



CONSULTATION RESPONSE  
TO THE SCOTTISH  
PARLIAMENT'S EDUCATION,  
CHILDREN AND YOUNG  
PEOPLE COMMITTEE ON  
THE CHILDREN (CARE AND  
JUSTICE) (SCOTLAND) BILL



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## 1. Introduction

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1.1. The office of Scottish Biometrics Commissioner was established by the Scottish Biometrics Commissioner Act 2020 (SBC Act). 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. Section 2 of the SBC Act stresses that the Commissioner must have regard to the interests of *children* and young person's when exercising his general function. The SBC Act also defines Children and young people as individual who are under 18 years.

1.2. The Scottish Biometrics Commissioner (SBC) welcomes the opportunity to comment on the Children (Care and Justice) (Scotland) Bill. Our views on this paper focus exclusively on Part 1 (Section 1) - which changes the age of referral to children's hearings system, and Part 2 (Section 8) - which changes the meaning of 'child' in criminal proceeding - as these relate directly to the Commissioner's general function. The paper starts by delineating the legal framework and then explains the policy and practical reasons for *supporting Sections 1 and 8* of the Bill. Through this response we give consideration to and referenced current standards and developments in this area.

1.3. The Commissioner would also like to inform the Committee that an *Assurance Review* of the Acquisition of Biometric Data from Children Arrested in Scotland will be submitted to the Parliament later this month. This review will cover in detail the current state of affairs in relation to children biometrics and will provide a few recommendations for Police Scotland to improve current police and practice.

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## 2. Legal Framework

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- Scottish Biometrics Commissioner Act 2020
- United Nations Convention on the Rights of the Child (UNCRC)
- Criminal Justice (Scotland) Act 2016
- Criminal Procedure (Scotland) Act 1995

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### 3. Discussion & Views

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3.1. In terms of the developmental position and place in society, the United Nations Committee on the Rights of the Child has underlined several times the importance of ensuring that all children in conflict with the law are always dealt with within the juvenile justice system and *never prosecuted and tried as adults*.<sup>1</sup> The Committee reinforced the requirement for all children under the age of 18 to be treated as children in its revised General Comment No 24 (2019) on *children's rights in the child justice system*.

3.2. Scotland has moved incrementally towards these standards. The principles of the Bill seem to reflect the general *direction of travel* that Scotland has taken in recent years, including the raising of the age of criminal responsibility, the UNCRC incorporation into Scots law, the Whole System Approach for young people who offend and the new standards for those working with children in conflict with the law. However, some key barriers remain. For example, the Scottish legislative framework that defines childhood is *complex and contradictory*. Multiple pieces of Scottish legislation refer to childhood in terms of chronological age of either 16 or 18, whilst the Whole System Approach has been extended to the age of 21 in some local authorities. The Criminal Justice (Scotland) Act 2016 defines children as any person under 18 years old, however offers different protections for those 16 and 17 in relation to the Children's Hearings. All of this serves as a barrier to those seeking and providing support to children and has an impact on the processing of children's biometric data. The main biometric data types used regularly in Scotland at present for policing are fingerprints, DNA and photographic images.

3.3. And while progress was made in raising the age of criminal responsibility to 12 years, through the Age of Criminal Responsibility (Scotland) Act 2019, the current age of criminal responsibility *is still below* the internationally accepted minimum age. This has been highlighted by both national and international expert bodies, including the

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<sup>1</sup> Article 1 of the UNCRC defines a child as 'every human being below the age of 18 years.'

Parliamentary Assembly of the Council of Europe,<sup>2</sup> the UN Committee on the Rights of the Child and the Children and Young People’s Commissioner Scotland.<sup>3</sup> Thus, we *welcome policy change* that ensures a more consistent approach to the status of children (all people under 18) when in police custody, and thus providing the required lever through which capturing and retaining their biometric data is lawful, necessary and proportionate.

### SBC Research & Analysis

3.4. From our Review of Children Biometric Data it was clear that *Police Scotland gives due* consideration as to whether it is proportionate and necessary to arrest and obtain biometric data for the purposes of recording on the biometric databases for children aged 12 to 15 years old.<sup>4</sup> In taking this decision the relevant officer considers the best interest of the child together with relevant police guidance (i.e. standard operating procedures). However, children aged 16 and 17 are treated as *adults* in relation to biometric capture and retention, unless they are considered vulnerable. This is subject to a compulsory supervision order.<sup>5</sup>

3.5. Due to the unique and personal character of biometric data, its use requires special due care, particularly when belonging to children. Under the UNCRC and international human rights standards, a child’s general *right to privacy* is given additional attention in cases where a child is in conflict with the law.<sup>6</sup> This safeguard extends to their biometric data use and retention as per the SBC Code of Practice.<sup>7</sup>

3.6. Our preliminary findings from the Review also indicate that Police Scotland’s *overall strategic approach* to children who find themselves in police custody and have biometric data captured, is strong. However, the available data shows that there are

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<sup>2</sup> See Resolution 2010 (2014) Final version. Child-friendly juvenile justice: from rhetoric to reality at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21090&lang=en>

<sup>3</sup> See <https://www.cypcs.org.uk/positions/age-of-criminal-responsibility/>

<sup>4</sup> For what is biometrics see: <https://www.biometricscommissioner.scot/news/what-is-biometrics/>

<sup>5</sup> The Criminal Justice (Scotland) Act 2016

<sup>6</sup> 40(2)(vii) of the UNCRC

<sup>7</sup> The Commissioner has published a statutory Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland. Particular attention is given to children in the Code (Principle 9). See the Code at: <https://www.biometricscommissioner.scot/media/5y0dmsq3/biometrics-code-of-practice.pdf>

(in total) significant number of biometric data taken and held in the criminal justice system from children.<sup>8</sup>

3.7. The available data from Police Scotland would suggest that there were 4,150 custody episodes in Scotland during calendar year 2022 which involved a child aged 17 years or under. This equates to 4.22% of all custody episodes. DNA data was captured from children in 3,091 of these episodes. By January 2023, 1434, of these DNA samples were still on retention and no biometric data was captured in 2022 from children below the age of criminal responsibility.

In consequence:

3.8. The Commissioner *supports* the changes in Part 1 which enables all children under the age of 18 to be referred to the Principal Reporter, removing existing restrictions on eligibility for 16 and 17 year olds (Sec. 1). This will enable more children to benefit from the children’s hearing system while respecting the constitutional independence of the Lord Advocate and Procurators Fiscal, who will retain the discretion to begin criminal proceedings and to prosecute children in court, where appropriate.

3.9. The Commissioner view is that the age of criminal responsibility in Scotland is *still too low*. Accordingly, he supports Part 2 of the Bill in relation to the amends to the definition of “child” in criminal proceedings legislation (Sec. 8), which will help to divert those under 18 years of age out of the adult system. This in turn would provide the lever through which capturing and retaining biometric data from children would be proportionate only in the most serious of crime types.

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<sup>8</sup> 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 relates. Source: SPA Scottish DNA Database Statistics 2022-23 <https://www.spa.police.uk/spa-media/f0idqaqh/pdf-20221202-scottish-dna-database-stats-nov-2022.pdf>, accessed on 17 January 2023.