



Law Society
of Scotland

Stage 3 Briefing

Scottish Biometrics Commissioner Bill

6 March 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 has the following comments to put forward for consideration at the Stage 3 debate on the Scottish Biometrics Commissioner Bill (the Bill) which is scheduled to take place on Tuesday 10 March 2020. Our comments focus on:

- The importance of the role of the Scottish Biometrics Commissioner (the Commissioner)
- The adequacy of resourcing
- Futureproofing and challenges
- Scrutiny, Accountability and Governance

General

We fully support the establishment of this important new role of appointing a Scottish Biometric Commissioner (Section 1 of the Bill). This is a significant role for Scotland (where the Commissioner's functions are set out in sections 2-5 of the Bill) which reflects the position in England and Wales where a similar but not identical role currently exists. What is vital to this role is that there are built-in opportunities for robust scrutiny regarding the governance of the role once the first Commissioner is appointed and during the currency of their role as it develops.

The need for robust scrutiny was recognised at the outset in the Bill's Policy Memorandum where being seen to promote the confidence of the public was essential in relation to the Commissioner's functions requiring that "the governance arrangements for the Commissioner must be, and be seen to be, transparent, accountable and free of any undue influence."¹

¹ Paragraph 20 of the Bill's Policy Memorandum
https://www.parliament.scot/S5_Bills/Scottish%20Biometrics%20Commissioners%20Bill/SPBill48PMS052019.pdf

How best that will be achieved depends on various factors which include:

The adequacy of resourcing

This role is being created at a time of a fast growing, challenging and changing environment. Not only does the role need to provide the Commissioner with enough flexibility within its functions to respond to change, we recognise that all new roles take time to bed in so that their role needs commitment in funding. That needs to ensure that not only the role but also support staff are “fully and properly resourced.”² These resources need to include funding for research, public consultations, marketing and legal advice to meet the kinds of challenges envisaged below. Promoting and knowledge of the Commissioner’s role is going to be very important to pick up the responsibilities which currently exist that fall under its remit but also to inform all the bodies primarily affected and that feed into this role.

Futureproofing and challenges

Building in future proofing in connection with the Commissioner’s role and functions is essential.

We highlighted this in our Stage 1 briefing on the Bill as the purpose of the Bill is (as well as the creation of the Commissioner’s role) is “to provide for its functions in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes.” We can only speculate on just what biometric data will comprise in the future. We are familiar with CCTV/security cameras as well as the development in other technologies such as gait and movement technology, voice recognition software.” All will need to be considered in due course.

Recent events, by way of example, have shown the importance of scrutiny which is part of the Commissioner’s role with the Scottish Parliament Justice Sub-Committee on Policing expressing their concerns with the use of live facial recognition technology. It stated that “it is not fit for use by Police Scotland and requires to ensure the technology’s compliance with human rights and data protection legislation³” It called for the Scottish Police Authority and the Commissioner (assuming successful passage of the Bill) to review the police’s use of retrospective facial recognition technology.⁴

That will allow (as we submitted in evidence to the Scottish Parliament inquiry)⁵ the scrutiny process to take account of other countries’ experiences such as the example of South Wales.⁶ It highlights just how important the Commissioner role will be in taking on that responsibility and affording them with the role and opportunity for scrutiny in relation to future testing and most likely related challenges. This is highly pertinent given the rapid development in artificial intelligence and the use of algorithms in all areas of work,

² <https://www.lawscot.org.uk/media/368106/2020-01-07-stage-1-briefing-scottish-biometrics-commissioner-bill.pdf>

³ <https://www.parliament.scot/newsandmediacentre/114524.aspx>

⁴ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/JSP/2020/2/11/Facial-recognition--how-policing-in-Scotland-makes-use-of-this-technology/JSPS0520R01.pdf>

⁵

https://www.parliament.scot/S5_JusticeSubCommitteeOnPolicing/Inquiries/JS519FR15_Law_Society_of_Scotland.pdf

⁶ <https://www.bbc.co.uk/news/uk-wales-49565287>

some of which currently exist and others that will be developed in the very near future. The speed of change in the criminal justice system should not be underestimated. The Commissioner's approach needs to balance the interests of keeping the public safe and the rights of the individual whereas, yet unidentified challenges will certainly lie ahead.

The inclusion in the Bill of provisions under condition 22A of the Ethics Advisory Group is much welcomed. However, we do support the amendments specifically to require the Commissioner to establish, maintain an advisory group as well as setting out its specific purpose in the Bill.

Recent changes have included the commitment of the UK to exit the European Union. The UK Government has recently published *The Future Relationship with the EU The UK's Approach to Negotiations*.⁷

Paragraph 27 of Part 2 stresses that "[t]he safety and security of our citizens is the Government's top priority" and recognises that as part of the exit negotiations, the UK will need to discuss operational co-operation between law enforcement authorities and judicial cooperation in criminal matters.

This may have an impact on the role of the Commissioner as there will be a need to work closely with the Commissioner for the Retention and Use of Biometric Material, who following amendments to section 3 of the Bill, is one of the bodies with Commissioner who is named to co-ordinate their activities when carrying out the role in Scotland. Following on from that may well be the need for the Commissioner to play an active role and be a member of any strategic boards that may be created in the light of the UK's exit.

Finally, the coronavirus may demonstrate the need for flexibility in response in meeting challenges that are as yet unforeseen. The Bill should provide a framework where the details are important, but much is going to depend on how the role and the Commissioner's functions pan out to meet the challenges in the future.

Scrutiny, Accountability and Governance

Enhancing the scrutiny and accountability functions within the Bill will promote consistency and transparency. It will promote confidence as well as providing accountability and governance for the role. Various amendments to the Bill have added to that much needed scrutiny. These include:

Complaints: Introducing section 5A of the Bill has met the demand for the Commissioner to establish a procedure by which persons may make complaints (or other representations) to the Commissioner in relation to the acquisition, retention, use or destruction of biometric data by or on behalf of the Police Service of Scotland and (b) the Scottish Police Authority.

Under section 5A (3) of the Bill⁸, there is a duty to consult named bodies and such others as the Commissioner may consider in advance of establishing this process.

⁷
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf

⁸ Stage 2R report <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12505&mode=pdf>

We would encourage that consultation to be as wide a possible, ensuring that the process to be introduced is as good as possible. That will allow a complaints system to be developed based on knowledge and understanding for those who may seek to utilise it to be able to do so easily with little delay.

We considered that a complaints mechanism had to be included to enable the public to refer issues to the Commissioner on the use of biometrics where there was a lack of compliance with the Code of Practice. The power to look at people's personal biometric data is a very important one and providing them with the right to complain if they believe that there has been a breach of the code is necessary.

Review of the Commissioner's functions and powers: This has now been included under section 5B of the Bill to allow the powers and functions of the Commissioner to be reviewed three years after the Bill receives Royal Assent and at the end of five years after a review under this section.

We would support the proposed amendment to tighten this up so that there is a time period for a review to be undertaken which could as proposed be linked to the publication of the Commissioner's strategic plan.

We recognise as was acknowledged in the Stage 2 debate that there is a "a lot of on-going accountability and reporting to Parliament [of the Commissioner] through strategic plans, budgets, annual reports, other reports and recommendations, and so on [and there] will also be parliamentary approval of the code of practice and any revisions to it."

For the reasons as outlined above of the Commissioner being a new role, this is important to bring enhanced scrutiny which has a bilateral effect; in providing support for the Commissioner but also for the public in the exercise and functions of the Commissioner. We do not agree that these may drain resources but suggest instead that these are necessary checks to ensure the high degree of transparency of the role which is required.

Code of Practice: Section 6 of the Bill reflects the requirements around the Code of Practice. This has been greatly amended to build in several safeguards while promoting the principles of human rights and privacy while securing public confidence and delivering community safety.

There are arrangements for the Scottish Parliament to scrutinise the first Code of Practice that the Commissioner produces. Once ministerial approval is provided, the Commissioner must lay it before the Scottish Parliament for its consideration and have regard to any representations that are made. Several relevant bodies with whom consultation the Code of Practice is required are set out in Section 8 which seems broad based and appropriate.



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