



Scottish Biometrics  
Commissioner  
Coimiseanair  
Biometrics na h-Alba

# Review of the Laws of Retention for Biometric Data Taken for Criminal Justice and Policing Purposes

## THE SCOTTISH BIOMETRICS COMMISSIONER

UPDATE REPORT

December 2023





FOLLOWING THE REPORT OF THE INDEPENDENT ADVISORY GROUP ON THE USE OF BIOMETRIC DATA IN SCOTLAND (IAG) IN 2018, THE SCOTTISH GOVERNMENT COMMITTED TO REVIEWING RETENTION PERIODS UNDER SECTIONS 18 TO 19C OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995 (1995 ACT) AS RECOMMENDED BY THE IAG. THE GOVERNMENT LATER DECIDED IT WOULD AWAIT THE APPOINTMENT OF THE NEW SCOTTISH BIOMETRICS COMMISSIONER IN ORDER THAT THE COMMISSIONER COULD CONTRIBUTE TO THE REVIEW.

AS PART OF OUR 202-23 STRATEGIC OBJECTIVE TO KEEP UNDER REVIEW THE LAW, POLICY AND PRACTICE ON BIOMETRIC DATA FOR CRIMINAL JUSTICE AND POLICE PURPOSES WE OUTLINED THE COMMENCEMENT OF THE REVIEW OF THE LAWS OF RETENTION PERIODS FOR BIOMETRIC DATA.<sup>1</sup> THIS REPORT SUMMARISE THAT WORK.

---

<sup>1</sup> See our Strategic Plan 2021-25.



## Content List

- I. The Scottish Biometrics Commissioner
- II. The laws on retention of biometric data for criminal justice and policing purposes
- III. What we did
- IV. Conclusion and next steps



## I. The Scottish Biometrics Commissioner

The [Scottish Biometrics Commissioner Act 2020](#) established the office of Scottish Biometrics Commissioner and provides for its functions.

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 Police Scotland, the Scottish Police Authority (SPA) and the Police Investigations and Review Commissioner (PIRC).

## II. The Law

The relevant law in relation to retention (and acquisition) of biometric data is:

- Part 2 of the Criminal Procedure (Scotland) Act 1995
- Section 56 of the Criminal Justice (Scotland) Act 2003
- Chapter 4 of Part 4 of the Age of Criminal Responsibility (Scotland) Act 2019.

[The Criminal Procedure \(Scotland\) Act 1995](#) (the 1995 Act) is the primary Scottish legislation allowing the collection and retention of fingerprints and other biometric samples from a person arrested by the police. It stipulates the conditions under which samples may be taken by the police, as well as rules for retention and specification of the purposes of use of prints and samples. The 1995 Act makes no specific legal provision for the use of police images.

Section 56 of the [Criminal Justice \(Scotland\) Act 2003](#), allowed for the establishment of a database of DNA profiles developed from persons who have supplied their written consent to have their DNA profiles retained for specific purposes, namely the investigation and prosecution of a single offence or more general retention which allows the volunteer's DNA profile to be examined for any other offences which may be investigated in future. Section 56 of the 2003 Act also provides for the withdrawal of consent in this case.

Chapter 4 of Part 4 of the [Age of Criminal Responsibility \(Scotland\) Act 2019](#) details the limitations on taking prints and samples from children under 12 years of age and limitations on taking prints and samples from children aged 12 and over in certain circumstances.

In addition to this legislation addition to the above legislation, Section 87(4) of the Sexual Offences Act 2003 allow the police to take fingerprints and to photograph any part of the offender's body and the Police, Public Order and Criminal Justice (Scotland) Act 2006 gives authority to the police and relevant staff to take relevant physical data (DNA) from an registered sex offender as part of their notification requirements.



The existing law may be **summarised** as follows:

- ❖ Fingerprint and DNA data from convicted persons can be retained indefinitely. This legal entitlement applies on the basis of a single criminal conviction for any type of offence, regardless of gravity;
- ❖ Data taken from a person arrested for an offence (and who has no previous convictions) must be destroyed as soon as possible following a decision not to institute criminal proceedings against the person or the acquittal of a person following such proceedings (subject to the highlighted bullet point below);
- ❖ Data from individuals who accept an offer from the procurator fiscal may be retained for three years in relation to a prescribed sexual or violent offence, with the chief constable able to apply to the sheriff court for further two-year extensions (there is no limit on the number of two-year extensions that can be granted in respect of a particular person's data);
- ❖ Data may be retained for two years in relation to non-sexual or non-violent offences which are the subject of an accepted offer from the procurator fiscal or a fixed penalty notice from the police;
- ❖ Data from individuals prosecuted for, but not convicted of, certain sexual and violent offences may be retained for three years, with the chief constable able to apply to the sheriff court for further two-year extensions (there is no limit on the number of two-year extensions that can be granted in respect of a person's data).
- ❖ Data from children dealt with through the Children's Hearings System may be retained only where the grounds for referral are established (whether through acceptance by the child at such a hearing or a finding in court) in relation to a prescribed sexual or violent offence. Such data can only be retained for three years unless the police apply for, and are granted, an extension by a sheriff. For less serious offences, where grounds are not established, or where the child is under the age of criminal responsibility, there is no retention in relation to children.

The retention of biometric data occurs in respect of **three categories** of people:

- a. people who have been convicted (or conviction equivalents);
- b. people who have been charged with an offence but not convicted;
- c. children



## Recommendation of the IAG (2018):

*“There should be a review of the rules on retention of biometric data in sections 18 to 19C [14] of the Criminal Procedure (Scotland) Act 1995, considering all questions of proportionality and necessity. The review should be research led and consider not only the gravity of the offending but also the value of biometrics in the investigation of certain offences, re-offending rates relating to different crimes, the escalation of offending, and the value that biometric retention has in the investigation of this escalation. It should be informed by any developments in the law in Scotland, England and the European Court of Human Rights.”*

### III. What we Did

In 2023 we worked with the Scottish Government (SG) and stakeholders, including our [advisory group](#)<sup>2</sup> reviewing the laws of retention in order to build greater understanding of the benefits and risks of using and retaining biometric data for criminal justice and police purposes.

It is important to note that a number of relevant developments happened since 2018, including:

- The introduction of new legislation, for example the [Scottish Biometrics Commissioner Act 2020](#) and a statutory [Code of Practice for the use of biometric data for police purposes together with](#) the commencement of UK Data Protection Act 2018, and the Age of Criminal Responsibility (Scotland) Act 2019
- New human rights cases such as *Gaughran vs The UK*<sup>3</sup>, and
- The advancement of new technologies

In June 2023 we, together with the SG, organised and held an expert working group in Edinburgh to discuss the current retention periods for biometric data and whether they are still fit for purpose.

---

<sup>2</sup> Section 33(1) of the Scottish Biometrics Commissioner Act 2020 provides that the Commissioner must establish and maintain an Advisory Group. The purpose of the group is to give advice and information to the Commissioner about matters relating to the Commissioner’s functions. The SBC and his AG considered and agreed that most of the issues and concerns relevant to the laws of retention from the IAG report have been at least partially addressed by those developments. For example, the gap on retention periods for images was filled by the provision of the Code of Practice, which sets out that it is to be the same as for fingerprints and DNA.

<sup>3</sup> (Application no. 45245/15). The European Court of Human Rights considered that the powers of retention of the DNA profile, fingerprints and photograph of the applicant failed to strike a fair balance between the competing public and private interests.



## Expert Workshop

Around 20 people were invited to the event, including representatives of public bodies, law society, law enforcement, academics and relevant regulators such as the ICO. The workshop was informed by a discussion paper circulated prior to the event and run under the Chatham House Rule. The workshop was chaired by the Commissioner and participants were asked to consider matters flowing from the discussion paper and arisen since 2018.

Some of the issues discussed by the attendees in the workshop were:

- Legislative and policy changes of the laws of retention
- Compliance of retention periods with Human Rights and Data Protection requirements
- Police Scotland's current policy on retention and impact of retention periods
- Current criteria for retention arrangements for convicted people and non-convicted people
- Ethics in retention of biometric data
- Comparative academic research on retention
- Retentions periods beyond the 1995 Act
- Retention periods in relation to children and/or related to any other vulnerable people
- Public engagement

## IV. Conclusion

Following the discussion, the Commissioner and all attendees favoured a review of the laws of retention of biometric data for police purposes, in particular Sections 18 to 19C of the 1995 Act. Some attendees suggested that the scope of such a review could go wider than just the 1995 Act to consider the whole landscape in relation to biometric retention.

The findings of the discussion were presented to the Cabinet Secretary for Justice and Home Affairs and the Scottish Government, she has now agreed to a review being pursued for 2024. The Scottish Biometrics Commissioner will assist the review.



## Next steps

During 2024, Scottish Government will work in partnership with the Commissioner and Police Scotland to review the laws of retention. There will be three stands to this work:

- A gap analysis of existing laws
- Comparative research on retention regimes in other jurisdictions
- A procedural review of Police Scotland case retention policies linked to the gap analysis of existing laws.

The review will conclude with a joint Scottish Government/SBC report to Scottish Ministers in October 2024 and where appropriate may make recommendations.

Scottish Biometrics Commissioner's Office

Point of Contact

Diego Quiroz

Operations Manager

EH7 4NS 0131 202 1043

Email [Diego.Quiroz – contact@biometricscommissioner.scot](mailto:Diego.Quiroz – contact@biometricscommissioner.scot)