



Scottish Biometrics  
Commissioner  
Coimiseanair  
Biometrics na h-Alba

## Scottish Biometrics Commissioner Act 2020: Draft Code of Practice

### Community Impact Assessment (version 0.2)

August 2022



### *Safeguarding our biometric future*

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Prepared to assist the Scottish Parliament in considering the draft Code of Practice on the acquisition, retention, use, and destruction of biometric data for policing and criminal justice purposes in Scotland to be laid before the Scottish Parliament by the Scottish Ministers under section 13 of the Scottish Biometrics Commissioner Act 2020.

# Community Impact Assessment

## Title of Proposal

Scottish Biometrics Commissioner Act 2020  
Draft Code of Practice: Community Impact Assessment.  
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## Purpose and intended effect

### Background

The Scottish Government's vision and priority outcomes for a just, safe, and resilient Scotland identifies the need to live in safe, cohesive, and resilient communities. The biometrics field is evolving rapidly and offers enormous potential in the detection, prevention, and prosecution of crime and for the exoneration of the innocent, thereby contributing significantly to the delivery of community safety outcomes.

However, the use of biometric data and technologies also raises a range of ethical and human rights considerations. Therefore, Scottish Ministers seek 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, proportionate, necessary, effective, and ethical. The goal is to keep communities safe while respecting the rights of individuals and groups and improving the accountability of the police and others who collect biometric data for criminal justice and policing purposes in circumstances which mostly exclude the usual safeguards of consent.

In pursuit of this strategic imperative, The Scottish Biometrics Commissioner Act 2020 as enacted by the Scottish Parliament established the office of the Scottish Biometrics Commissioner and provides for its functions. The first Scottish Biometrics Commissioner was appointed by HM the Queen on the nomination of the Scottish Parliament and took office on 12 April 2021. The Commissioner's 4-year [Strategic Plan](#) covering the period 01 December 2021 to 30 November 2025 was subsequently laid before the Scottish Parliament on 24 November 2021.

Section 7 of the Scottish Biometrics Commissioners Act 2020 provides that in furtherance of the Commissioner's general function, the Commissioner must prepare, and may from time-to-time revise, a code of practice on the acquisition, retention, use, and destruction of biometric data for criminal justice and police purposes.

Section 8 of the Act, provides that in preparing a draft code of practice, the Commissioner must have regard to the importance of:

- (a) Promoting and protecting human rights,
- (b) Promoting and protecting an individual's right to privacy,
- (c) Promoting and protecting public confidence in the acquisition, retention, use, and destruction of biometric data for criminal justice and police purposes, and
- (d) Ensuring the safety of individuals and communities

In terms of the effect of the Code, Section 9 of the Act, provides that when exercising the functions to which the code relates, the Code of Practice must be complied with by:

- (a) Constables and police staff of the Police Service of Scotland (Police Scotland)**
- (b) The Scottish Police Authority (SPA)**
- (c) The Police Investigations and Review Commissioner (PIRC)**

### **Objective**

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, the Scottish Biometrics Commissioners Act established a new Commissioner accountable to the Scottish Parliament to:

- keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data for policing and criminal justice purposes; and
- prepare, promote, and monitor the impact of a Code of Practice that provides information and guidance about the responsibilities of specified bodies and establishes recognised standards in relation to biometric data.

The Scottish Government considers these measures will support the lawful, effective, proportionate, necessary, and ethical use of biometric data, leading to better outcomes and maximising the value offered by biometric technologies in a policing and criminal justice context.

### **Intended effect**

The draft Code of Practice as prepared by the Scottish Biometrics Commissioner (copy attached) has been prepared in accordance with the provisions of section 7 of the Scottish Biometrics Commissioner Act 2020.

This Code seeks to promote good practice, transparency, and accountability in Scotland by setting out an agreed framework of standards which strikes the right balance between the needs and responsibilities of policing and our criminal justice system in terms of enforcing the law and keeping citizens safe, and the fundamental obligation to guarantee the basic human-rights and freedoms of individual members of the public.

The draft Code of Practice is structured around 12 Guiding Principles and Ethical Considerations to which Police Scotland, the SPA, and PIRC must adhere to when acquiring, retaining, using, or destroying biometric data for criminal justice and policing purposes in Scotland. These principles and ethical considerations provide a framework to assist both self-assessment and professional decision-making by the bodies to whom the

code applies and form the basis against which compliance with this Code of Practice will be assessed by the Scottish Biometrics Commissioner.

The Guiding Principles and Ethical Considerations outlined in the draft Code of Practice are supported by a National Assessment [Framework](#) for Biometric Data Outcomes in Scotland. The Assessment Framework has been developed by the Scottish Biometrics Commissioner in partnership with the Improvement Service and is based on the Public Sector Improvement Framework in Scotland.<sup>1</sup> It provides a structure through which to consider strategic direction, execution, and results, in relation to biometric data used for criminal justice and policing purposes in Scotland. The framework has six outcome headings and contains forty-two individual quality indicators that have been nuanced to the biometric data context in Scotland

The 12 Guiding Principles and Ethical Considerations around which the draft Code of Practice is structured have been developed by the Scottish Biometrics Commissioner working in partnership, including with the bodies to whom this code will apply. This has been facilitated through the statutory power to work with others (section 3, Scottish Biometrics Commissioner Act 2020), and through the membership of the Commissioner's statutory Advisory [Group](#) established under section 33 of the Act, which includes representatives from the bodies to whom the Commissioner's functions extend.

The draft Code has been further developed following extensive consultation and engagement on a Scotland, UK, European, and international basis. The 12 Guiding Principles and Ethical Considerations provide detailed guidance on lawful, professional, technical, ethical, equality and human-rights based standards and expectations, and, as such, constitute a framework for professional decision-making for those who acquire, use, retain, or destroy biometric data under each of the following headings:

### **The 12 Principles and Ethical Considerations:**

<b>1</b>	<b>Lawful authority and legal basis</b>
<b>2</b>	<b>Necessity</b>
<b>3</b>	<b>Proportionality</b>
<b>4</b>	<b>Enhance public safety and public good</b>
<b>5</b>	<b>Ethical behaviour</b>
<b>6</b>	<b>Respect for the human-rights of individuals and groups</b>
<b>7</b>	<b>Justice and accountability</b>
<b>8</b>	<b>Encourage scientific and technological advancement</b>
<b>9</b>	<b>Protection of children, young people, and vulnerable adults</b>
<b>10</b>	<b>Promoting privacy enhancing technology</b>
<b>11</b>	<b>Promote equality</b>
<b>12</b>	<b>Retention periods authorised by law</b>

The collaborative approach to the development of the draft code has delivered the

<sup>1</sup> Public Sector Improvement Framework (PSIF), Improvement Service:  
<https://www.improvementservice.org.uk/products-and-services/performance-management-and-benchmarking/public-sector-improvement-framework>

unqualified support of the policing and criminal justice community in Scotland. Once the draft Code has been approved by Scottish Ministers, and brought into effect by regulations, Scotland will become the first country in the world to have a statutory code of practice on the acquisition, retention, use, and destruction of biometric data for criminal justice and police purposes. This will be a significant human rights achievement for Scotland and will help to drive improvement and enhance accountability in an area where it is acknowledged that Scotland already performs well.

Through the proposed statutory Code of Practice, the Commissioner is expected to deliver greater transparency around performance, while their role in advising on working practices is likely to have a positive impact on the standard of service delivered on behalf of the public. The Commissioner's independent oversight function in relation to biometric data and techniques will also support innovation and Scotland's engagement and reputation on an international level.

## Consultation

There have been two distinct phases of consultation to date which have helped to shape the content of the draft Code.

**Phase 1:** Took place from July to September 2021 where the initial draft as prepared by the Commissioner was reviewed and further developed by the statutory Advisory Group. The membership of this group includes:

- Three independent members with relevant subject matter expertise
- HM Chief Inspector of Constabulary in Scotland
- Police Scotland
- Scottish Police Authority
- Police Investigations and Review Commissioner
- SPA Director of Forensic Services
- Information Commissioner (ICO)
- Children and Young People's Commissioner in Scotland
- Scottish Human Rights Commission
- UK Biometrics and Surveillance Camera Commissioner
- Crown Office and Procurator Fiscal Service (COPFS)

**Phase 2:** Took the form of a closed consultation from 01 October to 31 December 2021 with all statutory consultees as required by section 10 of the Scottish Biometrics Commissioners Act. This included:

- Scottish Ministers (Cabinet Secretary for Justice and Veterans, SG Officials, Chair of Criminal Justice Committee)
- The Lord Advocate
- The Lord Justice General
- The Faculty of Advocates
- The Law Society of Scotland
- The Chief Constable of Police Scotland
- HM Chief Inspector of Constabulary in Scotland

- The Scottish Police Authority (Chair and Director of Forensic Services)
- The Police Investigations and Review Commissioner
- The Information Commissioner (ICO)
- The Scottish Human Rights Commission
- The Commissioner for Children and Young People in Scotland

Section 10 (1) (m) of the Act also requires that the Commissioner must consult with such other persons as the Commissioner considers appropriate. During this phase of consultation this included:

- The National Crime Agency (NCA)
- British Transport Police (BTP)
- Ministry of Defence Police (MDP)
- The Biometrics and Surveillance Camera Commissioner (OBSCC)
- Genewatch UK
- Professor Carole McCartney, Northumbria University
- No2 ID Scotland
- Ada Lovelace Institute – Nuffield Foundation
- UK Biobank
- Big Brother Watch
- Open Rights Group Scotland
- Home Office Biometrics and Forensics Ethics Group (BFEG)
- Forensic Science Regulator for England and Wales
- UK Forensic Information Database Service (FINDS)
- Scottish Government Emerging Technologies Independent Advisory Group
- COSLA Police Scrutiny Convenors
- Mental Welfare Commission for Scotland
- Biometrics Institute
- Equality and Human Rights Commission (EHRC)

### **Phase 3: Public Attitudes & Awareness Survey and Public Consultation**

A consultation with the public in Scotland on the draft code was conducted, which run in parallel with Scottish Parliament’s Justice Committee scrutiny as outlined in section 11 of the Act. The Consultation run from 20 April to 01 June, 2022. This consultation was facilitated through the website of the Scottish Biometrics Commissioner and other outreach and engagement activities. We received no responses from individual members of the public to that aspect of our consultation, although we did engage further with civil society through on line discussions forums such as the RSA network in Scotland.

As a precursor, and to assist with capacity building, the Scottish Biometrics Commissioner has also commissioned the UK’s leading social research company NatCen to conduct a public attitudes and awareness survey to better understand what a broad cross section of the Scottish public understands and thinks about how biometrics are used for policing and criminal justice purposes in Scotland. The survey results will be published by the Scottish Biometrics Commissioner in the spring of 2022.

### **Business and wider Public Sector**

The Code is not expected to have an impact on businesses or the wider public sector as the scope of the code is limited to biometric data used in the context of policing and criminal justice. The code will not apply directly to private sector organisations or the wider public sector.

It might however be possible for private sector organisations or the wider public sector to choose to adopt the principles of the Code of Practice published by the Commissioner on a voluntary basis. Where a private sector business is acquiring, retaining, using, or destroying biometric data on behalf of one of the bodies to whom the Act applies, the Commissioner may consider the way the business is providing a service as part of his wider review role. However, it would be for the body to whom the Act applies to ensure that the terms of that service including any technology provided to them do not breach the terms of the code of practice, and the business in question would not be compelled to respond directly to any requirements from the Commissioner.

### **Community Impact Assessment**

The Code of Practice contains several principles and ethical considerations intended to ensure that the way that biometric data is acquired, used, retained, or destroyed for criminal justice and policing purposes in Scotland promotes community confidence, and does not discriminate against any disadvantaged or vulnerable people or groups. These are detailed in the Equality and Human Rights Impact Assessment (EQHRIA) which accompanies the draft Code.

Section 2 (3) of the Scottish Biometrics Commissioner Act 2020, requires the Commissioner to promote public awareness and understanding of the powers and duties that Police Scotland, the SPA, and PIRC 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 and challenged. The Commissioner (and therefore the Code) must have regard to the interests of children, young persons, and vulnerable adults.

Against this context, it must be understood that a small percentage of the population in Scotland (persons with a pending case or criminal conviction) have their biometric data held for criminal justice or policing purposes. For example, on 31 March 2021 there were 374,934 subject profile records from Scotland on the UK DNA Database. This equates to around 6.8% of the Scottish population.<sup>2</sup> Against this context, around 80% of these were males who had been dealt with through the Criminal Justice System and 20% female.

Therefore, on one hand it may be argued that that the Code of Practice will have a neutral impact on communities in Scotland as around 93% of the Scottish population do not have their biometric data held on the primary biometric databases in the context of having been an offender.

However, it may equally be argued that the Code will have a further reaching positive community impact as the 12 General Principles and Ethical considerations around which it

<sup>2</sup> Source: Forensic Information Databases Strategy Board Report 2020-2021.



is designed are intended to benefit the whole community by:

- Promoting public awareness and understanding
- Providing an agreed framework for professional decision-making
- Delivering a statutory compliance framework
- Through the delivery of independent oversight and reporting to the Scottish Parliament by the Scottish Biometrics Commissioner.

In addition, Section 14 of the Scottish Biometrics Commissioner Act 2020 requires the Commissioner to keep the Code under review and to provide reports to the Scottish Parliament. Such reports will provide enhanced levels of scrutiny, transparency and accountability which should deliver positive outcomes in terms of community understanding and confidence.

Furthermore, Section 15 of the Scottish Biometrics Commissioner Act makes provision for a data subject, or someone acting on their behalf, to complain to the Commissioner in circumstances where the data subject considers that there is or may have been a breach of the statutory Code of Practice. This should provide additional levels of community confidence through the establishment of independent oversight and a means of legal address on matters beyond the scope of simple data protection considerations.

In relation to minority communities and protected characteristic groups, the Code also seeks to promote community confidence and impact through the additional safeguards contained within the various principles as discussed in the associated EQHRIA document.

### **Declaration and publication**

I have read the Community Impact Assessment and I am satisfied that the measures outlined in the draft Code of Practice actively promote community cohesion including specific matters of equality, human rights and the protection of children, young people, and vulnerable adults.

**Signed:** Dr Brian Plastow, Scottish Biometrics Commissioner

**Date:** 07 September 2022

*Brian Plastow*

**Scottish Biometrics Commissioner**

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