



Law Society  
of Scotland

# Consultation Response

Police Scotland's use of remote piloted aircraft  
systems and body worn video cameras

15 January 2021



## Introduction

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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 welcomes the opportunity to consider and respond to the Justice Sub-Committee on Policing in relation to the oral evidence session with Police Scotland and the Scottish Police Authority (SPA) on Police Scotland's use of remote piloted aircraft systems (RPAS) and body worn video cameras (BWVC). This is planned to be held on Monday, 18 January 2021.

We note that this important debate is taking place against the backdrop of attention focusing on the issues in respect of the COVID-19 pandemic.

This debate involves important and far-reaching issues of privacy and public interest to which regard must be had now. There is a need to ensure effective public consultation as to the use that is undertaken to be followed by robust scrutiny and evaluation processes established to allow for the development of a legal and regulatory framework to capture all authorized use of RPAS and BWVC. Their use should not be extended or indeed, where their use has exceeded the previously notified range of processes, that should not continue until such time as all these steps have been undertaken and are in place appropriately.

These are necessary to respect of rights of the public and the rule of law. Please see our comments as follows:

### **1. Police Scotland's use of Remote Piloted Aircraft Systems (RPAS) and the parameters of that use. For example, whether it should extend to urban areas and beyond searching remote and rural terrain for vulnerable and missing person and whether RPAS should be used for surveillance purposes.**

It is important that there is clarity and transparency in these practices as they affect the public now and for the future. It is therefore important in our view to evaluate where we are now in relation to the use of RPAS and thereafter to ensure that necessary clarity exists for all including the present and any proposed extended use of RPAS.

RPAS were introduced operationally for the purpose of enhancement of Police Scotland's facilities, specifically Police Scotland Air Support. This was planned in 2019 as a localised air support capacity for the North of Scotland. What has been indicated in the SPA Evaluation Report is that RPAS have been “predominantly deployed to missing person searches, However, these have been used for public order incidents, policing operations and post incident investigation.”<sup>1</sup>

The concern is the creep towards more concerning use of the RPAS- for surveillance, following and apprehending suspects and recording in public spaces.

It is with regard to these other incidents that fuller qualitative scrutiny must be applied retrospectively as needs be. That Report outlined their use as having included a murder inquiry, for public order matters, demonstrations, industrial accidents, collision investigation and planning. No matter their use in the past that does not mean merely opportunity should approve or allow that use to be made of RPAS.

Having RPAS is an important resource for Police Scotland which they should be able to use, given that they already exist, as fully and as effectively as possible providing financial accountability for their value for money. It is no doubt as specified in the recommendation “provid[ing] a valuable tool for major incidents and events.”

Going forward, when we refer to clarity, we mean about the range of purpose of the actual and intended use of RPAS.

We are unsure of the level of authorisation that is required within Police Scotland for the utilisation of RPAS for any purpose. In our view, there is a considerable difference in their use for the missing persons which seemed to be the original and intended purpose with may be justified, given the overwhelming public interest in someone being found safely. However, this does not justify the invasion of privacy on other occasions by their general use.

While not necessarily seeking to constrain the police in their operation of RPAS as there may be operations in the future (future-proofing) which would benefit from their use, consideration must be given as to potential challenges as to such purpose, and the need for sufficient administrative senior authorisation and transparent and clear processes being in place. This may indeed vary according to the facts and circumstances of each case but there must be limits. These limits must be known in advance and agreed publicly.

In measuring how much use has been made of RPAS, there should be a role for reporting to the Scottish Parliament on their use on an annual basis- this may be by means of adopting the recommendations as the possible expanded role or the Police Investigations and Review Commissioner (PIRC) which may include:

<sup>1</sup> SPA Evaluation Report <https://www.spa.police.uk/spa-media/e52l2odp/item-10-1-rpas-evaluation.pdf>

“investigat[ing] a current practice or policy of Police Scotland if she believes that it would be in the public interest to do so; this power should be used to focus on broad themes or trends, or practices which might be of particular public concern.<sup>2</sup> RPAS seem to us to amount to an issue of public concern.

Turning to the information which RPAS produce, we suggest that specific issues need considered as to the criminal evidential considerations.

Is such evidence admissible? (i.e. the standard test of consideration as to fairness in what has been obtained.) Issues may arise as outlined in the case of *Lawrie v Muir*<sup>3</sup> per Lord Cooper who stated that the court must determine whether such evidence should be admitted depending on the balance between the need to preserve civil liberties and the need to ensure that justice is done. This is encapsulated too in the balance between rights under Article 6 (Right to a fair trial) and Article 8 (right to private life) of the European Convention on Human Rights.

In indicating that RPAS are not used “covertly”, we seek clarity as to what that means in practice.

Prior consent is not obtained to their use from the public and their operations are conducted to an extent in full view. If used for drug surveillance, is this not by its very nature covert?

Unlike CCTV cameras, there is no way to advise people that they are being watched unless the drone carries a banner with a privacy notice written on it. As people do not know that their actions are being recorded, how can they exercise their rights to object or otherwise?

We would echo the considerable concerns expressed to date that there has been no “evaluation of best value, privacy, human rights and ethical assessments.” These all need to be carried out.

## **2. The oversight, governance and transparency of Police Scotland’s use of RPAS and BWVS and any possible role for the incoming Scottish Biometrics Commissioner, once in post.**

We refer to our response to Question 1 which covers in part the need for oversight, governance and transparency regarding the use of RPAS.

Regarding BWVC, we refer to the Report on Complaints Handling, Investigations and Misconduct Issues in Relation to Policing<sup>4</sup> which recommends their use. If advancing their use, there needs to be a public consultation first, given the implications for the public in their use, and for equality impact assessments to

<sup>2</sup> <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/pages/3/> Paragraph 22

<sup>3</sup> 1950 JC 19 at 26

<sup>4</sup> <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/>

be carried out before decisions can be made about how, when and for what purpose BWVCs should be used.

Crucial to any such assessment seems the need for evaluation of the use of such cameras in relation to the football co-ordination unit for Scotland (FoCUS).

This is highly pertinent when we understand that research has shown that there are findings to suggest:

“officers are provoking and intimidating football supporters at matches by using hand-held surveillance cameras to control crowds, according to a study. Researchers have said that the use of CCTV, portable devices and ...BWV are counterproductive when policing hooliganism and anti-social behaviour. Privacy campaigners claim that monitoring treats innocent fans like criminals and damages common-sense police tactics.”<sup>5</sup>

That seems to run counter to the indications made in the Report on Complaints Handling, Investigations and Misconduct Issues in Relation to Policing<sup>6</sup> which suggest that their use may assist in avoiding complaints in that “complaints can be prevented by good psychology, empathetic engagement, a trauma-informed approach and using techniques that de-escalate aggression and create a safer environment for everyone”<sup>7</sup>

These conflicting views suggest that caution is required as avoiding police complaints does not equate to the intrusion in privacy in relation to the circumstances where BWVCs should be used.

This justifies the public consultation approach to provide evidence on which further assessment can be made. Before there can be any escalation of their use in any event if permitted, there is also a need for clear and publicly available guidance which should include the same rights being afforded to others to film the police actions on telephones or other mobile devices. There cannot be one rule for one and not for others.

The Scottish Biometric Commissioner Act received Royal Assent on 20 April 2020 (2020 Act).<sup>8</sup>

It creates a number of relevant provisions to include:

### **1. The oversight of the police’s use of biometric data.**

The 2020 Act does not specifically refer to the information to be obtained from RPAS or BWVCs. Section 34 should cover such information, defining biometric data as “information about an individual’s physical, biological, physiological or behavioural characteristics which is capable of being used, on its own or in

<sup>5</sup> <https://www.thetimes.co.uk/article/police-scoring-own-goal-with-cameras-at-matches-3b0q0w7pq>

<sup>6</sup> <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/>

<sup>7</sup> <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/pages/3/>

<sup>8</sup> <https://www.legislation.gov.uk/asp/2020/8/enacted>

combination with other information (whether or not biometric data), to establish the identity of an individual.”

Subsection 2 specifies that “biometric data” may include (b) a photograph or other recording of an individual’s body or any part of an individual’s body.

## **2. Creation of the role of the Scottish Biometrics Commissioner (which already exists in England & Wales)**

The functions of that role are outlined under section 2(1) of the 2020 that states the role as:

“support and promot[ing] 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 by (a) the Police Service of Scotland, (b) the Scottish Police Authority, and (c) the [PIRC].”

This is crucial in relation to considering the expansion of the use of RPAS and BWVCs given the terms of section 2(3) where in exercising these general functions, the Commissioner is to:

- (a) keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by or on behalf of the persons above
- (b) promote public awareness and understanding of the powers and duties those persons 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, and
- (c) promote, and monitor the impact of, the code of practice.

In conclusion, if there is to be an agreed increase in use of these resources, this must be completed under a clear agreed framework setting the hierarchy out from the individual police officer utilizing the equipment, the authorization to be obtained within Police Scotland, the relationship with scrutiny and powers of the PIRC and the role of the Scottish Biometric Commissioner, once appointed and in post and ensuring the necessary monitoring evaluation and accountability to the public.

Much of this will require to be embedded in the non-statutory Police Scotland Code of Ethics that is based on the values of integrity, fairness and respect. That sets out very clear standards and expectations for all members of the service which we support the Report’s recommendation should be fully encapsulated in statute<sup>9</sup> and is the starting point.

## **3. Any data protection, security and retention implications, as well as the impact on**

<sup>9</sup> <https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/pages/3/> Paragraph 5

## community, privacy and human rights, or any ethical implications

We refer to our answer to Question 2.

The use of privacy was discussed recently in the Petition of *BC and Others v Chief Constable Police Service of Scotland and Others*<sup>10</sup> where it acknowledged that it was a “core value and one which is inherent in a democratic and civilised state” Paragraph [106].

We expand on the privacy aspects as we have concerns that Police Scotland could seek to use these devices in undertaking a fishing exercise. Though they may only seek high level definition, with the ability of RPAS can they spy within the personal homes of people such as suspected terrorists where justification may be sought whether on the grounds of national security or otherwise. How should or would this differ from raking through a bin to look for interesting evidence without a warrant.

Accordingly, their use needs to be set out clearly and the purpose of their use justified on a legal basis since this provides in effect much greater capability of overt surveillance in public places.

We need to recognise too that technology is developing and advancing. It is linked to the information and data that can be obtained from such surveillance devices. There is potential to use technology as recognised above to help policing for safety, but It must be “conducted and held to account within a clear and unambiguous framework of legitimacy and transparency. This will ensure that in pursuit of delivering a safe society, such use does not go beyond that which is necessary and proportionate in a free society.”<sup>11</sup>

Paragraph 13.45 of the Lord Anderson’s 2015 Report is to our mind a useful reference as it called for “a single body of law, and a single system of oversight, for equivalent investigatory activities conducted by different public authorities.”<sup>12</sup> It stresses the need for a rights-compliant approach with the maximum possible technological neutrality for:

- (a) the types of measures permitted for the collection of data
- (b) the range of public authorities entitled to collect it
- (c) the objectives for which each type of collection measure can be used
- (d) the categories of person which may be subject to each type of collection measure
- (e) the threshold required to justify the use of each type of collection measure
- (f) the procedures for authorising each type of collection measure

<sup>10</sup> 2019CSOH 48

<sup>11</sup> <https://videosurveillance.blog.gov.uk/2019/07/31/the-state-of-surveillance/>

<sup>12</sup> David Anderson QC Independent Reviewer of Terrorism Legislation A Question of Trust <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>

(g) the duration for which each type of collection measure can be applied<sup>13</sup>

These are the factors to highlight that need addressed in going forward.

#### **4. The engagement consultation and transparency of plans to use or the current use of RPAS and BWVCs**

We refer to our answer above.

#### **5. The legal and regulatory basis that Police Scotland rely upon to use RPAS in urban and remote areas.**

We refer to our answers above.

There are a couple of points to consider from a legal perspective:

We note that there is no mention of the use of Regulation of Investigatory Powers (Scotland) Act 2000. Are there not issues arising in relation to any authorisations which are currently required under that legislation? How does this interact with the police's current and any future use? Strict regulation of the deployment of these devices is necessary and a regime similar to RIPSAs should be in place. Authorisation would require to come from a high-ranking officer to give effect to this and given the PS commitment to carrying out site surveys, prior to any deployment, this would prevent any situation where RPAS would be used for pro-active policing. In that respect the site surveys ought to be easily accessible to the public.

It is also going to be unclear when the RPAS and BWVC are recording. What implications does this have for Police Scotland? Are they to be used to deter?

How do we consider proportionality? The devices have been used for antisocial purposes. Are they to be used for COVID-19 surveillance and enforcement? Is this justified?

Has a Data Protection Impact Assessment been completed? How is data minimisation data retention and security to be covered? How is the data obtained to be stored? What rights exist in relation to Article 17 of the GDPR with regard to the right to erasure?<sup>14</sup> It states:

"The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay."

<sup>13</sup> <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>

<sup>14</sup> <https://gdpr-info.eu/art-17-gdpr/>



**6. Police Scotland's current use of BWVCs and whether that requires to be evaluated to inform the risks costs and benefits in their business plan prior to the wider introduction such as evaluation of their use by the football co-ordination unit**

This needs to be undertaken.



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