binding. I will return to this point later in this letter when turning to questions from the Committee on areas where the legislation could be strengthened in relation to compliance factors.

As the Committee will also be aware, some of the 12 principles of the draft Code specifically touch on this area. Principle 5 on ethical behaviour for example requires that new technologies must be impact assessed in line with the Public Sector Equality Duty to eliminate discrimination. This principle also requires that systems for staff working with biometric data and technologies should be quality assured to minimise error rates, and/or should be externally validated and accredited. Similarly, Principle 8 requires that the way that any biometric technology is used or deployed is scientifically valid and reliable, that any algorithms for biometric matching are free from bias and are non-discriminatory on the grounds of race, gender, or any

protected characteristic. This Principle also provides that where a technology is provided by private industry (rather than the Home Office) the data controller (Police Scotland, SPA, PIRC) must ensure that the technology complies with all of the provisions of the Code. Therefore, the bodies to whom the Code applies will have a statutory requirement to ensure that private contractors can be held to the same high standards by the contracting body.

Therefore, I can confirm that the Commissioner and the Advisory Group will assess the interactions between all biometric technologies and the Code but on a retrospective basis. Whilst there is currently no obligation in law for the bodies to whom the Scottish Biometrics Commissioner Act 2020 applies to involve the Commissioner or advisory group in advance of procurement decisions, I nevertheless believe that such procurement decisions will be guided by the knowledge that procuring a technology that would breach the Code would be counterproductive.

On the level of human oversight and interaction with AI systems that would be required to ensure the 12 principles are complied with, the draft Code is clear that key decisions are made by humans rather than machines, and that all such decisions can be explained, justified, and challenged. Principle 5 on ethical behaviour states that staff working with biometric data and technologies should be familiar with the concept of unconscious or confirmation bias. It also provides that processes should be in place to acknowledge the limitations of biometric technologies and databases in terms of the potential for automated searches to produce both false positives and false negatives.

The Code also requires that there are policies and procedures in place to acknowledge and minimise error rates resulting from the interaction between humans and technologies and systems of working must be quality assured, and/or externally validated or accredited. As indicated in my evidence session, due to the interaction between humans and technologies, there is no such thing as a 100% reliable biometric technology, therefore key decisions must always be made by humans. This reflects the current position in Scotland. For example, if the automated searching ability within the National DNA database suggests a possible match between a crime scene sample and a criminal justice sample this is always confirmed (or not) by a forensic scientist. The same is true for fingerprints. Similarly, where retrospective facial search is used in Scotland, any potential matches suggested by a machine are ultimately determined by a human.

In my experience there are two essential truths that are relevant to such debates. The first is that there is no such thing as good or bad technology, its rather a question of how people choose to use it. The second is that it is important to remember that crimes and matters involving the identification or verification of human identity are always ultimately determined by people (forensic scientists and police officers) and not by machines.

In relation to the question about the specification, procurement and decisions on AI systems, made at a UK level specifically by NCA, BTP, MDP, should the section 104 order be granted, then any oversight by the Scottish Biometrics Commissioner and compliance with the Code would be confined to data acquired, retained, used, or

destroyed in Scotland or to 'Scottish' data regardless of where held. However, as with Police Scotland, the SPA, and PIRC there is nothing in the Scottish Biometrics Commissioner Act which mandates a role for the Commissioner in the specification or procurement of biometric technologies by bodies to whom my functions extend.

Finally, on this theme it may assist Committee members to know that Professor Shannon Vallor, who is the Baillie Gifford Chair of the Ethics of Data and Artificial Intelligence at the Edinburgh Futures Institute has recently agreed to join my professional advisory group.

Complaint volumes

As indicated in my evidence session it is impossible to quantify how many complaints might be received in relation to non-compliance with the Code but in respect of Police Scotland, the SPA, and PIRC, my professional judgement is that at least initially complaints volumes would be low.

However, if additional bodies are to be added to my jurisdiction in future then naturally the likely trajectory of complaints volumes will increase accordingly. As discussed, due to the constraints of available budget flowing from the FM's that accompanied the founding legislation, I have only three members of staff. Any complaints received relative to the Code would be investigated by my Operations Manager who is my only external facing member of staff. During periods of leave, my Corporate Services Manager would discharge this function.

As Commissioner, and on receipt of the investigation report and recommendations, I would then determine whether or not there had been a breach of the Code, and if so, whether it was a minor or one or something more substantive which required a report to be published under section 20 (1) of the Act. Should my initial optimism on complaints volumes prove unfounded, or if my functions are extended, then in all such scenarios I will need to prepare a business case for additional funding or resource.

As will be abundantly clear to the Committee, there is very little resilience within a tiny organisation comprising of a Commissioner and only three members of staff, but all of this was determined by the Parliament as informed by the FM's that accompanied the founding legislation.

Retrospective application

I can confirm to the Committee that the Code will apply to all data acquired, used, retained or destroyed by the bodies to whom my functions extend. This includes being applied to data that is currently retained by Police Scotland such as legacy force custody image data and case management systems images data. It is now nine years since the establishment of Police Scotland and therefore much of the legacy force biometric data such as images of persons arrested but not subsequently charged or proceeded against (and who have no previous convictions) will have been destroyed.

Furthermore, any decision to not destroy such data would represent a purposive decision to retain. Therefore, the Code will apply to all biometric data retained from the point where the Code is given legal effect under regulations made by Scottish Ministers.

Compliance mechanisms

In your letter of 20 June 2022, the Committee indicates that it would welcome my views on whether, going forward, there could be more effective and quicker compliance methods, especially if the remit is expanded to include other organisations.

There are two specific areas where I feel that additional powers would assist in this regard and as part of a 'preventative' approach to avoid unnecessary or unintentional breaches of the Code of Practice. The first of those relates to notification requirements and the second relates to early intervention powers.

On notification, there is currently nothing in the Scottish Biometrics Commissioner Act which requires a body to whom my functions extend to notify me of a substantial data breach involving biometrics, for example the accidental weeding or loss of a large number of biometric data sets (as experienced by the Home Office), and the resultant threat to public safety. Accordingly, I have included this notification requirement within the draft Code.

However, as highlighted by the Committee, there is also nothing in the Act which requires a body to whom my functions extend to notify me that they are in the process of seeking to procure a new biometric technology, or upgrading biometric features within an existing technology. Without such a requirement, it is possible that I might only become aware 'after the event' and potentially as part of a mop-up when something goes wrong. The digital triage devices experience in Scotland is a good example to cite of both the Scottish Police Authority and the Parliament being drawn in retrospectively.

Therefore, this is the first area where I feel that a '**notification requirement**' in respect of an intention to procure a new biometric technology or upgrade an existing technology would strengthen the current legal framework.

The second area relates to early intervention. From my perspective it would be really helpful if the legislation could be strengthened to allow me to issue an '**improvement notice**' in circumstances where my review activity identified an area where action was required to prevent a potential breach of the Code. Such a notice would enable me to specify the required improvement actions to be taken and a realistic timescale for doing so. This approach could be applied on a preventative basis, or in response to very minor technical breaches of the Code.

Both of these suggestions follow a preventative approach and would deliver a quicker and more cost effective means of ensuring compliance with the Code.

Biometrics in other sectors

On the use of biometrics in educational settings the Committee will be aware that this is not part of my remit, but as discussed I will be conducting a thematic review of the acquisition, retention, use, and destruction of biometric data from children and young people in Scotland as part of the criminal justice process in the winter.

The fieldwork is intentionally timed to coincide with the first anniversary of changes to the age of criminal responsibility in Scotland. This work may include the opportunity for some intersectionality including the UN Convention on the Rights of the Child, and the Children's Care and Justice Bill.

More broadly, and on non-criminal justice matters, government obligations on the UN Convention on the rights of the child should seek to ensure that children are not the subject of surveillance by the State that is neither proportionate or necessary. In my view children at school in Scotland should have the freedom to sit in class or take school meals without being watched, recorded, and analysed by a biometric technology.

Oversight of public space CCTV Cameras in Scotland

As mentioned in the evidence session, unlike England and Wales Scotland does not have a Surveillance Camera Commissioner. The gathering, control, storing and use of video images is covered by the 1998 Data Protection Act and independent oversight of such matters is exercised by the UK Information Commissioner (ICO), but importantly only from a data protection perspective. This also caters for biometric enabled facial recognition as biometric data and genetic data are each covered as special category sensitive data under Article 4 (14) of UK GDPR.

In March 2011, Scottish Government produced a National Strategy for Public Space CCTV in Scotland which noted the disjointed local authority landscape within which CCTV operates. The stated aim of the strategy at the time was ...'to facilitate a more strategic approach to CCTV development and management, so as to deliver community safety more effectively'. However, that strategy has not been updated in the last eleven years. In 2019, the Scottish Community Safety Network (SCSN) produced a report entitled 'Public Space CCTV in Scotland: The Current Landscape and Future Opportunities'⁴ The research found that there are mixed views on the success of the 2011 strategy.

I would therefore suggest that the first step in determining the most appropriate oversight mechanisms for public space CCTV surveillance in Scotland would be the redevelopment of a coherent national strategy. In doing so, it should be recognised that many of the public's concerns about the expansion in state surveillance are not simply about data protection, they are also about broader questions of public confidence and trust. Therefore, regardless of the legal basis for doing so, the acid test for any Scottish framework for overt surveillance technology has to be the extent to which the affected community is prepared to support it, and accept it.

⁴ [Landscape-and-future-opportunities-CCTV-in-Scotland-Exec.pdf \(safercommunitiesscotland.org\)](#)

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It may be that as part of that work that a political appetite emerges for appropriate public oversight and regulation beyond that already provided by the ICO, potentially including a Scottish Surveillance Camera Code of Practice. I trust that these various comments are of assistance and I would likewise welcome any future opportunities to assist the Criminal Justice Committee in their important work.

Yours sincerely

Dr Brian Plastow
Scottish Biometrics Commissioner

Letter from the Minister for Community Safety

19 August 2022

Dear Convener

SCOTTISH BIOMETRICS COMMISSIONER'S CODE OF PRACTICE

Thank you for copying the Cabinet Secretary for Justice and Veterans into your letter dated 20 June 2022 to the Scottish Biometrics Commissioner (the Commissioner) regarding a number of issues arising from his appearance before the Justice Committee on 15 June 2022. The Commissioner's response to your letter has also been shared with the Cabinet Secretary. I am responding on behalf of the Cabinet Secretary on the issues which are relevant for Scottish Ministers.

Expansion of the Commissioner's Remit

I note the Committee's view that expanding the Commissioner's oversight to also include the Scottish Prisons Service (SPS) would be appropriate. You may be aware that Section 2 (7) of the Scottish Biometrics Commissioner Act 2020 (the 2020 Act) empowers Scottish Ministers to add to the list of bodies who fall within the remit of the Commissioner - subject to the candidate body being within devolved competence, and only in respect of its collection, retention, use or disposal of biometric data for policing or criminal justice purposes. This change would be achieved by regulations (affirmative procedure) and could be done at any time.

During the passage of the Scottish Biometrics Commissioner Bill, the Scottish Government's view was that sufficient time should be allowed for the Commissioner's office to bed in, before any such decisions should be made. My view is that it is too soon to consider whether the SPS should be added to the Commissioner's remit. The Commissioner was only appointed in April 2021 and his Code of Practice has yet to be published and implemented.

Therefore, while I am happy to consider other police and criminal justice-related bodies as potential candidates, this should be done at a suitable time and in full consultation with the candidate body.

The Committee may recall that another opportunity to consider broadening the Commissioner's remit is provided under Section 6 of the 2020 Act, whereby Scottish Ministers must produce a report which includes a review of the Commissioner's functions and an assessment of whether any changes need to be made to the list of bodies which fall within the Commissioner's remit. The first report under this requirement is due no later than the end of November 2026, though it is of course open to Scottish Ministers to conduct the review sooner, should they consider that to be appropriate.

The Committee also mentioned the UK Border Agency (UKBA) as a possible addition to the Commissioner's remit. However, as Immigration is a matter which is

reserved to the UK Government, we would require their agreement first. From a policing perspective, I note and agree with the Commissioner's view that any data sourced from the Immigration and Asylum Database by Police Scotland would fall within his jurisdiction.

The Committee also queried whether data collected in Scotland through the operations of the Security Service should fall within the Commissioner's remit. However, data obtained through covert surveillance activity would fall within the oversight of the UK Investigatory Powers Commissioner.

I also note the Committee's concerns about oversight of biometric data in other sectors such as Health and Education. The UK Information Commissioner's Office (ICO) has responsibility for oversight of compliance with data protection legislation in these areas. Anyone who wishes to make a complaint about inappropriate use of biometric data by their local authority or the National Health Service Scotland should contact the ICO. As these are not criminal justice or police-related organisations, a complaint cannot be made to the Scottish Biometrics Commissioner, nor can these bodies be added to his remit in terms of the 2020 Act.

Surveillance/CCTV cameras in Scotland

Those operating CCTV in public spaces must ensure that they comply with the relevant laws, including the Human Rights Act 1998, and the Data Protection Act 2018. Data protection is a matter reserved to the UK Government and the Scottish Government therefore does not have powers to make laws in this area. The public body that regulates protection of privacy across the UK is the ICO. The ICO can respond to queries about data protection from the public and deal with complaints about privacy and data protection. Its role is to uphold information rights in the public interest.

The Scottish Government published the National Strategy for Public Space CCTV in Scotland in March 2011. The Strategy was created to provide guidance and a common set of principles to operators of public space CCTV across Scotland. It did not impose requirements but sought to provide advice and clarity to support decisions on the effective use of CCTV systems within the legal framework. There are no current plans to develop a new national strategy but we are planning to commission research shortly into the effectiveness and use of public space CCTV to help inform our policy position further. The research exercise is due to begin in the autumn and to complete in the Spring of 2023. This will help us to better understand the benefits and use of public space CCTV, learn from other jurisdictions and inform our discussions with partners including Police Scotland and COSLA.

The Scottish Government would be willing to contribute to a broader discussion on this topic should Parliament wish to initiate this.

Commissioner's remit in respect of new technology

For the avoidance of doubt, there are a number of provisions in the 2020 Act which give powers to the Commissioner in respect of the technology used to collect, process, retain or destroy biometric data. This is because the Commissioner's

general function to promote the adoption of lawful, ethical, and effective practices in relation to the acquisition, retention, use and destruction of biometric data would include the technology used to collect, store and process that data.

Taken together, these provisions allow the Commissioner to - for example - seek information from relevant policing bodies and impose an information notice if the information is not forthcoming. The Commissioner is also able to make a recommendation in respect of technology relevant to his functions, and to publish the response he receives to any such recommendation. If the report includes a recommendation relating to the technology used or capable of being used for the purposes of acquiring, retaining, using or destroying biometric data, the Commissioner must impose a requirement on the relevant person to respond to the recommendation. It is of course for the Commissioner to decide how and when to use these powers.

Reporting cycle anomaly

I am aware that the misalignment of reporting periods between the Commissioner's Annual Report and his Strategic Plan is generating some issues for him. I will look for an opportunity to amend the reporting period for the Strategic Plan, but as this will require primary legislation, a suitable vehicle will need to be identified and there is no suitable candidate at the present time.

I hope this response is helpful. The 2020 Act is an important piece of legislation which speaks to some of the key societal issues of our time – touching on human rights and ethics as they relate to police use of very personal information. But we must continue to ensure that the public have confidence in technological advances and how data is collected, used and retained. The Scottish Government stands ready to work with others - including the Scottish Parliament and the Scottish Biometrics Commissioner - to promote a clearer understanding of these issues in our communities.

Ash Regan