



Scottish Biometrics Commissioner

# Annual Report

1 April 2022 – 31 March 2023

Safeguarding our biometric future



Scottish Biometrics  
Commissioner  
Coimiseanair  
Biometrics na h-Alba



# Foreword

## by the Scottish Biometrics Commissioner

I am delighted to present my second annual report to the Scottish Parliament and people of Scotland. While in my [first annual report and accounts](#) I outlined the positive design and delivery of the new Scottish Biometrics Commissioner function during the global pandemic both on time, and under budget, this report will focus on the successful delivery of the objectives outlined for this period in our [Strategic Plan](#) in line with [Section 32 of the Scottish Biometrics Commissioner Act 2020 \(the Act\)](#).

I should note that for 2022/23, I will be laying two annual reports before the Parliament in recognition of the competing reporting requirements arising from Sections 32 and 31 of the Act, and as agreed last year with Audit Scotland. This report is therefore prepared under [Section 32](#) for the Scottish Parliament in accordance with the provisions of the Act. My Section 31 report, which will examine performance of our organisation against our Strategic Plan and our accounts will be laid separately, although properly, there will be some crossover between both reports.

In accordance with the requirements of Section 32 of the Act, this report must include:

- a. a review of issues identified by the Commissioner in the financial year as being relevant to the use of biometric data for criminal justice and police purposes,
- b. a review of the Commissioner's activity in that year, including the steps taken to fulfil each of the Commissioner's functions,
- c. any recommendations by the Commissioner arising out of such activity.

The primary audience for this report is parliamentarians, however the report is of relevance to anyone with an interest in how biometrics data and technologies are used for policing and criminal justice purposes in Scotland. The goal of the report is threefold. Firstly, it seeks to provide a synopsis of the relevant biometric related issues within the criminal justice ecosystem in Scotland. This includes a brief description of our powers and information on Scotland's biometric landscape. Secondly, it seeks to supply the current biometric data volumes held in Scotland together with an account of biometric databases - for completeness. This section also provides a summary of the legal basis for retaining biometric data with a view of a potential review of the law next year. Thirdly, it seeks to present the highlights of the year in relation to our Strategic Plan and statutory functions and ends with a discussion on future trends and opportunities for biometrics data in Scotland.

From the inception, I would like to bring up one of the highlights of our performance, which is the adoption of our statutory [Code of Practice](#) on the use of biometric data and technologies. The Code of Practice came into legal effect in Scotland on 16 November 2022. With that approval by the Scottish Parliament, Scotland became the first country in the world to have a national statutory Code of Practice guiding the ways in which biometric data and technologies may be used for policing and criminal justice purposes, supported by legal powers within the Act to monitor compliance, and a unique [complaints mechanism for data subjects](#). This is a significant human rights achievement for Scotland of which we should be proud, and one which was widely acknowledged in the media.<sup>1</sup>

<sup>1</sup> [World first for Scotland in use of biometric data and DNA](#), Holyrood Magazine, 16 November 2022

On 28 February 2023, and following the Code of Practice taking legal effect, I laid an updated version of my 4-year Strategic Plan before the Parliament. The updates include a new annual programme of compliance assessments for the Code of Practice now that it has taken legal effect. This will be an annual rolling programme applying to Police Scotland, the SPA Forensic Services, and the Police Investigations and Review Commissioner which commences from the winter of 2023.

Subsequently, and working in strategic partnership with the Scottish Police Authority, I laid two joint assurance reviews before the Scottish Parliament in March 2023. One examined the acquisition of biometric data from Children by Police Scotland, the second reviewed the acquisition of biometric data from vulnerable adults requiring the support of an Appropriate Adult whilst in police custody. Both reports commended Police Scotland's strategic approach to safeguarding the rights of vulnerable groups whilst in police custody and each also made a small number of recommendations for improvement. The recommendations are cited below.

For 2022/23 we have made five separate recommendations to Police Scotland. These include retaining the ability to administer Scottish biometric data when it is aggregated to UK systems, better upholding the right to information for biometric data subjects under UK GDPR and on the Code of Practice; improving internal management information to better inform strategic decision-making, and developing distinct policies and safeguards on biometric acquisition from children.

During this year, there have been calls in the Scottish Parliament for expansion of my functions by members of the Scottish Parliament.<sup>2</sup> I will expand more on this in the first chapter of this report, but I have highlighted my willingness to embrace such opportunities in evidence to the Parliament's Criminal Justice Committee and to the former Cabinet Secretary for Justice<sup>3</sup>, as well as in meetings with Scottish Government Officials, the Scottish Prison Service, and the Criminal Justice Board. Biometric data is not the sole preserve of 'policing' bodies and is used extensively throughout the entire criminal justice ecosystem in Scotland - including in criminal prosecutions, in prisons, and in the multi-agency management arrangements for violent and sexual offenders as well as on shared criminal justice contexts such as Digital Evidence Sharing Capability (DESC). My concern is that all of these do not benefit from independent oversight or the protection of the Code of Practice. However, I acknowledge that any expansion of remit is entirely and properly a matter for Scottish Ministers.

During this year, we have met regularly with and supported the work of statutory and non-statutory stakeholders. Some of the stakeholders include academia, policing related bodies, tech companies, the Independent Advisory Group on New and Emerging Technologies, the Scottish AI Alliance, the Scottish Government Digital Identity Program and the UK Forensic Information Databases Strategy Board. I also gave evidence before the Criminal Justice Committee and engaged on a number of legislative policies. We re-designed our website to serve as a repository of useful information on both our function, and to provide a public information hub on how biometrics are used for policing and criminal justice purposes in Scotland.

<sup>2</sup> See for example call from the SLD: SNP running away from expanded biometrics commission role, Scottish Liberal Democrats, 16 February 2023

<sup>3</sup> On 26 January the Scottish Biometrics Commissioner met with the Cabinet Secretary for Justice and Veterans, Keith Brown MSP and on 15 June 2022 Dr Plastow gave evidence before the Criminal Justice Committee.

I am extraordinarily grateful to our stakeholders, including the Chair of the Scottish Police Authority Martyn Evans, SPA Board Members, and the SPA Executive Team and officials for supporting our work over this period.

I am also grateful to the then Chief Constable of Police Scotland Sir Iain Livingstone and his Executive Team for their ongoing support and for accepting the various recommendations that we have made. In addition, I would like to acknowledge a debt of gratitude to my staff including my Operations and Corporate Services Managers Diego Quiroz and Cheryl Glen, and to Joanna Milne our Business Support Officer as well as my professional Advisory Group for their ongoing support and encouragement.

Through such work we have been able to demonstrate our value as we continue to establish ourselves as a trusted voice on contemporary debates relating to biometric data and technologies within the policing and criminal justice community at home, the UK, and internationally.

Looking ahead to 2023/24, it will be again a busy year, we will hold a criminal justice expert roundtable to determine whether a review of the retention periods for biometric data under Sections 18 to 19C of the Criminal Procedure (Scotland) Act 1995 is still needed. Our thematic review next year will focus on the acquisition, use and retention of images and photographs by Police Scotland, the Scottish Police Authority and the Police Investigations and Review Commissioner. We will continue our work on the Code of Practice, by introducing an annual programme of compliance based on validated self-assessment to ensure compliance with the Code as well as following up on progress against our recommendations related to the children and vulnerable adults' assurance reviews. It is difficult to predict if, or when, we will receive our first complaint about potential non-compliance with the Code of Practice. However, it is reasonable to project that such a complaint is just as likely to come from a person whose biometric data has been captured as a result of being a victim of crime, as it is from someone whose biometric data has been captured as a result of being arrested and charged with an offence.



**Dr Brian Plastow**  
**Scottish Biometrics Commissioner**

SG/2023/167 – prepared in accordance with the provisions of section 32 of the Scottish Biometrics Commissioner Act 2020.

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# Key Facts

About biometrics for criminal justice and policing purposes in Scotland (figures as to 31 March 2023).



**371,220**  
profiles

**371,220**  
individuals

There were 371,220 profiles on the Scottish DNA Database - that is 371,220 people.



**831,616**  
fingerprints

**462,906**  
individuals

There were 831,616 Scottish fingerprint forms on the UK fingerprint database (IDENT1). These relate to 462,906 people - note that some people have several forms on file.



**664,235**  
images

**379,721**  
individuals

There were 644,235 Scottish images on the Police Scotland Criminal History System and the UK Police National Database (CHS/PND). These relate to 379,721 people – note that some people have several images on file.

Over 2,000,000 other images held for policing and criminal justice purposes, on primary, secondary and tertiary databases with no automated biometric searching capabilities.

Scottish biometric databases continue to grow compared to figures 2021/21 (except DNA database - see chapter 2 of this report for a further discussion). The net increase appears highest in the case of fingerprints, but that is due to the lag associated with manual weeding arrangements.

# Key Findings

During the year, the organisation achieved all of its operational and strategic objectives, and we would like to highlight:

- ✓ Delivered our first set of thematic assurance reviews on the use of biometrics in criminal justice – on [Children](#) and [Vulnerable Adults](#)
- ✓ These reports both concluded that the overall strategic approach of Police Scotland to safeguard children and vulnerable adults who find themselves in police custody and have biometric data captured is strong
- ✓ The assurance reviews also highlighted that there are specific opportunities for improvement on information and how it is presented to children and/or vulnerable people when their biometric data is acquired. We provide detailed recommendations, which are included in this report (below)
- ✓ Prepared and published our [Code of Practice](#) on the use of biometrics
- ✓ Prepared and published our [Complaints mechanism](#), so the Code of Practice is accompanied by a public complaint mechanism for data subjects
- ✓ Published a [guide to biometrics for the general public](#)
- ✓ Prepared and published a report on [public attitudes](#) to police use of biometric data
- ✓ Engaged and responded to a wide range of [consultations](#)
- ✓ Produced a [video animation](#) explaining biometrics and our role in Scotland
- ✓ Engaged and consulted experts, civil society and the public on the Code of Practice and complaints procedure
- ✓ Provided evidence to the Parliament [Criminal Justice Committee](#), SPA Board and the UN Human Rights Council
- ✓ Published our first [Annual Report and Accounts](#) which was laid before Parliament
- ✓ Delivered presentations at a variety of external events including the [Digital Policing Conference](#); Digital Forensic Evidence (Dundee University); Sprite + network; Stirling University & Scottish AI Alliance



# Summary of Recommendations

During the year we have made five separate recommendations to Police Scotland and one jointly to the Scottish Police Authority.

## Recommendation 1

Police Scotland should improve the collection of management information in relation to all biometric data types to better inform its strategic decision-making. Police Scotland should then determine what information it could safely place in the public domain to improve the public understanding of its value. This could be in a similar manner to the Scottish DNA database statistics that are already published. This should as a minimum include information on fingerprint volumes and match rates and volumes of images held within the Scottish Criminal History System (CHS) and the Police National Database (PND).

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## Recommendation 2

When acquiring biometric data in police custody settings from all persons deprived of their liberty through arrest, and whose biometric data is acquired, Police Scotland should provide basic information to data subjects about the applicability of the Scottish Biometrics Commissioner's statutory Code of Practice, including the legislative provision for the Commissioner to consider complaints about failure to comply with the Code by Police Scotland. Such information and how it is presented and delivered should be tailored to the needs of the recipient, for example children or vulnerable people.

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## Recommendation 3

Police Scotland should improve the information given to all persons who have their biometric data acquired and retained in police custody settings because of being arrested and deprived of their liberty. As a minimum, this should include an explanation of the legal basis under which the subject's biometric data (fingerprints, image, DNA swab) is to be acquired, and an explanation that such data may be speculatively searched against UK policing databases. Such information and how it is presented and delivered should be tailored to the needs of the recipient, for example children or vulnerable people.

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#### **Recommendation 4**

Police Scotland should develop, consult on, and then publish operational policies, procedures, and practices for the acquisition of biometric data from children under 18 years of age that are consistent with the Justice Vision for Scotland and relevant standards for working with children in conflict with the law. There should be no general policy, which otherwise sanctions the blanket capture of biometric data from children. Any decision to take biometric data from a child should be taken on a case by-case basis and authorised by a senior police officer not beneath the rank of Inspector. In reaching a decision, the senior officer should have regard to factors such as the best interest of the child and the gravity of the offence.

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#### **Recommendation 5**

In contributing biometric or forensic data to UK policing systems, Police Scotland and the Scottish Police Authority should ensure that they have the functionality to administer and maintain that Scottish data in compliance with Scottish legislation and any Codes of Practice in terms of its use.



# 01

## Overview

This chapter seeks to provide a synopsis of the relevant biometric related issues within the criminal justice ecosystem in Scotland. This includes a brief description of our powers and Scotland's biometrics landscape.

# About Us

## The Scottish Biometrics Commissioner Act 2020

The Scottish Biometrics Commissioner Act 2020 (the Act) sets out the Commissioner's general function which 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. The Scottish Police Authority (SPA)
- c. The Police Investigations and Review Commissioner (PIRC)

Section 2 (3) of the Act then directs that in exercising those 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 referred to in subsection (1) [Police Scotland, the SPA, and PIRC]
- 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 and challenged
- c. Promote, and monitor the impact of, the Code of Practice.

# Scotland's Biometrics Landscape

While the use of biometric data such as fingerprints and photographs is not new - it has been used as a means of verification, identification, and exclusion for more than one hundred years in policing - the advent of the forensic biometric technologies have revolutionised the investigation of crime. Since the 1980's with the arrival of DNA analysis, biometrics has emerged as a powerful tool to help solve numerous crimes.<sup>4</sup> More recently there has been an exponential growth in a range of a new wave of biometrics in law enforcement in the shape of second and third generation biometrics.<sup>5</sup>

One of the most controversial is the use of public space (live) facial recognition surveillance (LFR) by the police, which has been adopted in other UK jurisdictions.<sup>6</sup> Only two police forces in England and Wales have so far deployed LFR and the published Authorised Professional Practice (APP) on its use by the College of Policing has been criticised by the Surveillance Camera Commissioner for England and Wales.<sup>7</sup> So far, Police Scotland<sup>8</sup> have resisted experimentation in this space and have not deployed overt LFR technologies.

Biometric data can also be recovered from suspects, victims of crime, or at crime scenes, and may therefore form part of the evidential chain from crime scene to court in criminal proceedings. As technology expands, the way biometric data can be captured or recovered has also expanded to cover for example 'virtual' crime scenes where digital forensic techniques are used to recover biometric data (e.g. images or voice) from a range of electronic devices and other sources.

There has been also a proliferation of databases operating and exchanging biometric data over different legal and functional jurisdictions within the UK and globally, including the application of artificial intelligence (AI) to those databases to develop algorithms for biometric matching. These issues raise important questions for society, including how best to balance our need for public safety and security, with broader privacy, human rights, and ethical considerations.

<sup>4</sup> Through the introduction of DNA24, Scottish Police Authority Forensic Services now provides Police Scotland and the Police Investigations Review Commissioner with one of the most advanced DNA interpretation capabilities in world policing.

<sup>5</sup> For further info see; ICO insight available at <https://ico.org.uk/media/about-the-ico/documents/4021972/biometrics-insight-report.pdf>

<sup>6</sup> See R (Bridges) v CC South Wales [2020] EWCA Civ 1058. See also for example: 'UK Police use of live facial recognition unlawful and unethical, report finds', 27 October 2022, the Guardian, available at <https://www.theguardian.com/technology/2022/oct/27/live-facial-recognition-police-study-uk> See also OBSCC/CRISP event 12 June 2022, London School of Economics, available at <https://stirling.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=56d462f3-a8f5-44b3-9ffc-aeba00db92df>

<sup>7</sup> Including the London's Met police and South Wales Police. Between 2016 and 2019, the Met deployed LFR 12 times across London. On 28 January and 14 July 2022 the Met deployed LFR outside Oxford Street. In 2020, the E&W Court of Appeal held that the South Wales Police force's use of LFR was unlawful insofar it breached privacy rights and equality legislation. In particular, the court found that the police had too much discretion in determining the location of video cameras and the composition of watchlists.

<sup>8</sup> Police Scotland confirmed during the inquiry of the Justice Sub-Committee on Policing on Facial Recognition that 'it has no intention to introduce the use of live facial recognition at this time.' See: report by the Committee at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/JSP/2021/3/18/b8a4803a-6f9a-4a77-9ff0-3d75251934c1-1/JSPS0521R01.pdf>

The establishment of a democratic oversight by the Scottish Parliament was a significant step to address concerns around the exponential growth of biometrics and biometric database in criminal justice. The distinctiveness of the Scottish Biometrics Commissioner functions is to provide an independent oversight of how biometric data and technologies are used for policing and criminal justice purposes in Scotland. In doing so, our function is to support and promote their lawful, effective, and ethical use. If policing and criminal justice is to maximise the opportunities presented by such new and emerging technologies, then it is essential that they proceed in ways which also maintain public and political confidence and trust.

Another important development is the definition of biometric data under the Act, which is more expansive than in other UK jurisdictions, where only DNA and fingerprints qualify as biometric data (e.g. under the Protection of Freedoms Act 2012). The UK GDPR also defines biometric data in Article 4(14) as ‘personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.

The Act provides that: “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 biometric data), to establish the identity of an individual.<sup>9</sup> This may include:

- Physical data comprising or derived from a print or impression of or taken from an individual’s body

- A photograph or other recording of an individual’s body or any part of an individual’s body
- Samples of or taken from any part of an individual’s body from which information can be derived, and
- Information derived from such samples.

We have now a legal definition of biometric data which is distinct and comprehensive. It includes fingerprints, DNA, images, recordings, and biological or other source materials or samples from which a biometric record may be extracted. The definition covers all biometric data types which may be used now or in the future, for example voice or gait recognition.

This year, Scotland became the first country in the world to have a national statutory Code of Practice guiding the ways in which biometric data (and technologies) may be used for policing and criminal justice purposes. The adoption of the Code of Practice was preceded by an extensive process, which included an expert and public consultation as well as a government and parliamentary procedure that reviewed (without amendment) our Code. The Code of Practice was approved and came into effect on the 16 November 2022. This significant step on criminal justice was extensively reported by the media both at national and international level.<sup>10</sup>

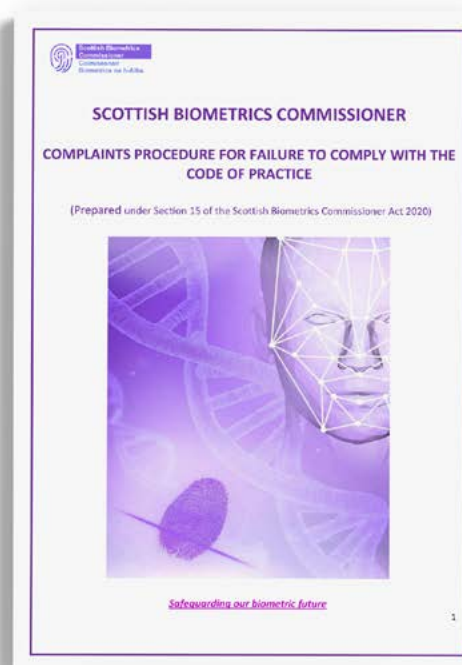
<sup>9</sup> Section 34 of the Scottish Biometrics Commissioner Act 2020

<sup>10</sup> World first for Scotland in use of biometric data and DNA, Holyrood Magazine, 16 November 2022; Scotland ‘first country in world’ to publish biometrics code of practice - The Irish News [https://www.irishnews.com/magazine/technology/2022/11/16/news/scotland\\_first\\_country\\_in\\_world\\_to\\_publish\\_biometrics\\_code\\_of\\_practice-2907020/](https://www.irishnews.com/magazine/technology/2022/11/16/news/scotland_first_country_in_world_to_publish_biometrics_code_of_practice-2907020/)

Simultaneously, we developed, adopted and published a simple procedure by which an individual, or someone acting on an individual’s behalf, may make a complaint to the Biometrics Commissioner in relation to Police Scotland, the SPA or the PIRC’s failure to comply with the Code of Practice.<sup>11</sup> Demonstrating compliance through an accountability mechanism, the Scottish system is now able to go beyond a “check-box” exercise.

An individual can complain to us, if those public bodies hold their personal biometric data, and when the individual believes that they - Police Scotland, SPA or PIRC – in doing so breach the Code of Practice. Both conditions should exist before the Commissioner may consider a complaint.

However, despite biometrics being used extensively throughout the entire criminal justice ecosystem, the Scottish Biometrics Commissioner functions are currently restricted to ‘policing’ bodies. This means that there is no independent oversight over the use of biometric data when it is shared between criminal justice partners who are not subject to our Act. Examples include biometrics shared between criminal justice partners as part of DESC,<sup>12</sup> and between prisons,<sup>13</sup> criminal justice social work, and others as part of the arrangements for managing violent and sexual offenders. Yet, policing and prisons are each within the devolved competence of the Scottish Parliament - and sit within the same Ministerial portfolio. If we are to get the most from independent oversight, and the safeguards of the Code of Practice, it should apply to the whole ecosystem, rather than to a few as the current piecemeal approach does.



<sup>11</sup> The complaints procedure was prepared under Section 15 of the Scottish Biometrics Commissioner Act 2020.

<sup>12</sup> For further information on DESC see: <https://www.gov.scot/news/transforming-evidence-sharing/>

<sup>13</sup> There are significant volumes of biometric data held without consent within prisons. The Prisons and Young Offenders Institutions (Scotland) Rules 2011 and The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2012 enables Governors within the Scottish Prison Service to acquire biometric data from prisoners, including from persons on remand and others who have not been tried or convicted of any offence.



As a constitutional matter, the Commissioner's functions do not extend to reserved policing or other matters within the authority of the UK Parliament. There are four specific examples to highlight:

1. Where biometric data is retained in Scotland as part of a National Security Determination (NSD) in relation to which the Commissioner for the Retention and Use of Biometric Materials for England and Wales has a broader UK remit.
2. Where biometric data is obtained covertly by Police Scotland or a UK policing body operating in Scotland under the Regulation of Investigatory Powers (Scotland) Act over which the UK Investigatory Powers Commissioner (IPCO) has statutory oversight.
3. Where biometric data is obtained in Scotland overtly from persons arrested by a UK wide policing body such as the National Crime Agency, British Transport Police, or Ministry of Defence Police. The Scottish Government and UK Government are seeking to progress an order under Section 104 of the Scotland Act to enable UK wide policing bodies to come under the authority of the Scottish Biometrics Commissioner with regard to biometric data derived from operations in Scotland.
4. Any matter relating specifically to the UK Data Protection Act 2018 and UK General Data Protection Regulations over which the Information Commissioner has statutory responsibility.<sup>14</sup> It should also be noted that the functions of the Scottish Biometrics Commissioner do not extend to public or private space (non-police) surveillance cameras in Scotland, or to the regulation of forensic science techniques used for policing and criminal justice purposes. Scotland does not have a Surveillance Camera Commissioner or a Forensic Science Regulator.

It is important to note that in March 2023 the UK Government introduced the Data Reform and Digital Information Bill (No. 2) to the UK Parliament. The Bill (Section 104) is seeking to abolish the roles of the Commissioner for the Retention and Use of Biometric Material and Surveillance Camera for England & Wales. The functions of the Commissioner will be diverted to other public bodies, including the Information Commissioner's Office (ICO) and Investigatory Powers Commissioner's Office (IPCO). The Bill (No. 2) is seeking also to 'modernise' the ICO by creating a new Information Commission. The Commission will replace the ICO, and the Bill transfers the ICO's existing roles and responsibilities over to the Commission. The Bill (No.2) is expected to run its legislative process by spring 2024.

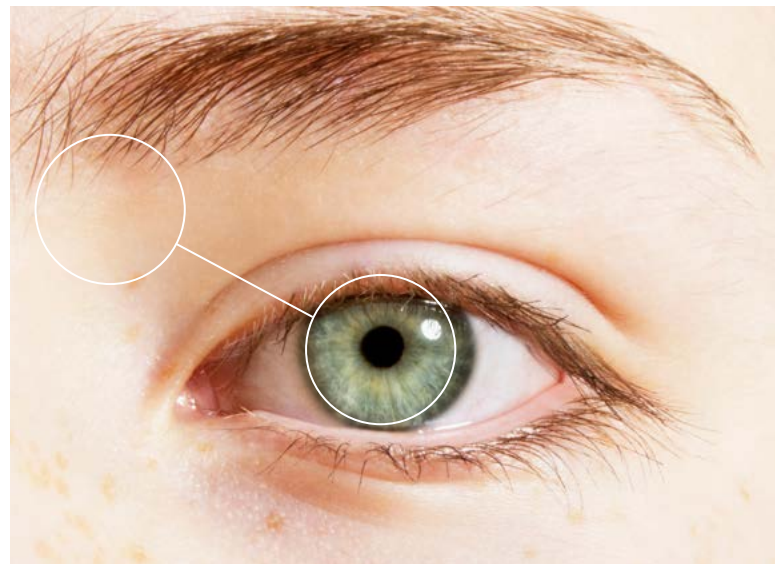
Working in strategic partnership with the Scottish Police Authority, we assessed the law, policy and practice of Police Scotland and SPA Forensics Services in relation to their biometrics governance for two population groups. The first, which also involved a partnership with the Children's Centre for Youth Justice (CCYJ), examined the acquisition of biometric data from Children by Police Scotland and the second focused on the acquisition of biometric data from vulnerable adults requiring the support of an Appropriate Adult whilst in police custody. Both reports gave confidence about Police Scotland's approach to safeguarding the rights of vulnerable groups whilst in police custody and each report also made a small number of recommendations for improvement.

<sup>14</sup> The Data Reform and Digital Information Bill (No. 2) is seeking to 'modernise' the ICO by creating a Commission.

This account over the reporting period provides a validation of the new legal policy framework on biometrics and a practical assurance of the use of children and vulnerable adults' biometrics by the police. There has been no major biometrics controversy or concern publicly expressed about the use of biometric data in a policing and criminal justice context in Scotland. DESC, however, has prompted concerns and media coverage from a data protection perspective.<sup>15</sup> The central question for the organisations running this project is whether the use of hyperscale cloud infrastructure provided by U.S. companies - which may involve biometric or genetic data - is compliant with UK data protection law. While the key issue is data protection and therefore a matter for the ICO -in line with the Act and reserved matters - we are currently engaging with Police Scotland, SPA and ICO, particularly on aspects related to compliance with our Code of Practice: which requires that biometric data must be protected from unauthorised access.

In England and Wales, live facial recognition has prompted their Commissioner for the Retention and Use of Biometric Material to call for legislation and guidance to provide greater certainty and accountability in this area.<sup>16</sup> In June 2022, an independent review report into biometric data and technologies (for England and Wales) led by Matthew Ryder QC, on behalf of the Ada Lovelace Institute concluded that new laws and better regulation are urgently needed. The report makes comments favourably on the developing policy and legal framework in Scotland, including the legislative requirement for a statutory Code of Practice.<sup>17</sup>

Finally, the issue of expansion of the Scottish Biometrics Commissioner's function has also been raised.<sup>18</sup> This goes together with ongoing discussions for more than two years between Scottish Government officials and Westminster on the terms of a Section 104 Order, under the Scotland Act, to bring the activities of British Transport Police, the National Crime Agency and the Ministry of Defence Police in Scotland (in terms of the acquisition, possession, use and destruction of biometric material) within our remit, and that of the Code of Practice. The case for expansion of the remit (and resource) of the Scottish Biometrics Commissioner is compelling and offers a potential solution to the paradigm of ongoing risk that arises from an organisation with only three members of staff. I have discussed such issues with the Parliament Criminal Justice Committee and the former Cabinet Secretary for Justice.<sup>19</sup> However, I acknowledge that this must be balanced at this time with the extraordinary strain on public finances.



<sup>15</sup> See for example Computer Weekly article available at:

<https://www.computerweekly.com/news/365534023/Scottish-police-tech-piloted-despite-major-data-protection-issues>

<sup>16</sup> See report at <https://www.computerweekly.com/news/365530997/Police-tech-needs-clear-legal-rules-says-biometric-regulator> and Police tech needs clear legal rules, says biometrics regulator | Computer Weekly

<sup>17</sup> See Matthew Ryder QC/ADA (2022) report at <https://www.adalovelaceinstitute.org/report/ryder-review-biometrics/>

<sup>18</sup> See for example call from the SLD: SNP running away from expanded biometrics commission role, Scottish Liberal Democrats, 16 February 2023

<sup>19</sup> On 26 January the Scottish Biometrics Commissioner met with the Cabinet Secretary for Justice and Veterans, Keith Brown MSP and on 15 June 2022 Dr Plastow gave evidence before the Criminal Justice Committee.



# 02

## Biometric Data in Scotland

Chapter 2 outlines the key metrics on volumes of biometric data held in Scotland for 2023. This chapter provides an account of the biometric databases as well as considering the legal basis for retaining biometric data, which may trigger a review of the permissible retention periods for biometric data prescribed in Scottish criminal law.

# Biometric Data Volume 2022/23

For 2022/23 there were 96,821 custody episodes at Police Scotland custody facilities throughout Scotland. As most crime in Scotland is committed by adult males, 75% of all biometric data records held in Scotland for policing and criminal justice purposes relate to males. The biometric data volume below was prepared for the last day of the financial year on 31 March 2023.

This summary information is expected to give both decision-makers and the public a greater understanding of the volumes and police powers in relation to the acquisition, retention, use, and destruction of biometric data in Scotland. These numbers are also presented in the ‘key facts’ infographic at the start of this report.

As can be seen Scottish biometric databases continue to grow compared to figures for 2021/22 (except for DNA). The net increase appears highest in the case of fingerprints, but that is probably due to the lag in manual weeding.

UK databases are the largest in Europe. A 2016 comparative study shows that 8.8% of the population of England and Wales is represented in the DNA database, the number for Scotland is equivalent to 5.6% of the population which makes it the largest DNA database in Europe – perhaps in the world.<sup>21</sup>

A global study by research firm Comparitech found an overall rise in biometric data collected for authentication and identification purposes. The study confirms that despite privacy concerns and lack of legislation, growing biometric data collection initiatives are generally gaining worldwide acceptance.<sup>22</sup> Our recent review on public attitudes to the use of biometrics by the police demonstrates similar patterns in Scotland.<sup>23</sup> There are many different databases utilised for criminal justice and policing purposes in Scotland, some of these are operated independently in Scotland whilst others are managed by the UK – the section below discuss this further.

**Figure 1.** 2021/22 vs 2022/23 biometric data held by Police Scotland (31 March 2023)

| Type of Biometric    | 2021/22          | 2022/23          | Change         |
|----------------------|------------------|------------------|----------------|
| DNA                  | 383,279          | 371,220          | -12,059        |
| Fingerprints         | 739,408          | 831,616          | +92,208        |
| Images <sup>20</sup> | 640,010          | 644,235          | +4,225         |
| <b>Total</b>         | <b>1'762,697</b> | <b>1'847,071</b> | <b>+84,374</b> |

<sup>20</sup> Criminal History System Images. SBC estimates that Police Scotland has at least 2 million images held over all its systems.

<sup>21</sup> Reed, K. & Syndercombe, D. (2016) A comparative audit of legislative frameworks within the European Union for the collection, retention, and use of forensic DNA profiles. EUROFORGEN-NoE. The Scottish DNA database also contains foreign nationals and traveling criminals who reside out with Scotland.

<sup>22</sup> See further <https://www.comparitech.com/blog/vpn-privacy/biometric-data-study/> Comparitech is a pro-consumer website providing information, tools, reviews and comparisons to help our readers in the US, UK and the rest of the world improve their cyber security and privacy online.

<sup>23</sup> Public Attitudes to Police Use of Biometric Data (2022), SBC Report, available at <https://www.biometricscommissioner.scot/news/public-attitudes-to-police-use-of-biometric-data/>

# Scotland's Biometric Databases

A particular feature of our databases is that some are operated independently in Scotland whilst others are managed by the Home Office or National Police Chief's Council under joint UK funding arrangements. All these databases form part of a network of interrelated databases used for a range of UK national security and law enforcement purposes including policing and criminal justice.

Scotland has its own **DNA** database (SDNAD) and sequencing and analysis technologies, but also uploads records to the UK National DNA Database (NDNAD) maintained under joint funding arrangements by the Home Office.

Police Scotland operates its own Criminal History System (CHS) containing the criminal history records and **photographic images** of persons charged with, or convicted of, a common law crime or statutory offence in Scotland. These images on CHS are uploaded automatically to a UK policing intelligence sharing system known as the Police National Database (PND), so that other UK forces can search the PND to help identify and prosecute criminals. In the event of acquittal only, the Scottish records and images are removed from CHS and PND by Police Scotland once notified of non-conviction or absolute discharge by the Crown Office and Procurator Fiscal Service. For children, the images are generally destroyed if the child is referred to the Children's Hearings system.

However, there are other databases containing photographs of persons arrested as part of the criminal justice process in Scotland. These images are not held on databases with automated biometric searching capabilities. Examples include:

- images held in connection with the management of sex offender(s),
- images of persons wanted on warrant,
- images held for intelligence purposes,
- images held as evidence as part of an investigation,<sup>24</sup>
- images held for virtual identification parades, legacy databases and so on.

Such data is held on a range of primary, secondary, or tertiary databases and a particular image may also feature on multiple databases. In addition, images may be held in an individual case file by an officer as part of an ongoing investigation either physically or perhaps in digital format on a PDA network such as Pronto. At the moment, there is no means of establishing how many images of all types that are currently held for policing and criminal justice in Scotland other than an approximation.<sup>25</sup> This has prompted us to focus our next thematic review on 'images and photographs.' We will submit a report of said review to the Scottish Parliament in March 2024.

<sup>24</sup> There are investigative techniques which may result in storage of data such as digital forensics where personal data such as a photographic image can be recovered from a personal device of a suspect or witness as evidential material during an investigation.

<sup>25</sup> In 2018, during the report of the Independent Advisory Group on Biometric Data in Scotland it was noted that Police Scotland held more than one million custody images on retention, today it will be significantly higher than this figure, and almost certainly at least double that figure.

On the other hand, Scotland does not have its own **fingerprint** database, but instead fingerprints captured optically or manually in Scotland are uploaded to IDENT1 which is the UK central national database - for holding, searching, and comparing data on those who encounter the police as detainees after being arrested.<sup>26</sup>

IDENT1 also provides Police Scotland with access to the UK Immigration and Asylum Database (IABS), this means that when Police Scotland take fingerprints from a person in custody, or recover fingerprints at a crime scene, officers may also compare the fingerprint against UK immigration and asylum records.

The Scottish Biometrics Commissioner's Code of Practice applies to all biometric data contained within databases and technologies used in Scotland by Police Scotland, the SPA and PIRC, except in circumstances where independent oversight is already exercised by an existing UK Commissioner under reserved or excluded functions. This means that the Scottish Biometrics Commissioner will exercise independent oversight of all non-excluded biometric data held or used in Scotland, and over all non-excluded 'Scottish biometric data' including where it is held directly in shared UK technology systems such as IDENT1.

Retention of biometric information is regulated largely by the Criminal Procedure (Scotland) Act 1995. It sets out the parameters and circumstances for their retention and deletion in connection with biometrics databases. The next section of this report reviews the law on retention and explains why a review of the retention periods may be needed in Scotland.

<sup>26</sup> A detailed and technical explanation of how DNA and fingerprints are used for policing and criminal justice purposes in the UK can be found in the Annual Report of the UK Forensic Information Database Service (FINDS) of which the Scottish Biometrics Commissioner is now a member. Information held in IDENT1 includes fingerprints, palm prints and scenes of crime marks.

# Legal Basis for Retaining Biometric Data for Criminal Justice Purposes

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 the above legislation, Section 87(4) of the [Sexual Offences Act 2003](#) provides that when completing the sexual offender notification requirement, the offender must, if requested to do so, allow the police to take fingerprints and to photograph any part of the offender's body. Registered sex offenders must be photographed a minimum of every 12 months or sooner if their appearance changes.

The [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#) also 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. Accordingly, such biometric data falls within the oversight of the Scottish Biometrics Commissioner and the arrangements described in the statutory Code of Practice.



The existing law may be summarised as follows:

- The 1995 Act is silent on what the retention period should be for fingerprint and DNA data from convicted persons.
- 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.
- 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, unless an extension is granted.
- 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, unless an extension is granted.
- 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 an extension is granted.

While the law is silent about specific periods and/or criteria for retention, Police Scotland (PS) and the SPA have instituted retention policies for fingerprints and DNA, and for images on the Criminal History System (CHS). These are:

- Fingerprint data is retained in alignment with the PS Criminal Record Data Policy,<sup>27</sup> or weeded 3 years from date of death of the subject whom the data applies (whichever is sooner).
- Image data is retained in alignment with the PS Criminal Record Data Policy, or weeded 3 years from date of death (whichever is sooner).
- DNA data is retained and reviewed at subject's 100th birthday or weeded 3 years from date of death (whichever is sooner).

The Scottish Biometrics Commissioner Act 2020 requires that the SBC Code of Practice must include provision about when biometric data must be destroyed in cases where a relevant enactment does not make such provision and may make different provisions for different purposes.

<sup>27</sup> Criminal Record Data Policy for Convicted Case Data applies two rules depending on the crime committed:

1. The 40/20 rule; which means that the subject to whom the data applies must be 40 years old (or over) and the information been on record for at least 20 years (i.e., both conditions must be met) and
2. The 70/30 rule, which means that the subject to whom the conviction applies must be 70 years old (or over) and the information been on record for at least 30 years (i.e., both conditions must be met). However, criminal record data will be retained until 100th birthday for example for life imprisonment and sexually aggravated offences.

In addition to the complexity of the law, there are also concerns in relation of the length of retention of certain biometric data (up to 100 years) as tantamount to indefinite retention. In *S & Marper v. The UK* (2008), the Grand Chamber of the European Court of Human Rights held that the indefinite retention of the fingerprints and DNA profile of a person taken consequent to his/her arrest was a breach of the right to privacy, as guaranteed by Article 8 of the European Convention on Human Rights (ECHR). In *Gaughran v. The UK* (2020) the Court repeated the same view regarding indefinite detention of a man who had a spent conviction in Northern Ireland. The Court paid particular attention to the lack of any relevant safeguards, including the absence of any real review. Note that the policy retention in England & Northern Ireland is different to the one in Scotland. In 2018, Independent Advisory Group on the use of biometric data in Scotland recommended to the Scottish Government that:<sup>28</sup>

*‘There should be a review of the rules on retention of biometric data in Sections 18 to 19C 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.’*

While the last 5 years have been characterised by advances in the law and the policy framework, including the Scottish Biometrics Commissioner Act, SBC Code of Practice and the UK Data Protection Act, there remains a number of concerns in relation to the clarity and accessibility of the law, necessity and proportionality of indefinite retention in accordance with the ECHR and the Data Protection Act 2018.

Retention periods is an issue that many countries are grappling with to ensure not only compliance with human rights and data protection, but to promote public trust and legitimacy of policing (i.e., balancing preventative measures and public protection against the impact on a person’s private life and data protection). For us this means that further work will need to be embarked on - together with the Scottish Government - to ensure biometric data is retained lawfully and Police Scotland is given the adequate regulatory basis for discharging their key role in society.

We will further examine and progress this issue in 2023/24, including by holding an expert criminal justice workshop to determine the scope of the review on retention periods.

<sup>28</sup> See the IAG report at <https://www.gov.scot/publications/report-independent-advisory-group-use-biometric-data-scotland/pages/1/>



# 03

## Highlights of the Year

Chapter 3 of the report seeks to present the operational highlights of the year in relation to our Strategic Plan and statutory functions, so it reviews our activity and briefly looks forward to 2023/24 period. The last section introduces our current Advisory Group.

# Background

Our [Strategic Plan](#)<sup>29</sup> sets out the following four strategic objectives and priorities:<sup>30</sup>

|                 |  |
|-----------------|--|
| <p><b>1</b></p> | <p>Keep under review and report on the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland</p>   |
| <p><b>2</b></p> | <p>Promote public awareness and understanding of criminal justice and policing sector powers and duties in relation to biometric data, how these powers are exercised, and how the exercise of these powers can be monitored or challenged</p> |
| <p><b>3</b></p> | <p>Provide reports to the Scottish Parliament on the outcomes from the use of biometric data and technologies and highlight key issues to inform public debate thus strengthening democratic accountability</p>                                |
| <p><b>4</b></p> | <p>Develop, publish, promote and assess compliance with a statutory Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland</p>                             |

<sup>29</sup> Our Strategic Plan 2021-25 was approved by the Parliament Corporation and laid before the Scottish Parliament on 24 November 2021. A revised Strategic Plan, resubmitted to the Scottish Parliament on 28 February 2023.

<sup>30</sup> The strategic priorities are directly aligned to the statutory functions of the Commissioner as established in [Section 2\(3\)](#) of the Scottish Biometrics Commissioner Act 2020.

In 2022 the Commissioner’s office completed its first operational cycle.

**Figure 2** below identifies the objectives, priorities, and envisaged outputs for 2022/23.<sup>31</sup>

| Our four strategic objectives and priorities  | How our priorities will be achieved   |
|---|---|
| <p><b>1</b> Keep under review and report on the law, policy, and practice relating to the acquisition, retention, use, and destruction of biometric data for criminal justice and police purposes in Scotland.</p> <p><b>Note on output 2:</b> (With reference to previous IAG recommendations in Scotland and <i>Gaughran v. United Kingdom</i> on DNA, fingerprint, and photograph retention – new ECtHR ruling on 13 February 2020 on indefinite retention).</p> | <p>1. Conduct a review of policy and practice in relation to the acquisition, retention, use, and destruction of biometric data relating to children, young people, and vulnerable adults. Assess impact of Age of Criminal Responsibility (Scotland) Act 2019 relative to biometric data.</p> <p><b>Output 1:</b> Thematic report on biometric data relating to children to the Scottish Parliament (March 2023).</p> <p><b>Output 2:</b> Thematic report on biometric data relating to vulnerable adults to the Scottish Parliament (March 2023).</p> <p>2. Review rules of permissible retention as prescribed in Scottish law.</p> <p><b>Output 3:</b> Commence review of laws of retention in Scotland (report in October 2024).</p> |
| <p><b>2</b> Promote public awareness and understanding of criminal justice and policing sector powers and duties in relation to biometric data, how these powers are exercised, and how the exercise of these powers can be monitored or challenged.</p>  | <p>Ongoing public and stakeholder engagement and the provision of capacity building materials through the website of the Scottish Biometrics Commissioner. Maintain complaints procedure in parallel with Code of Practice. Conduct investigations into any complaints received from data subjects.</p> <p><b>Output 4:</b> Maintain complaints mechanism and publish Commissioner’s determination in event of any individual breach of the Code of Practice.</p>   |

<sup>31</sup> To ensure accountability and meet our 4 strategic objectives and priorities, we have developed a set of key performance indicators (KPIs), which are explained and further developed in our 2022/23 Annual Report & Accounts.

| Our four strategic objectives and priorities   | How our priorities will be achieved   |
|--|---|
| <p><b>3</b> Develop, publish, promote, and assess compliance with a statutory Code of Practice on the acquisition, retention, use, and destruction of biometric data for criminal justice and police purposes in Scotland.</p> | <p>Maintain statutory substructure and compliance framework through a Code of Practice approved by the Parliament and Scottish Ministers through regulations, which balance ethical public interest considerations with democratic freedoms and the privacy and human rights of data subjects.</p> <p><b>Output 5:</b> ongoing review of contents of Code of Practice.</p>  |
| <p><b>4</b> Provide reports to the Scottish Parliament on the outcomes from the use of biometric data and technologies and highlight key issues to inform public debate, thus strengthening democratic accountability.</p>     | <p>Maintain Advisory Group to enhance capacity and capability. Use networks and information gathering techniques and analysis to identify key issues. Identify potential research opportunities in Scotland, and opportunities for knowledge exchange with other UK jurisdictions and internationally.</p> <p><b>Output 6:</b> Commissioner’s 2nd Annual Report to Parliament (October 2023).</p> <p><b>Output 7:</b> Publication of Annual Accounts for 2022/23 (November 2023).</p> |

# Review of Activity

## Strategic Priority 1

### Keep under review law, policy and practice

#### Assurance Reviews on the Use of Biometrics

Between October 2022 and March 2023 our office developed and published two thematic assurance reviews on Children and Vulnerable Adults. For the joint assurance review of the acquisition of biometric data from children arrested in Scotland, we worked jointly with the Scottish Police Authority and with the Children & Young People’s Centre for Justice. The review was structured in three parts:

- Review of the current law and policy, including international standards.
- Evidence gathering from data volumes for the year, interviews with both police officers in custody settings and forensic services as well as a series of roundtable discussions with children.
- Recommendations.

Our second assurance review focused on the acquisition of biometric data from vulnerable persons in police custody we worked jointly with the Scottish Police Authority. The review focused on the policies, procedures, and safeguarding arrangements in place for vulnerable persons in police custody, who have been recorded on the Police Scotland Custody System vulnerability assessment page as requiring the support of an appropriate adult. The assurance activity included a review of all pertinent policies and procedures relating to biometric data, a questionnaire for custody staff, a data return provided by Police Scotland on volumes of biometric data acquired for the calendar year, and strategic discussions with partner agencies.

These reports both concluded that the overall strategic approach to working in partnership to safeguard children and vulnerable adults who find themselves in police custody and have biometric data captured is strong. We also identified opportunities for Police Scotland to take steps to improve such processes, so we included three common recommendations directed towards Police Scotland with a further specific fourth recommendation within the Children’s report. In accordance with Section 21(2) of the Act, the Commissioner imposed a requirement for Police Scotland to provide a written statement by no later than 30 June 2023, setting out what it proposes to do in response to the recommendations, or if Police Scotland does not intend to implement the recommendations (in full or in part), the reasons for that.





## Strategic Priority 2

### Promote public understanding and awareness

We developed a number of tools and capacity building materials, which are available on our [website](#), aimed to promote greater understanding and awareness of the use of biometrics within criminal justice. These include:

#### **Public Attitudes Views on the Police Use of Biometrics**

As there was little existing Scotland and UK-wide research on the topic to draw upon, the Scottish Biometrics Commissioner sought to obtain a better understanding of people’s views on the police use of biometrics in Scotland. In collaboration with ScotCen Social Research, we examined peoples’ attitudes to both help build a layered understanding of people’s opinions on biometrics and inform our future engagement with stakeholders. The result from this research project suggested important levels of public confidence in the use of biometric data and technologies for policing and criminal justice purposes in Scotland. It was also a useful research study for setting a robust baseline measure with the potential to assess change over time.

#### **A Guide to Biometrics**

The purpose of this short guide was to assist members of the public to understand the main types of biometric data that is acquired, used, retained, and destroyed for policing and criminal justice purposes in Scotland. This guide is useful to identify the different types of biometric data captured by the police and why, how and when biometric data is taken. The guide is aimed at a diverse audience, including academics, policy makers, the Scottish and wider UK populations.



#### **A Video Animation Explaining Biometrics**

As we are aware this is a technical and complex area, and with the aim of reaching a wider audience, including young audiences and people with disabilities, we commissioned an animation video explaining what biometrics and the role of the Scottish Biometrics Commissioner is.

### Further Stakeholder Engagement

During 2022/23 the Commissioner and his office met regularly with key stakeholders to promote, discuss, and reflect biometric data related issues. We regularly participated in the UK Forensic Information Databases Strategy Board and Police Scotland's Biometrics Oversight Board meetings throughout the year. We engaged and supported the work of external expert groups such as the Independent Advisory Group on New and Emerging Technologies, which reported to the Scottish Government, the work of the Scottish AI Alliance in their development of its Playbook and the Scottish Government Digital Identity Program's public engagement phase.

We supported the UN Human Rights Council in its Universal Periodic Review of the UK by providing evidence on progress made in Scotland in the area of biometrics and criminal justice since their last review. We participated in the Digital Justice & Policing Scotland Conference and engaged with the academic community, including delivering the annual lecture for the Centre for Research into Information, Surveillance and Privacy (CRISP) at the University of Stirling.

The Commissioner met with public bodies, including the Chief Inspector of Prisons, the Chief Executive of the Scottish Prison Service, the ICO, the Biometrics Commissioner for England and Wales and Community Justice Scotland. He visited the Cabinet Secretary for Justice at the Parliament to discuss the Code of Practice and the expansion of his mandate. The Commissioner also attended a Motorola demonstration on biometric capabilities within the Pronto PDA solution used by police officers throughout Scotland and was invited by Hikvision to discuss their Scottish operations.

Early this year, there were also calls at both the Scottish and UK governments to undertake a comprehensive investigation into the reach of Chinese public space surveillance in Scotland.<sup>32</sup> While the Commissioner clarified that non-police public space surveillance did not fall within his statutory remit and Scotland did not have a coherent public space surveillance strategy, he encouraged the Scottish Government as part of its promised review, to give serious thought to a public space surveillance Code of Practice that included human rights and ethical considerations.<sup>33</sup>



<sup>32</sup> See <https://www.parliament.scot/chamber-and-committees/votes-and-motions/S6M-07832>

<sup>33</sup> All of this to ensure that procurement processes and ethical supply chains similarly come under an independent oversight regime in Scotland. See Commissioners' statement on biometric enabled public space surveillance in Scotland | Scottish Biometrics Commissioner at <https://www.biometricscommissioner.scot/news/commissioners-statement-on-biometric-enabled-public-space-surveillance-in-scotland/>

## Strategic Priority 3

### Develop, publish and promote a statutory Code of Practice

We developed and published a Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes in Scotland in accordance with the provisions of Section 7 of the Act. This Code seeks to promote good practice, transparency, and accountability by setting out an agreed framework of standards for professional decision-making 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.

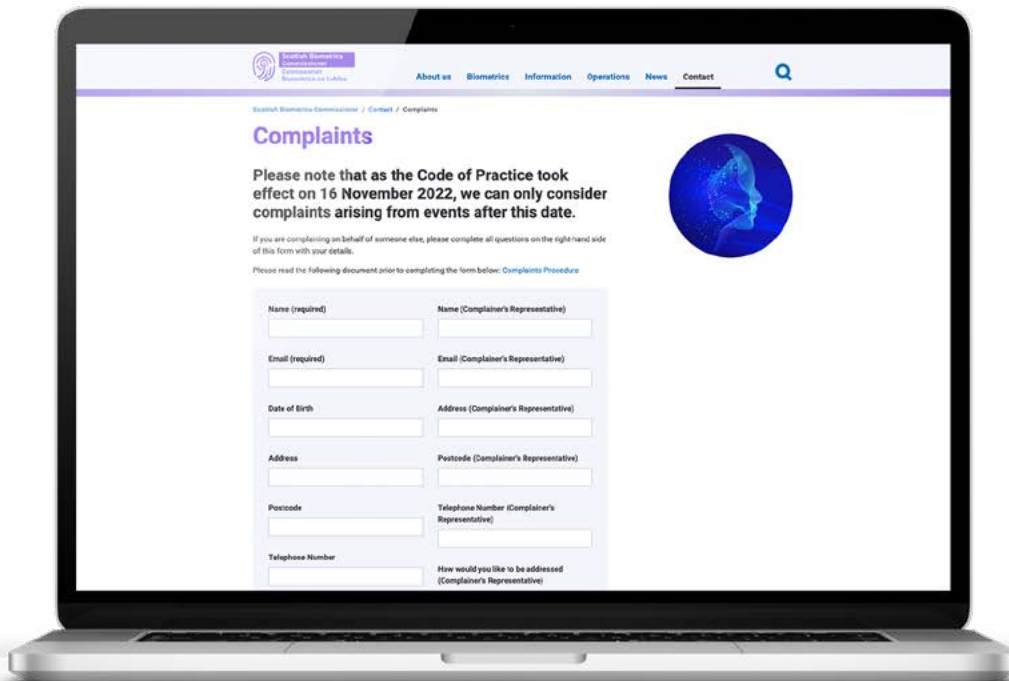
The Code of Practice was developed following extensive and ongoing consultation and is structured around 12 Guiding Principles and Ethical Considerations to which Police Scotland, the SPA, and PIRC must adhere to when acquiring, retaining, using, or destroying biometric data for criminal justice and policing purposes in Scotland. The Code is designed into 8 parts.

Parts 1 to 4 of the statutory Code of Practice contain introductory background information on biometric data and technologies in a policing and criminal justice context. Part 5 of the Code should also be read in conjunction with Appendix 'A' which contains an assessment framework of 42 quality indicators for biometric data outcomes. These sections also serve as a self-assessment checklist for the bodies to whom this Code of Practice applies in terms of supporting their own distinct internal governance arrangements. Part 6 is forward looking and outlines the considerations and recommended process for adopting future biometric technologies or new applications of existing technologies. Parts 7 and 8 describe the arrangements set out to monitor and report on the Code, including where necessary the issuing of compliance notices. The Code of Practice was approved (without amendments) and came into effect on the 16 November 2022.



The Commissioner also developed and published a [complaints procedure](#) for failures to comply with the Code of Practice in accordance with [Section 15](#) of the Act. The procedure was amply consulted before adoption. This procedure explains how and under what circumstances a person may complain to us, how we will investigate a complaint, the juristic status of the Commissioner in relation to the investigation and determination of such matters, and the powers in relation to ensuring compliance with the Code of Practice. An individual can complain to us, if Police Scotland, SPA or PIRC hold their personal biometric data, and when the individual believes there is a breach of the Code of Practice.

Both conditions should exist before the Commissioner may consider a complaint. If there has been a breach of the Code of Practice, the Commissioner must prepare and publish a report about that failure unless the Commissioner considers that it is sufficiently minor not to merit it. The Commissioner may also serve a compliance notice on the body concerned if considered appropriate. Any failure to subsequently comply with such a notice may be reported by the Commissioner to the Court of Session. A person can complain to us in writing, by telephone, by email, or via a [proforma](#) on our website.



## Strategic Priority 4

### Provide reports to the Scottish Parliament

In addition to the reports presented to the Parliament on children and vulnerable adults, our first Annual Report & Accounts was laid before Parliament in October 2022. The report described our performance in successfully delivering the new function of the Scottish Biometrics Commissioner's office from the ground up both on time and under budget. Three recommendations were made in this report:

#### Recommendation 1

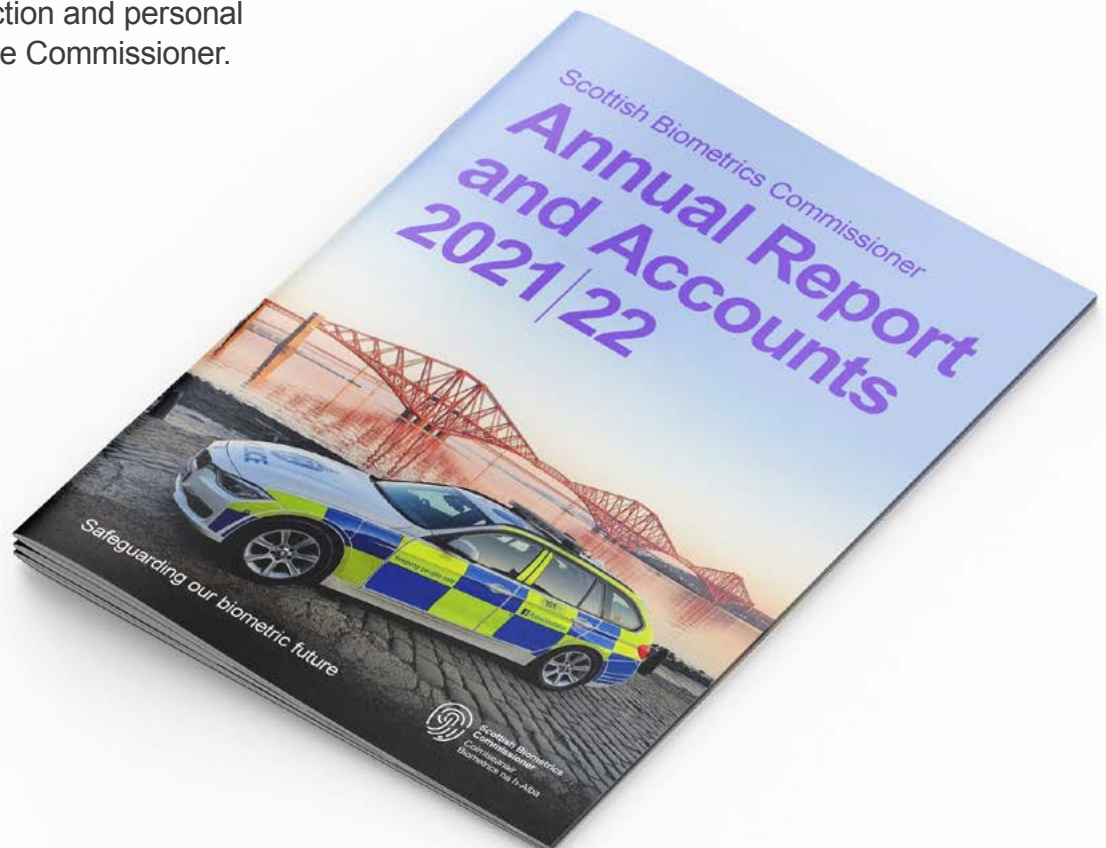
Scottish Government should progress a legal resolution to realign the provisions of Section 28 (period of Strategic Plan) and Section 29 (budget period) of the Act in line with the original policy intention of the founding legislation.

#### Recommendation 2

If proceeding to implement any future expansion of the functions of the Scottish Biometrics Commissioner beyond Police Scotland, the SPA and the PIRC, Scottish Government and the Scottish Parliamentary Corporate Body should firstly consult with the Commissioner prior to producing a comprehensive business assessment of the likely impact on both the established function and personal responsibilities of the Commissioner.

#### Recommendation 3

In contributing biometric or forensic data to UK policing systems, Police Scotland and the SPA should ensure they have the functionality to administer and maintain that Scottish data in compliance with Scottish legislation and any Codes of Practice in terms of its use.



# Biometrics Trends and the Future

*“Machines will be capable, within twenty years, of doing any work that a man can do.”*<sup>34</sup>

**Herbert A. Simon, 1960**

AI pioneer and Nobel Memorial Prize in Economics.

Biometric capability is expanding to include technologies that measure not only a part of the human body but conduct behavioural analysis and prediction. Behavioural analysis technologies are often powered by AI algorithms and rely on a wide range of personal and biometric data to perform their purported functions.<sup>35</sup> The propagation of biometric technologies also means that the information law enforcement can now know and record about a person has enlarged exponentially. In theory, biometric capability could revolutionise the investigation and prevention of crime. In practice, the way that technology is used could put at risk the model of policing ‘by consent’ on which we rely.

The continuing advances in biometric technology and AI will ensure that modern police forces enjoy enhanced efficiency. However, these will not always be adopted without controversy. In Scotland, Policing 2026, the 10 year strategy for policing includes the introduction of a number of new technologies for use by police officers, such as embedded body-worn video cameras, smart devices which can access and download images from a local authority app, mobile devices, and the use of facial recognition technology.

Facial recognition, as mentioned in chapter one, has attracted much criticism due to inaccuracies<sup>36</sup> and evidence of discrimination.<sup>37</sup> So far Police Scotland has resisted experimentation in this space.<sup>38</sup> In 2020, Police Scotland confirmed to the Scottish Parliament that it had no plans to introduce live facial recognition technology in Scotland.

<sup>34</sup> In *The New Science of Management Decision* by Herbert A. Simon (Professor of Administration, Graduate School of Industrial Administration, Carnegie Institute of Technology), 1960.

<sup>35</sup> The ICO, however, has warned the algorithms are currently unable to effectively detect emotional cues. For a further discussion see: ‘ICO warns against using biometrics for ‘emotional analysis,’ Oct. 2022, available at: <https://www.computerweekly.com/news/252526548/ICO-warns-against-using-biometrics-for-emotional-analysis>

<sup>36</sup> The accuracy of the estimation and reliability are affected by a number of internal and external factors including database population and environmental factors such as the positioning of equipment relative to bright lights.

<sup>37</sup> ‘AI in policing and security’, Parliament Office of Science and Technology (POST), UK Parliament, 29 April, 2021, available at <https://post.parliament.uk/ai-in-policing-and-security/#:~:text=There%20are%20concerns%20that%20facial%20recognition%20algorithms%20may,risk%20enhancing%20public%20fears%20about%20surveillance%20and%20privacy>. The EU AI Act also proposes a full-on ban on facial recognition in public spaces.

<sup>38</sup> Police Scotland confirmed during the inquiry of the Justice Sub-Committee on Policing on Facial Recognition that ‘it has no intention to introduce the use of live facial recognition at this time.’ See: report by the Committee at <https://sp-bpr-en-prod-cdneq.azureedge.net/published/JSP/2021/3/18/b8a4803a-6f9a-4a77-9ff0-3d75251934c1-1/JSPS0521R01.pdf>, see also: Facial recognition: ‘No justification’ for Police Scotland to use technology - BBC News at <https://www.bbc.co.uk/news/uk-scotland-51449166>

There are limited circumstances where Police Scotland may wish to consider deploying live facial recognition in future as such technologies improve. For example, in situations where intelligence suggest a very high risk to public safety or security from known individuals, in cases of child abduction involving a threat to life, or when the technology offers the potential to mitigate a serious risk to public safety that cannot otherwise be achieved through conventional policing techniques alone. There are also mounting questions around how personal data retained from new technologies will be protected, and whether highly personal information should be included in aggregated databases beyond Scotland.<sup>39</sup>

The extent to which the public will tolerate new biometric technologies will depend largely on whether there are independent mechanisms in place to make sure they are used responsibly. This means that they are compliant with the law, are scientifically validated and their deployment meets the strict necessary and proportionality tests. Whilst we continue to support Police Scotland, SPA and PIRC in using emerging technologies to keep our communities safe, any deployment of modern technologies should include advance public consultation and democratic oversight. Part 6 of our Code of Practice outlines the considerations and recommended process for adopting future biometric technologies and new applications of existing technologies, see also Appendix D.

In a wider societal context the increased biometric capability is also raising key ethical and legal questions about public-private partnerships. In the public context, governments often rely on private contractors to design and develop new technologies. The vast majority of biometric capability is privately owned and accessed under contractual arrangements between public and the private sectors. However, current partnerships seem to be failing in recognising ethical values and ensuring that the technology is fully functional, accountable and backed by science from inception. Partnerships between the private and public sectors are an area to monitor as they are critical to the lawful, proportionate, and accountable use of biometrics in Scotland.

Future events are necessarily uncertain, but given the current and potential increase on biometric capability (by law enforcement bodies), there is a pressing need for:

- Greater dialogue and transparency to build public trust and confidence.
- Better regulation to upgrade and close exiting gaps in the law, for example on retention periods and addressing the lack of legal basis for images.
- Ensuring that Police Scotland has the functionality to administer and maintain Scottish data in compliance with Scottish law and our Code of Practice.
- Extension of the role of the Scottish Biometrics Commissioner beyond Police Scotland, SPA and PIRC to cover, at a minimum, other areas of criminal justice - such as prisons to ensure the acquisition of biometric data without consent benefits from independent oversight.

<sup>39</sup> For example, in DESC and PRUM databases, which is the international framework that enables the UK to share DNA and fingerprint with the EU.

Looking to the future of law and policy, there is an opportunity for Scottish Ministers to ensure that an interconnected criminal justice ecosystem, where biometric data is used by a range of other actors including prisons and DESC, has a proper legislative framework and democratic oversight. There are opportunities also to provide independent oversight over public space CCTV surveillance cameras and other public space biometrics capture technologies that operate independently of policing in Scotland. As biometric capability to collect and compare more biometric information from more sources and speed increases, the greater the need becomes for democratic accountability to instil public confidence in these capabilities. These opportunities are closely related to the potential expansion of the remit of the Scottish Biometrics Commissioner should Ministers so determine.

In terms of practice, for 2023/24 we have specifically considered 'images and photographs' for our thematic assurance review. This is an area that requires further scrutiny due to legislative silence on acquisition and the plethora of images retained in various places and databases in the country. This review will provide, for first time, a baseline study to determine the current situation for images and photographs in Scotland for policing and criminal justice. In addition, we will be assisting a review of the laws of retention that guarantee compatibility with the European Convention of Human Rights, the Data Protection Act 2018, and our Code of Practice.

Over the coming months we will also conduct a compliance assessment to ensure Police Scotland, SPA and PIRC are observing our Code of Practice. We will follow up on progress against our previous recommendations and continue to engage with stakeholders nationally and internationally. It may be noted that there are still unknown variables in our operation, which will be clearer next year, such as the potential volume of complaints about breaches of the Code of Practice, and a potential extension of the Commissioner's powers to include UK-wide policing bodies operating in Scotland under Section 104 of the Scotland Act 1998.



# Our Advisory Group

This is the second year since the Advisory Group was first convened (virtually) on 19 July 2021. Over those two years we had productive discussions on biometric related areas, including on our Strategic Plans; Code of Practice; National Assessment Framework; thematic reviews; complaints process and a range of other matters. I am therefore extraordinarily grateful to our independent chair and members for their ongoing support and encouragement. The full minutes, agendas for the eight meetings, and actions arising from these meetings can be found on our [website](#).

## **Section 33 of the Act**

The Commissioner is required to establish and maintain an Advisory Group. While the Advisory Group does not form part of our internal governance arrangements, it provides advice and information to the Commissioner about matters relating to the Commissioner's functions. The Commissioner determines the members of the group, subject to the approval of the Parliamentary Corporation as to the number of members, the persons to be appointed, and any remuneration or expenses. The terms of reference for the Advisory Group can be viewed on our [website](#).

## The Advisory Group members are:



- **Professor Derek Penman QPM**  
(Independent Chair)  
International Policing Consultant,  
former Chief Police Officer  
& Chief Inspector of Constabulary
- **Director of Forensic Services**  
Scottish Police Authority Forensic Service
- **Professor John McNeill**  
Independent member and former PIRC  
Commissioner
- **HM Chief Inspector of  
Constabulary in Scotland**  
HMICS
- **Professor Shannon Vallor**  
Baillie Gifford chair in the Ethics of Data and  
Artificial Intelligence at the Edinburgh Futures  
Institute (EFI) at University of Edinburgh
- **Professor Fraser Sampson**  
Biometrics & Surveillance Camera  
Commissioner (E & W)
- **Detective Chief Superintendent**  
Police Scotland – Major Crime  
and Public Protection
- **Director of Investigations**  
Police Investigations & Review Commissioner  
(PIRC)
- **Procurator Fiscal**  
Crown Office and Procurator Fiscal Service  
(COPFS)
- **Head of ICO Regions**  
Information Commissioners Office (ICO)
- **Dr Genevieve Lennon**  
Chancellor's Fellow, University of Strathclyde
- **Chief Data Officer**  
Police Scotland
- **Head of Policy**  
Children & Young Peoples Commissioner  
for Scotland
- **Head of Data Governance**  
Police Scotland
- **Operations Manager  
& Corporate Services Manager**  
Scottish Biometrics Commissioner
- **Biometrics Policy Lead**  
Scottish Human Rights Commission
- **Head of Change and Operational Scrutiny**  
Scottish Police Authority



Safeguarding our biometric future



Scottish Biometrics  
Commissioner  
Coimiseanair  
Biometrics na h-Alba