

# Is Scotland 'sleepwalking' towards its place within a UK surveillance state in 2024?

## New Year opinion piece

**Dr Brian Plastow, Scottish Biometrics Commissioner.**

### Abstract

In this short opinion piece, I discuss the process of democratic backsliding to highlight a worrying pattern of decreasing democracy in the UK. In doing so I engage with the recurring theme of disempowerment, including of independent oversight of the police use of biometrics in England and Wales. I also pose the question of whether Scotland may be sleepwalking towards its place within a UK surveillance state during 2024 due to the seeds already sown by the UK Government in both the Data Protection and Digital Information Bill, and the Criminal Justice Bill. In closing, I advocate an alternative direction for Scotland where independent checks and balances over biometrics and biometric enabled surveillance are strengthened rather than weakened to enhance public confidence and trust.

### Introduction to democratic backsliding

Democratic backsliding is recognised internationally as the process whereby nation states gradually become less democratic over time. It tends to manifest through increasing concentration of power in the hands of the state, and the parallel erosion of devolved powers, and of political and constitutional norms.<sup>1</sup>

Democratic backsliding involves a state intentionally removing independent checks and balances on the exercise of its power such as:

1. Breakdown in the norms of political behaviour and standards.
2. Disempowerment of the legislature, the courts, and independent regulators.
3. The reduction of civil liberties and press freedoms; and/or
4. Harm to the integrity of the electoral system

In this short opinion piece, I engage with the first three of these themes to consider whether the UK Government is surreptitiously creating the enabling conditions for enhanced UK-wide police surveillance of law-abiding citizens and, whether through failure to effectively recognise such sophistry and stealth, Scotland may be sleepwalking towards its place within a UK surveillance state.

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<sup>1</sup> [What is Democratic Backsliding, and is the UK at risk? Russell M, Renwick A, and James L, The Constitutional Unit Briefing, University College London, July 2022.](#)

## Stage 1: Breakdown in the norms of political behaviour and standards

We are currently living through a period of intense moral panic.<sup>2</sup> 'Moral panic' is a situation in which the government (and its politically aligned media) create a folk devil of a particular social group(s). This is normally combined with a political rhetoric and ideology intended to encourage likeminded sections of the public to demand the authorities to do something about the societal issue of concern.

This expression of concern is described as a moral panic because it is based on an outraged sense of offense. However, the information which prompts it is often limited, false, or inaccurate. 'Folk devils' refers to a group whose common interest or activity has become stigmatised by politicians, the media, or society as a 'problem' that requires to be 'controlled.'

One such example is the current moral panic around 'legal' net migration which hit a record 745,000 last year despite years of political pledges to cut the numbers.<sup>3</sup> The result is political angst amongst those of a particular political persuasion who still view legal immigration as a problem that requires to be controlled.<sup>4</sup> Many of those subscribing to this ideology had previously prophesied 'new freedoms' and 'taking back control of our borders' as utopia, without having the foresight to realise that inside every utopia is a dystopia striving to get out.<sup>5</sup> The lesson from other parts of the globe is that ideological plans to bring established human freedoms under the control of the state regress inevitably into regimentation, compulsion, and a breakdown in the conventional norms of political behaviour and standards.<sup>6</sup>

In a policing context, the conventional norms and standards of UK Government behaviour have witnessed significant backsliding. For example, in November 2023, when the then Home Secretary accused the Metropolitan Police of 'bias' in their handling of pro-Palestinian (anti-war) protests. Government ministers attacking the police for allowing citizens to exercise their rights of freedom of expression, and freedom of assembly should worry us all. These are rights which are protected under articles 10 and 11 of the European convention on human rights and which are incorporated into domestic British law by the 1998 Human Rights Act.<sup>7</sup> This caused Chief Constable Gavin Stephens, the National Police Chiefs' Council (NPCC) chair to remind politicians that UK police chiefs must be able to operate independently in the exercise of their functions without political interference.<sup>8</sup>

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<sup>2</sup> Folk Devils and Moral Panics, Cohen, S., 1972, Routledge, London.

<sup>3</sup> [Sunak under pressure as net migration to UK hits record 745,000, Financial Times, November 2023.](#)

<sup>4</sup> [EU Exit, taking back control of our borders, money and law while protecting our economy, security and Union, HM Government, November 2018.](#)

<sup>5</sup> Inside Every Utopia Is a Dystopia, Crowley J., Boston Review, April 2017.

<sup>6</sup> *Ibid.*

<sup>7</sup> [Met police chief defies calls to ban pro-Palestine Armistice Day march in London, The Guardian, 7 November 2023.](#)

<sup>8</sup> [Police must remain independent of politics, NPCC chair says, BBC, 10 November 2023.](#)

Therefore, the breakdown in the norms of political behaviour and standards can be witnessed in the demonisation of legal migration (and migrants), through political interference in the independence of the police, and are epitomised by the former Home Secretary Suella Braverman vilifying homeless people by claiming that rough sleeping was simply a lifestyle choice.<sup>9</sup>

Rather than accept its own culpability for a series of political failings, including a weakened economy, we are in my view living through a period where the UK Government now casts certain groups of citizens and certain institutions as a 'problem' that requires to be controlled.

## **Stage 2: Disempowerment of the legislature, the courts, and independent regulators**

The second condition of backsliding by the state is the disempowerment of the legislature, the courts, and independent regulators.

The Parliament of the United Kingdom of Great Britain and Northern Ireland is the supreme legislative body of the UK and may also legislate for the Crown Dependencies and the British Overseas Territories. 'Devolution' is the term used to describe the process of transferring power from the centre (Westminster) to the nations and regions of the UK. The UK system of devolution is asymmetric, in that different forms of devolution and varying degrees of power are transferred to Scotland, Wales, and Northern Ireland.<sup>10</sup>

### **Disempowerment of the legislature**

There have been two notable examples of disempowerment of the Scottish legislature worthy of mention. The first is the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill which was blocked by the UK Government shortly after being passed by Scottish ministers in 2021. The Bill sought to enshrine the rights of children as outlined in the UNCRC (including the right to food in a poverty crisis) into Scottish law, making them legally binding. The Bill was blocked from becoming an Act after the UK Government successfully challenged it in court for going beyond the powers of the Scottish Parliament.

The second was the unprecedented use of Section 35 of the Scotland Act 1998 by the UK Government to veto the Gender Recognition (Reform) Scotland Bill. In both cases, the UK Government successfully argued that matters approved by the Scottish Parliament could have an adverse effect on reserved matters.

In both examples however, it is important to remember that the respective Court judgements did not rule that there was anything wrong with the policy objectives sought by the Scottish Parliament, but rather that the practical implementation could

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<sup>9</sup> [Braverman claims rough sleeping is a 'lifestyle choice' amidst plans to crack down on street tents, ITV News, 4 November 2023.](#)

<sup>10</sup> [Parliament's authority, UK parliament, accessed 26 December 2023.](#)

conflict with wider reserved considerations. Therefore, in these examples the UK Government has determined that the institution of the Scottish Parliament requires to be 'controlled' for exceeding its authority.

The UNCRC Bill has since been brought back to Holyrood for amendment to ensure that it is competent as Scottish ministers accused the UK Government of blocking the democratic will of our Parliament.<sup>11</sup> The revised Bill was again passed by the Scottish Parliament in December 2023.

### **Disempowerment of the courts**

Perhaps the most prominent example of disempowerment of the courts is the UK Government desire to 'offshore' asylum seekers by sending them on a 4000-mile flight to the landlocked Central African Republic of Rwanda despite the UK Supreme Court upholding the earlier Court of Appeal ruling in *AAA v Secretary of State for the Home Department* [2023] EWCA Civ 745 that the UK Government's policy is unlawful.

In defiance of the UK Supreme Court determining that Rwanda is not a safe country, the UK Government decided to navigate an alternative path around the most prominent legal minds in the UK and almost immediately introduced a new Bill, to enable the Westminster Parliament to unilaterally declare that Rwanda is a safe country and at the same time including provisions for UK ministers to disregard sections of the Human Rights Act.<sup>12</sup>

It has also been widely reported that hardliners want the UK government to go even further in subsequent stages of the Bill to make legislative provision for UK ministers to ignore asylum rulings by both domestic judges and the European Court of Human Rights in support of its 'Stop the Boats' strategy.<sup>13</sup>

### **Disempowerment of independent regulators**

In 2012, the UK Government introduced the Protection of Freedoms Act (PoFA). Amongst other things, PoFA introduced a Commissioner for the Retention and Use of Biometric Material (CRUBM) for England and Wales.

The CRUBM was assigned limited statutory powers in relation to the retention of fingerprints and DNA (not images) by the police in England and Wales. The CRUBM was also assigned a quasi-judicial function to oversee where fingerprints and DNA were retained (from non-convicted persons) as part of a National Security Determination, including any made in Scotland by the Chief Constable under section 18G of the Criminal Procedure (Scotland) Act 1995.

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<sup>11</sup> [UNCRC Bill brought back to Holyrood as Scottish ministers accuse UK Government of 'blocking' democratic will, Holyrood Magazine, 27 June 2023.](#)

<sup>12</sup> [Safety of Rwanda \(Asylum and Immigration\) Bill, 7 December 2023.](#)

<sup>13</sup> [What is the new Rwanda plan and why is it controversial? Sky News, 17 December 2023.](#)

At the same time, PoFA introduced a Surveillance Camera Commissioner for England and Wales to provide for a code of practice in relation to public space surveillance camera systems. In 2021, both posts were combined under a single postholder known as the Biometrics and Surveillance Camera Commissioner for England and Wales.

Over the years, the CRUBM has highlighted various issues of concern about the use of biometric material by the police in England in Wales. In 2015, the first commissioner, the late Alastair MacGregor QC highlighted that the police in England and Wales had been uploading tens of thousands of images of innocent people to the UK Police National Database (PND).<sup>14</sup> This was despite an earlier court ruling that retaining such images was unlawful.<sup>15</sup> The commissioner also expressed concerns about the reliability of the retrospective facial search technology being applied to those images at that time.

In 2019, the second commissioner Professor Paul Wiles highlighted concerns about the risk of the UK Government 'abusing' biometric databases.<sup>16</sup> This followed the National Police Chief's Council (NPCC) revealing to the commissioner that the UK Government had given the MoD access to the police national fingerprint database (IDENT1) without the knowledge or consent of the police. The MoD had gained access through the Home Office to seek to identify deceased combatants in the Middle East who may have been UK citizens.

In 2023, the third commissioner Professor Fraser Sampson highlighted problems with police effectiveness and efficiency and noted that the police in England and Wales had lost or compromised more than 1,500 DNA samples which was a 23% increase in sampling errors from the previous year.<sup>17</sup> In 2021, he also highlighted the need for independent oversight of the effectiveness of public space surveillance systems to protect human rights and prevent profound injustices by the UK state.<sup>18</sup>

This small selection of examples highlights the importance of independent oversight in terms of ensuring that biometric databases and technologies deployed for policing, criminal justice, and public safety purposes are lawful, effective, efficient, and ethical. Whilst the role of independent regulators is primarily to support and promote, sometimes it also requires uncomfortable truths to be exposed even when those truths may not be politically expedient. One way to respond to such discomfort is through backsliding and disempowerment. In the case of independent oversight over biometrics and mass public space surveillance in England and Wales, this is exactly what the UK Government are in the process of doing.

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<sup>14</sup> ['Innocent people' on police photos database, BBC, 3 February 2015.](#)

<sup>15</sup> *S and Marper v United Kingdom* [2008] ECHR 1581

<sup>16</sup> [Clear risks of government 'abusing' biometric databases, says the Commissioner, Sky News, 27 June 2019.](#)

<sup>17</sup> [Police in England and Wales botch more than 1,500 DNA samples, The Guardian, 9 February 2023.](#)

<sup>18</sup> [Post Office Horizon scandal shows why its folly to say 'If you've done nothing wrong you've nothing to worry about' says surveillance camera Commissioner Fraser Sampson, Yorkshire Post, 28 May 2021.](#)

## Data Protection and Digital Information Bill

At the time of writing, the Data Protection and Digital Information Bill is at the Committee Stage in the House of Lords having passed its third reading in the House of Commons. Amongst other things, the Bill will abolish the role of the Biometrics Commissioner for England and Wales and the Surveillance Camera Commissioner for England and Wales. The rationale for doing so is not properly explained, however the policy intention is to 'simplify' oversight regimes and seems predicated on the erroneous assumption that the police use of biometrics and biometric enabled surveillance is simply a question of ensuring that such data is protected.

Consequently, the Bill assumes that questions of the lawfulness of the acquisition, retention, use, and destruction of biometric data by the police in England and Wales under domestic criminal procedure law, and related questions of the effective, efficient, and ethical use of that data is no longer important enough to benefit from independent oversight.

On 19 November 2021, I wrote a [joint letter](#) with the Commissioner for England and Wales about the Bill as it was presented at that stage. In that submission, we opined that the UK Government determining that the police use of biometrics is simply another manifestation of data protection and ought logically to sit with the UK Information Commissioner (ICO) was entirely misplaced.

On 11 May 2023, I again highlighted my concerns by writing a [letter](#) to Carol Monaghan MP, Glasgow North East in her capacity as a Scottish MP on the House of Commons Committee considering the Bill. In that letter, I highlighted that if the Biometrics Commissioner role is abolished in England and Wales, then except on matters specifically relating to the Data Protection Act 2018, the police in England and Wales will be given carte blanche to do whatever they like in the biometrics space whether that be the chilling effect of rolling out mass public space surveillance, or indeed transgressing any other ethical boundaries. I also advised that the police hold significant volumes of biometric data on deceased persons, yet DPA/GDPR only protects the living.

By October 2023, my concerns crystallised when it was widely [reported in the media](#) that the Minister of State for Crime, Policing and Fire announced that he plans to integrate the images of 45 million UK passport holders with 'Strategic Facial Matcher' which is the Home Office replacement for the UK Police National Database (PND). His intention is to allow the police to use facial recognition technology to compare images from volume crime scenes such as shoplifting by bulk washing those images against those of 45 million UK passport images. [My response](#) to this statement can be viewed on my website.

In this example of backsliding, the UK Government use the moral panic around retail crime as the 'problem' that requires to be 'controlled' solely through the panacea of facial recognition technology, and with no acknowledgment that the underlying



problem is at least in part fuelled by matters within the responsibility of government including a poverty crisis.<sup>19</sup>

It is also worth noting that the UK Government does not have a published strategy setting out the direction of travel for biometrics including the use of artificial intelligence in a policing and criminal justice context. The lack of an agreed definition of what even constitutes 'biometric data' in a policing context in England and Wales is also problematic.

In my view, the absence of a coherent strategy and oversight framework for England and Wales beyond DNA and fingerprints has facilitated a 'Biometric Wild West' where police forces are doing whatever they want in this space.<sup>20</sup> A good example is the increasing use of polygraph tests where it has been reported that fourteen forces in England and Wales conducted more than 700 'lie detector' tests on suspects, and as part of sex offender management processes during 2023.<sup>21</sup> This despite such devices having no clear legal basis in UK law, and not being subject to any independent scientific validation or accreditation, or indeed any independent oversight.<sup>22</sup>

### **Criminal Justice Bill**

By November 2023, the UK Government further revealed their hand by introducing the [Criminal Justice Bill](#). The policing minister, Chris Philp, made a first explicit reference to the unsaid purpose of the legislative change during a first committee sitting of MPs scrutinising the Bill on 12 December 2023.

Questioning Graeme Biggar, the director general of the National Crime Agency (NCA), Philp said: "*There is a power in clause 21 to allow police and law enforcement, including the NCA, to access driving licence records to do a facial recognition search, which, anomalously, is currently quite difficult*".<sup>23</sup>

Therefore, the stated intention of the UK Government (stage 3 of democratic backsliding) is the reduction of civil liberties by treating the fifty-five million holders of a UK photographic driving licence and the forty-five million holders of a UK passport as 'digital suspects' to be bulk washed through the apparatus of state surveillance by the police.

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<sup>19</sup> [Retail theft: The growing frontline threat in a cost-of-living crisis? IFSEC Insider, 6 June 2023.](#)

<sup>20</sup> DNA and Fingerprints fall within the oversight of the Biometrics Commissioner for England and Wales (until abolished) and are within the remit of the UK FINDS Strategy Board.

<sup>21</sup> UK police forces rapidly expanding use of controversial lie detector tests, i News, 31 December 2023.

<sup>22</sup> Polygraph procedures claim to measure physiological indicators such as blood pressure, pulse, respiration, and skin conductivity while a person is asked to answer a series of questions.

<sup>23</sup> [Police to be able to run facial recognition searches on 50 million driving licence holders, The Guardian, 20 December 2023.](#)

### Stage 3: The reduction of civil liberties

In a democracy, the citizens are supposed to have all the power, and government is supposed to be how citizens exercise that power. But when you have a surveillance state, the state has all the power and citizens have little.<sup>24</sup>

In the UK, there is a long and proud tradition of policing by consent. There is also a long and proud tradition of layers of independent oversight to strengthen police accountability. In the field of biometrics, the police have used images and fingerprints for more than one hundred years, and DNA for more than three decades. Both live and retrospective facial recognition are used in UK policing, although use of the former is restricted to a small number of forces in England and Wales. However, each technology compares probe images solely against a gallery of images (or watchlist) comprised solely of persons previously arrested by the police.

The police in the UK (including Scotland) already have the technological means to view a person's driving licence image when dealing with a road traffic matter through a DVLA interface on their personal digital assistant. In a specific enquiry, they can also request access to a UK passport image. However, none of this can be done in the form of a routine bulk wash of the images of innocent citizens against images derived from the scene of a minor crime. Doing so in my view would place citizens in a permanent police 'digital lineup' and would be a disproportionate breach of privacy.

A better approach would be for any such future capability to be restricted to the investigation of the most serious types of offending including matters of UK national security. Any bulk cross comparison of police and UK Passport Agency/DVLA images, given its covert and non-targeted nature, and the inevitability of significant collateral intrusion, should also require specific judicial authority (for example a warrant) or alternatively a specific surveillance authority under the Regulation of Investigatory Powers Act. This would ensure either judicial oversight and safeguards, or alternatively safeguards through the independent oversight of the Investigatory Powers Commissioner's Office (IPCO).

The Home Office has suggested that there are no current plans to allow the police automatic access to UK passport and UK driving licence images for facial recognition purposes. However, this assurance is directly contradicted by public statements made by the Minister of State for Crime, Policing and Fire. The Home Office also has a history of introducing technologies without public announcement or consultation. The introduction of the Facial Search capability within the UK Police National Database being just one such example. Accordingly, any such assurances should be viewed with caution.

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<sup>24</sup> How America's Surveillance State Breeds Conformity and Fear, speech by Glenn Greenwald, delivered at Socialism 2012 Conference, Chicago, July 04, 2012.



Through sophistry and stealth, we may be rapidly approaching an age of little or no privacy, where law abiding citizens including the holders of a UK passport or UK photographic driving licence may always be open to intrusive and unnecessary surveillance by the state. Those who may not care about such developments because they 'have nothing to hide' are missing the point completely.

In George Orwell's dystopian novel 1984, traditional law enforcement is replaced by the 'Thought Police' or 'Thinkpol'. They use surveillance via the telescreens and offender profiling to monitor the populace. However, in "1984" Big Brother did not have enough police to watch all the surveillance cameras all the time. However, in 2024, powerful artificial intelligence (AI) in the hands of the police may soon mean that AI can watch all the surveillance product all the time. Just like the award winning 2022 film highlighting the interconnectedness between different dimensions and the blurring in the boundaries between them, biometric enabled surveillance by the UK state may soon be 'Everything Everywhere All at Once'.<sup>25</sup>

On 01 January 2024, it was reported in The Times that millions of foreign travellers may soon be able to enter the UK without a passport because new electronic gates will use facial recognition alone to process arrivals.<sup>26</sup> Such technology is currently used in airports in Dubai and Australia under limited circumstances. The 'intelligent border' plan is almost certainly part of a wider undisclosed strategy by the UK Government to exploit the current moral panic around border security to encourage, and in time compel, the enrolment of all our faces into a *de facto* digital national identity card surveillance system. It should also be noted that the police (including in Scotland) already have automated access to the Immigration and Asylum Database (IABS) which contains 92 million records through a link between IDENT1 (the UK law enforcement automated fingerprint system) and IABS.

Moreover, as border control legislation (UK passports) and road policing legislation (UK driving licences) are reserved to Westminster, Scotland will have little say in decisions taken about those images being routinely accessible by the police through shared 'UK' policing databases such as Strategic Facial Matcher. Accordingly, Scottish politicians at Westminster and Holyrood should take note that there is a high probability that Scotland may be sleepwalking towards its place within a UK Surveillance State. This journey may commence from 2024 when the seeds already sown in the Data Protection and Digital Information Bill, and Criminal Justice Bill begin to germinate following the widely anticipated receipt of Royal Assent.

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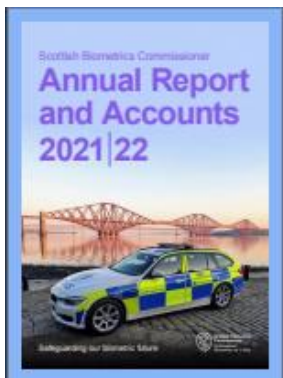
<sup>25</sup> Everything Everywhere All at Once, IAC Films, 2022.

<sup>26</sup> No need for a passport under new border plan, The Times, 01 January 2024.

## An alternative direction for Scotland?

Since being appointed as Commissioner by Her late Majesty Queen Elizabeth II on the nomination of the Scottish Parliament in April 2021, I have consistently highlighted the constitutional challenges to Scotland arising from shared UK policing databases containing biometric data.

In my [2021/22 Annual Report and Accounts](#) (page 7), I highlighted the challenges which arise from different legal definitions of 'biometric data' across the constituent parts of the UK, especially when such data is hosted on common UK law enforcement databases. I also warned of the risk that decisions would be taken at a UK-level around the future of UK-wide databases containing images such as PND (Strategic Facial Matcher), including decisions on inter-agency data sharing, and facial image exchange programmes, without input from Scottish Government, or the Scottish Biometrics Commissioner.



**Image No 1: 2021/22 Annual Report and Accounts**

In my [2022/23 Annual Report and Accounts](#) and in my [Operational Report](#) to the Scottish Parliament (page 38), I highlighted opportunities to enhance the effectiveness and efficiency of policing through the lawful, necessary, and appropriate use of biometric enabled technologies. However, I also highlighted that any inappropriate use could put at risk the model of policing by consent on which we rely.

The prospect of the police treating the holders of every UK passport and every UK photographic driving licence as a 'suspect' to participate in regular 'digital identity parades' is one such example and could permanently damage the relationship between the citizen and the state and significantly undermine public confidence and trust in the police.



**Image No 2 and 3: 2022/23 Annual Report and Accounts and Operational Report**

In all these reports, and in other oral and written submissions, I have highlighted to the Scottish Parliament my support for the adoption of biometric enabled technologies in Scotland including police body worn video (BWV), the Scottish Government funded Digital Evidence Sharing Capability (DESC), the use of the retrospective facial search capability available to Police Scotland within the UK Police National Database (PND) and in the UK Child Abuse Image Database (CAID). I have also said publicly that I would support the use of live facial recognition in Scotland in circumstances justified by threat and risk and where it could achieve objectives not possible through conventional policing techniques alone. However, I acknowledge that such decisions are entirely within the operational independence of the Chief Constable of Police Scotland should she so determine.

I have also highlighted opportunities for Scotland to go in a different direction on independent oversight and assurance to that now being pursued by the UK Government. Scotland is the only nation in the UK to have in place a [‘World Leading’](#) statutory [Code of Practice](#) on the acquisition, retention, use, and destruction of biometric data for policing and criminal justice purposes, backed by powers to ensure compliance, and a complaint mechanism for data subjects.



**Image No 4: The Scottish Code of Practice**

Therefore, at a time when the UK Government is backsliding, and removing independent checks and balances on the exercise of its power, there is an

opportunity for Scotland to enhance democracy and go in an entirely different direction. Should Scottish Ministers so determine, this could include expanding the functions of the Scottish Biometrics Commissioner and the protections of the statutory Code of Practice to other areas of criminal justice where biometrics are collected under devolved powers, including in pursuit of a new national public space surveillance strategy for Scotland.

During 2024, there will be an opportunity to engage in a national conversation around such matters including at a conference that I hope to co-host with Martyn Evans, chair of the Scottish Police Authority. Further details of the conference will be available on my website and that of the SPA in the coming weeks, however this will provide an opportunity to 'showcase' some excellent work in Scotland in relation to the use of biometrics and forensics for policing and criminal justice purposes.

*Brian Plastow*

**Dr Brian Plastow, Scottish Biometrics Commissioner**

**08 January 2024.**