



Law Society  
of Scotland

# Stage 1 Briefing

## Scottish Biometrics Commissioner Bill

7 January 2020



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee and Privacy Law subcommittee previously responded to the Scottish Parliament's Justice Committee's Call for Evidence on the Scottish Biometrics Commissioner Bill (the Bill).<sup>1</sup> The Committee published its Stage 1 Report<sup>2</sup> on the Bill on 9 December 2019.

We have the following comments to put forward for consideration at the Stage 1 debate which is scheduled to take place on Thursday 9 January 2020. These focus on:

- The role of the Scottish Commissioner
- The definition of biometric data
- Future proofing of the Bill
- Complaints

## The role of the Commissioner

**Appointment:** Section 1 of the Bill<sup>3</sup> establishes a post of Scottish Biometrics Commissioner (the Scottish Commissioner) which will broadly follow the earlier approach of England and Wales where the role of a Commissioner for the Retention and Use of Biometric Materials already exists. The Scottish Commissioner's role is anticipated to be similar, given what is being proposed in sections 2-5 of the Bill which will allow Scotland to benefit from that earlier experience.

As far as the Scottish Commissioner's appointment is concerned, the appointment process must ensure their independence.<sup>4</sup> The processes for their appointment must be fully robust and transparent, especially

<sup>1</sup> As introduced [https://www.parliament.scot/S5\\_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48S052019.pdf](https://www.parliament.scot/S5_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48S052019.pdf)

<sup>2</sup> <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/12/5/Female-Genital-Mutilation--Protection-and-Guidance---Scotland--Bill---Stage-1-Report#Background>

<sup>3</sup> Schedule 1 sets out the Office of the Scottish Biometric Commissioner

<sup>4</sup> Paragraph 61 of the Stage 1 Report endorses the proposal that the Commissioner be appointed by the Scottish Parliamentary Corporate Body.

given the potential length of the first term of office which could potentially extend to eight years. A successful appointment justifying that length of appointment must be achieved in order to allow them to be successfully established in their role and to undertake the scope of their required functions to ensure that the public develops confidence and familiarity with their functions. That will take time.

**Resourcing:** It is recognised that their appointment is taking place within the context of a fast growing and changing environment. Time will be required to consolidate their appointment along with support staff so that their role will need to be fully and properly resourced.

We endorse the observations outlined in the Stage 1 Report<sup>5</sup> that not only should the role and Scottish Commissioner's office be required to be appropriately funded; such funding must also continue at an acceptable level to allow for:

*“research, public consultation and marketing, and legal advice to support the [Scottish] Commissioner's work, with scope for this to be increased if decisions are taken subsequently to increase the [Scottish] Commissioner's workload or the scope of their office.”<sup>6</sup>*

Only in that way can the Scottish Commissioner be able to ensure that they can properly fulfil their functions and be appropriately accountable.

**Meeting the challenges:** While we fully support the appointment of a Scottish Commissioner, establishing the role will be challenging as the Scottish Commissioner requires to ensure that the approach to:

*“the collection, use, retention and disposal of biometric data in the context of policing and criminal justice is lawful, effective and ethical.”<sup>7</sup>*

Fundamentally, that approach requires to balance the interests of keeping the public safe and the rights of the individual. The Scottish Commissioner's role and the purpose of the creation of the Code of Practice in terms of sections 6- 10 of the Bill need to promote and protect the principles of human rights and privacy, while securing public confidence and delivering community safety.

Rather than speculation as to what the Code of Practice might or will include, we welcome the Stage 1 Report<sup>8</sup> recommendation to ensure that the draft Code meets the principles set out for the Code in the Bill's Policy Memorandum that the draft Code is introduced when the legislation is commenced and as the Scottish Commissioner takes up office.<sup>9</sup>

<sup>5</sup> <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/12/5/Female-Genital-Mutilation--Protection-and-Guidance---Scotland--Bill---Stage-1-Report#Background>

<sup>6</sup> Paragraph 264 of the Stage 1 Report

<sup>7</sup> Paragraph 4 of the Bill's Policy Memorandum <https://sp-bpr-en-prod-cdneq.azureedge.net/published/J/2019/12/9/Scottish-Biometrics-Commissioner-Bill-Stage-1-Report/JS52019R25.pdf>

<sup>8</sup> <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/12/5/Female-Genital-Mutilation--Protection-and-Guidance---Scotland--Bill---Stage-1-Report#Background>

<sup>9</sup> Paragraph 200 of the Stage 1 Report

**Clarity of Role:** The Stage 1 Report<sup>10</sup> recognised that there was a need for greater clarity around the roles of the Scottish Commissioner on several points. To adhere to the best standards of transparency, these should be clarified during the passage of the Bill.

That will interact with the English Commissioner as that will be important to establish and build on once the Scottish Commissioner is in post and their role is evolving, given the similarity and overlap between their respective roles. That runs in tandem with looking after their common interests in dealing with criminal justice issues including terrorism and serious organised crime.

The Bill would have been expected to set out how they would work jointly with, assist or consult each other but both the Bill and its Policy Memorandum were somewhat silent as to how this process would work. We would therefore support the need for the development of a Memorandum of Understanding<sup>11</sup> between the parties.

That would provide much needed flexibility as well as adopting good and established practices from the English Commissioner's experience while maintaining a degree of necessary formality and consistency for both when working in this developing field of biometric data. That would also allow account to be taken of the implications arising from Brexit which is still unknown at present. Given the fast-moving environment of biometric data, it seems important relating to UK security considerations that our links and co-operation with European and international networks are maintained. In the early stages of the Scottish Commissioner's role, these will be important relationships to develop and establish.

This includes that the Scottish Commissioner<sup>12</sup> becomes a member of any strategic boards overseeing the development of new UK wide police databases post Brexit.

**Transparency of process:** Biometric data is not restricted to the police use as it will include data from other public bodies such as those involved in the educational system and the NHS.

We support the call at the Stage 1 Report<sup>13</sup> to ascertain just how the measures in the Bill will and are intended to interact with other organisations in the collection and use of biometric data, be they private or public.

This would be included in how the Scottish Commissioner should seek to develop a better understanding as to how they can raise awareness of their role. That includes being the leader in Scotland which though it centres on the use of biometrics for criminal justice and policing purposes, it is not so restricted and goes further than that.<sup>14</sup>

<sup>10</sup> <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/12/5/Female-Genital-Mutilation--Protection-and-Guidance---Scotland--Bill---Stage-1-Report#Background>

<sup>11</sup> Paragraph 111 of the Stage 1 Report

<sup>12</sup> Paragraph 172 of the Stage 1 Report

<sup>13</sup> Paragraph 86 of the Stage 1 Report

<sup>14</sup> Paragraph 131 of the Stage 1 Report

Some suggestions, information, advice and understanding as to how this new and important role for Scotland will be developed would be of interest as once the Scottish Commissioner is in post and the Code of Practice is published, knowledge and adherence as to its terms will be essential.

The Stage 1 Report<sup>15</sup> has suggested that it should recognise how the role the Scottish Commissioner will interact with the private sector users of biometrics, as well as the private sector technology developers whose work drives the development of new biometrics data.<sup>16</sup> We await further clarification.

## Biometric data

We welcome the definition of the term “biometric data” in section 23 of the Bill. The importance of biometric data is described in paragraph 24 of the Stage 1 Report<sup>17</sup> where it outlines that:

*“the first two decades of the 21st Century have seen an exponential increase in the use of ever more advanced wireless technology capable of collecting, storing and using large volumes of biometric and personal data. These include laptops, mobile phones, tablets and other smart devices. Combined with the growth of wireless internet connectivity, this presents a challenge to policing in the 21st Century.”*

That is the challenge facing biometric data. Further developments that are outlined include the use of “CCTV/security camera monitoring in public spaces by public and private organisations, and the introduction of the use of facial recognition and facial search technology [as well as] [o]ther technologies, such as gait and movement recognition technology, eye/retinal identification, voice recognition software ..social media”

These all provide new biometric sources for the police. Careful drafting of the definition is required to ensure that flexibility is maintained ensuring that the Bill continues to be relevant and can respond to yet undeveloped technologies. The role of oversight for the Scottish Commissioner in this regard is appropriate as a means of independent scrutiny in respect of the criminal justice system and policing in Scotland.

Expert advice on ethics should be obtained to support the Scottish Commissioner’s role in the criminal justice system and for policing purposes. The establishment of an ethics advisory group should be encouraged as that will help to underpin for the Scottish Commissioner’s role and the Code of Practice by adhering to the requirements of human rights and data protection.

<sup>15</sup> <https://digitalpublications.parliament.scot/Committees/Report/EHRIC/2019/12/5/Female-Genital-Mutilation--Protection-and-Guidance---Scotland--Bill---Stage-1-Report#Background>

<sup>16</sup> Paragraph 158 of the Stage 1 Report

<sup>17</sup> <sup>17</sup> <https://digitalpublications.parliament.scot/Committees/Report/EHRIC/2019/12/5/Female-Genital-Mutilation--Protection-and-Guidance---Scotland--Bill---Stage-1-Report#Background>

Assurance to the public “that the balance between benefits and risks and between benefits and loss of privacy are being properly managed” is fundamental to the success of the Bill.<sup>18</sup>

## Futureproofing of the Bill

The need to keep pace with developments of technology is a constant theme of the Bill as highlighted above.

As far as the Code of Practice that is being developed is concerned, we would suggest that it includes:

- How experimental trials or the development of new technologies are to be conducted to ensure that they are conducted in such a way to support operational choices by the police and the methods and biometric data that is being obtained
- Development of artificial intelligence to support the application of data analytics to biometric data, including the facial recognition technology and intelligence from the analysis of behavioural data.

## Complaints

We agree that a complaint mechanism should be included within the Bill, to enable the public to refer issues to the Scottish Commissioner on the use of biometrics or where there is a lack of compliance with the Code of Practice.<sup>19</sup>

<sup>18</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/825106/CCS001\\_CCS0319869991-001\\_Biometrics\\_Commissioner\\_AR\\_2018\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825106/CCS001_CCS0319869991-001_Biometrics_Commissioner_AR_2018_Web_Accessible.pdf)

<sup>19</sup> Paragraph 181 of the Bill



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