



Scottish Biometrics
Commissioner
Coimiseanair
Biometrics na h-Alba



Children and Young People's
Centre for Justice



SCOTTISH BIOMETRICS COMMISSIONER, CHILDREN AND YOUNG PEOPLE'S CENTRE FOR JUSTICE & SCOTTISH POLICE AUTHORITY

Joint assurance review of the safeguards in place concerning the acquisition of biometric
data from children and young people in police custody

TERMS OF REFERENCE



Safeguarding our biometric future



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Document Control

Version 0.1	August 2022
Version 1.0	January 2023
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About the Scottish Biometrics Commissioner

1. The Scottish Biometrics Commissioner is established under the [Scottish Biometrics Commissioner Act 2020](#).
2. The Commissioner's general 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 by:
 - (a) [The Police Service of Scotland](#) (Police Scotland)
 - (b) [Scottish Police Authority](#) (SPA)
 - (c) [Police Investigations and Review Commissioner](#) (PIRC)
3. The Commissioner has wide ranging general powers and may do anything which appears to the Commissioner to be necessary or expedient for the purposes of, or in connection with, the performance of the Commissioner's functions, or to be otherwise conducive to the performance of those functions.¹

Meaning of biometric data

4. The Scottish Biometrics Commissioner Act 2020 contains the following definition:

'In this Act, "biometric data" means information about an individual's physical, biological, physiological, or behavioural characteristics which is capable of being used, on its own or in combination with other information (whether or not biometric data), to establish the identity of an individual, and may include:

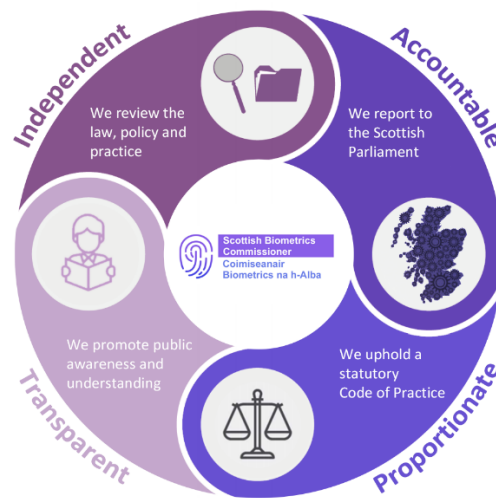
 - (a) *Physical data comprising or derived from a print or impression of or taken from an individual's body,*
 - (b) *A photograph or other recording of an individual's body or any part of an individual's body,*
 - (c) *Samples of or taken from any part of an individual's body from which information can be derived, and*
 - (d) *Information derived from such samples²*

¹ Scottish Biometrics Commissioner Act 2020, [Section 4](#)

² Scottish Biometrics Commissioner Act 2020, [Section 34](#)

Our values

5. As a values-led organisation, we will conduct our activities in a way that is Independent, Transparent, Proportionate and Accountable:



Independent

We will always act independently and publish impartial and objective review reports. Our professional advice will be informed and unbiased. The Scottish Biometrics Commissioner is a juristic person, appointed by Her Majesty the Queen on the nomination of the Scottish Parliament and is independent of Scottish Government.

Transparent

We will be open about what we do and give reasons for our decisions. We will publish our reports and findings and will not restrict information unless deemed necessary to protect the identity of data subjects, or due to wider public interest considerations.

Proportionate

We will ensure that our activity is proportionate and does not exceed what is necessary to achieve our statutory purpose. We will minimise the burden of any review activity on Police Scotland, the Scottish Police Authority, and the Police Investigations and Review Commissioner. We will ensure that the way that we do what we do is necessary, effective, and efficient.

Accountable

We will be accountable for what we do to the Scottish Parliament and will submit ourselves to whatever scrutiny is appropriate to our function. We will promote equality, diversity, and human rights in everything that we do.



Our power to work with others

6. Section 3 of the Scottish Biometrics Commissioner Act 2020 confers a power on the Commissioner in the exercise of his functions to work with other named bodies. This includes amongst others, the Scottish Police Authority.³

Exercising our general function

7. In exercising our general function as previously described, the Commissioner 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 Police Scotland, the Scottish Police Authority and the Police Investigations and Review Commissioner.
8. We must also promote public awareness and understanding of the powers and duties these 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.
9. In supporting and promoting the adoption of lawful, effective, and ethical practices, we must have regard to the interests of children and young people, and to vulnerable persons.⁴ Details of how we will exercise our general function can be viewed in our Strategic Plan 2021 to 2025.⁵
10. When discharging our statutory functions, we will use our National Assessment Framework to consider strategic direction, execution, and results in relation to biometric data used for criminal justice and policing purposes by the bodies to whom our statutory powers extend. Our framework has six outcome headings and contains forty-two quality indicators that have been nuanced to the biometric data context.

About the Scottish Police Authority

11. The Police and Fire Reform (Scotland) Act 2012 created the Scottish Police Authority (SPA) and set out its five core functions:
 - to maintain the Police Service
 - to promote the policing principles set out in the 2012 Act
 - to promote and support continuous improvement in the policing of Scotland
 - to keep under review the policing of Scotland; and
 - to hold the Chief Constable to account for the policing of Scotland.

³ Scottish Biometrics Commissioner Act 2020, Section 3(f)

⁴ Scottish Biometrics Commissioner Act 2020, Section 2(6)

⁵ The Scottish Biometrics Commissioner 4-year Strategic Plan 2021-2025 was laid before the Scottish Parliament on 24 November 2021



12. These five functions demonstrate the dual, integrated responsibilities of the SPA; its oversight role in scrutinising policing in Scotland and holding the Chief Constable to account; and its supportive role in maintaining and improving the police service. The SPA is also responsible for the management and delivery of Forensic Services in Scotland.
13. The Authority aims to increase public trust and confidence in the policing of Scotland in the way it discharges its functions and through the quality of its governance arrangements. Further information can be found on the [SPA website](#).

About the Children and Young People's Centre for Justice

14. The Children's and Young People's Centre for Justice (CYCJ) works towards ensuring that Scotland's approach to children and young people in conflict with the law is [rights-respecting](#), contributing to better outcomes for our children, young people and communities.
15. We produce robust internationally ground-breaking work, bringing together children and young people's contributions, research evidence, practice wisdom and system know-how to operate as a leader for child and youth justice thinking in Scotland and beyond.
16. Our focus is on three key activities:
 - **Participation and engagement:** amplifying the voices of children and young people
 - **Practice and policy development:** developing, supporting and improving justice for children and young people
 - **Research:** Improving our understanding of justice for children and young people
17. These activities are underpinned and connected by communication and knowledge exchange work, which is focused on improving awareness of evidence in different forms, and supporting dialogue between different perspectives, types of knowledge and viewpoints.

Legal basis for this assurance review

18. This joint assurance review will be conducted under the provisions of [Sections 2\(6\)\(b\) and 3\(f\) of the Scottish Biometrics Commissioners Act 2020](#). The ensuing report will be laid before the Scottish Parliament by the Commissioner under [Section 20\(2\) of the Act](#).

Children in the criminal justice system

19. The review proposed by the SBC builds upon the institutional mandate of the three partnership organisations by advancing greater accountability of policing, protecting the human rights of children and reviewing and reporting on the law, policy, and practice relating to biometric data.
20. Children who are involved in offending come into contact with the criminal justice system in a variety of ways depending on their age, their needs and circumstances. The number of children who

come into contact with the police has reduced significantly. Around 2,200 children were proceeded against in the Scottish courts during 2015/16, of whom very few were under the age of 16.

21. Children can also receive support and supervision through the Children's Hearings System in relation to their offending behaviour as well as other behavioural and care concerns. In 2016/17, there were 26,840 referrals to the Children's Hearings system, of which 73% were on non-offence (care and protection) grounds and only 27% on offence grounds.
22. Children are defined as any individual under the age of 18 years under [Section 2](#) of the Scottish Biometrics Commissioner Act 2020. Under the [Age of Criminal Responsibility \(Scotland\) Act 2019](#), which fully commenced on 17 December 2021, children under the age of 12 can no longer be charged, arrested or prosecuted.
23. While the number of children who come into contact with the police is small compared with adults, there are a significant number of biometric data taken and held in the criminal justice system. For example, there are around 37,000 records in the Scottish DNA database relating to people (mostly now adults) who were children at the time of the index offence to which the source biometric data record relate ([see Table 1](#)). In addition, retention periods of biometric data is largely similar to adults and varies from three years to indefinitely in cases of criminal conviction. The lack of sufficient differentiation for the special position of children in our society raises concerns.⁶
24. For children or young people aged 12 to 17 years, in each case, consideration should be given as to whether it is lawful, proportionate and necessary to obtain biometric data and recording it on the policing biometric databases.

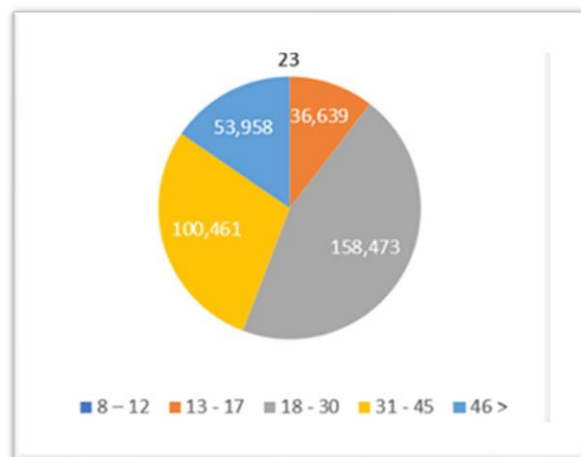


Table 1 – Records held for children in the Scottish DNA database from April 2022 (the numbers reflect the ages that the persons were when their DNA was captured)

⁶ See IAG on the Use of Biometric Data (2018) findings in relation to children. Both international and national courts have found that the blanket and indiscriminate retention of biometric data is unlawful and constitutes an unjustified interference with the right to respect for private life, in violation of Article 8 of the European Convention of Human Rights. In *S and Marper v the UK*, 2008, the European Court of Human Rights was 'struck by the blanket and indiscriminate nature of the power of retention in England and Wales' of DNA and the 'fact that the same rules applied to juveniles (such as S) as to adults, despite the need to consider children differently under the criminal justice system to comply with the UN Convention on the Rights of the Child'. This was also discussed in *Gaughran v. the United Kingdom* (application no. 45245/15 and *R (on the application of) RMC and FJ -v- Commissioner of Police of the Metropolis and others* [2012] EWHC 1681 (Admin).



25. Scotland's "Whole System Approach" to youth justice aims to keep children out of the formal justice system as far as possible, mindful of the risks of stigmatising children and in line with the best interests of the child. The Scottish Government believes delivering the rights of children and young people, as enshrined in the UN Convention on the Rights of the Child (UNCRC), is fundamental to making children's rights real and Scotland the best place in the world to grow up. To underline its commitment, the Scottish Government delivered new legislation to incorporate the UNCRC into domestic law. In line with these principles, there is a strong need to ensure that biometric data is acquired, used and retained in a manner that reduces any unintended negative risks and take full account of children's human rights.

Scope, Aims and Objectives

26. The Scottish Biometrics Commissioner's [Strategic Plan for 2021 to 2025](#), scheduled two distinct but related assurance reviews for the winter months of 2022/23. Both assurance reviews will be conducted in partnership with the Scottish Police Authority. In phase 2, we will examine the arrangements and safeguards in place for the acquisition, retention, use and destruction of biometric data relating to vulnerable persons. The terms of reference for that assurance review can be viewed on our website once published.
27. The aim of this review is to assess the law, procedure and practice related to the acquisition, retention, use, and destruction of biometric data relating to children and young people. The review will consider what evidence exists to support the value and outcomes of capturing biometric data from children and young people in terms of crime scene to criminal justice sample match rates. Consideration will be given to the balance between the privacy of individuals and community safety.
28. The report will highlight best practice, what is working well, and explore any challenges in the use of biometric data by Police Scotland and the Scottish Police Authority.
29. The review will examine qualitative insights into the experiences of young people who have been arrested by the police and had their biometrics captured.
30. The review will also assess impact of the [Age of Criminal Responsibility \(Scotland\) Act 2019](#) relative to biometric data.

Methodology

31. The report will provide an analysis of the relevant legislation, policy and practice related to children and young people biometric data in Scotland. The primary research method for this review is literature review together with semi-structured qualitative interviews and focus groups, including with children. There would also be a review of wider government policy intentions and a data volumes request.



32. It appears that little research has been carried out on children and biometric data in the criminal system in Scotland concluding that further analysis is required:
- to better understand the value and outcomes of capturing biometric data from children and young people
 - to better comprehend the numbers of biometric data held for children
 - to better identify the type of biometric data held for children and young people
 - to ensure biometric use, acquisition and retention is in line with legal and human rights standards
 - to capture and share best practice, nationally and internationally, as well as challenges for the use, acquisition and retention of biometrics for children.
33. As an initial step the team will develop a clear assessment criteria for the review. The assessment criteria will be based on the SBC [National Assessment Framework](#) published last year. This will be shared with Police Scotland to discuss information sources and key contacts.
34. Following this, the review team will consider the legal framework, including human rights and ethical considerations. The review will also capture practitioners views on law, policy, and practice. The literature review will cover available policies, procedures and standard operating procedures relative to children and young people.
35. A small number of semi-structured qualitative interviews with staff as well as a small number of focus groups with key staff will follow.
36. In carrying out our review, we will seek the views and experiences of service users, and those who represent them, to shape our work. This will include work led by the CYCJ in order to gain insights into children's perspectives. This aspect will also assist with the strategic imperative of ensuring user focus as set out in the [Public Services Reform \(Scotland\) Act 2010](#), albeit the Scottish Biometrics Commissioner is not a designated scrutiny body as listed in Schedule 19 of that Act.

Resources

37. The review would be led by the SBC in partnership with Scottish Police Authority and The Children's and Young People's Centre for Justice under the power to work with others specified in Section 3 of the SBC Act 2020.
38. Each of these partners will offer valuable skills and strategic knowledge. It is envisaged that the CYCJ will provide advice and guidance on children and young people's rights and views. The SPA will provide broad knowledge of the policing system and support with analysis, reviews and interviews.
39. In light of our available resources, it is estimated that we will probably need one member of staff from each organisation to assist on the review and report. This will include three days per week from the SBC and one day per week approximately from Scottish Police Authority and CYCJ for the duration of the review.



Timeline

40. The assurance report on the outcome of this review will be laid before the Scottish Parliament before 31 March 2023. The indicative timescale for the necessary activity is as follows:

	November	December	January	February	Mid-March
Law and policy review	■				
Revisit literature review (SOP etc.)	■				
Semi-structured interviews with National Systems Support staff		■	■		
Focus groups with key staff		■	■		
Roundtable with children (12 to 17 years old)			■		
Analysis			■		
Write up				■	
Production of report (external company)				■	
Report laid before the Scottish Parliament no later than 30 March					■

Communication Plan

41. A report of our review will be published and made available on our respective websites. We anticipate publishing a summary report to the public in Spring 2023. The communication plan will be developed in summer 2022 and will include a media release from the three organisations once the findings have been established.

Further Information

42. Further information on this proposed assurance review may be obtained from Diego Quiroz, SBC Operations Manager: diego.quiroz@biometricscommissioner.scot