



Scottish Biometrics
Commissioner
Coimiseanair
Biometrics na h-Alba

Scottish Biometrics Commissioner Act 2020: Draft Code of Practice

Business Regulatory Impact Assessment (version 0.2)

August 2022



Safeguarding our biometric future

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

Business and Regulatory Impact Assessment

Title of Proposal

Scottish Biometrics Commissioner Act 2020
Draft Code of Practice: Business and Regulatory Impact Assessment.
Updated: 31 August 2022

Version 0.2 Author: Diego Quiroz, Operations Manager, Scottish Biometrics Commissioner
Diego.Quiroz@biometricscommissioner.scot

Purpose and intended effect

Background

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

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

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

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

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

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

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

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

Objective

To ensure that the approach to the collection, use, retention, and disposal of biometric data in the context of policing and criminal justice is lawful, effective, and ethical, the Scottish Biometrics Commissioners Act established a new Commissioner accountable to the Scottish Parliament to:

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

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

Intended effect

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

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

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

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

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

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

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

The 12 Principles and Ethical Considerations:

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

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

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

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

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

Consultation

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

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

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

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

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

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

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

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

Phase 3: Public Attitudes & Awareness Survey and Public Consultation

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

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

Business and wider Public Sector

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

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

Costs to bodies to whom the code applies

There is nothing in the draft Code of Practice which would require any material alteration to existing processes, practices, procedures, or technology by Police Scotland, the Scottish Police Authority or the Police Investigations and Review Commissioner. This has been confirmed through consultation with each body concerned. Accordingly, there are no direct financial implications associated with the content of the draft Code. Likewise, each organisation has existing governance arrangements in place through which to ensure compliance with the Code. This includes the Police Scotland Biometrics Oversight Board chaired by a Deputy Chief Constable, the SPA Forensic Services Committee and through management team meetings within the Police Investigations and Review Commissioner (PIRC).

However, should the role of the Scottish Biometrics Commissioner be extended beyond Police Scotland, The SPA, and PIRC by Scottish Ministers in future then there would be a corresponding need for Scottish Government and the Scottish Parliament corporation to conduct a separate business impact assessment to consider the costs of such expansion of the functions of the Scottish Biometrics Commissioner including on delivery of the Strategic Plan, Code of Practice, and the associated scrutiny and compliance programme.

Scottish Firms Impact Test

The statutory requirement to comply with the Code of Practice will not apply directly to private sector or third sector organisations. However, where an organisation is acquiring, using, retaining, or destroying biometric data on behalf of a body to whom the code applies the Commissioner will have a role in ensuring that such arrangements do not breach the code of practice. In this regard, the draft code requires the bodies to whom the code applies to ensure that any such arrangements are in accordance with the general principles and ethical considerations as detailed in the Code.

Competition Assessment

Using the four Competition and Markets Authority competition assessment questions, the Commissioner has concluded that the provisions in the Code are not expected to limit the

number or range of suppliers of biometric or forensic services; or to limit the ability of suppliers to compete; or to limit the choice and information available to consumers.

Consumer Assessment

The provisions in the Code are not expected to affect the availability or price of any goods or services in the market for biometric or forensic services and may have a positive impact on the quality of those services provided. The Code does not impact on consumers in respect of storage or increased use of consumer data; or in the information available to consumers. The Code has no unidentified unintended consequences for the market which could impact on consumers.

Test run of business forms

The Code does not require new forms for businesses to complete.

Digital Impact Test

The provisions of the Code are not expected to impact on technology or become redundant due to technological advances. Indeed, the intention is to ensure the effective, proportionate, and ethical use of biometric data in the face of technological advances.

Enforcement, sanctions, and monitoring

It will be a key role of the Commissioner to advise, guide and oversee the practice of those bodies covered by the Code. The Commissioner has the power to report on, and make recommendations regarding, the use of biometric data by a relevant body. While the body will not be compelled to comply with a recommendation contained in a report, the Commissioner can require the body to respond to the recommendation.

A response, or a failure to respond, can be publicised by the Commissioner. The Commissioner is also able to serve a notice on a relevant body requiring the production of information to the Commissioner, which if ignored, could result in the Commissioner referring the matter to the Court of Session. Should the Court make an order to produce information to the Commissioner, then a failure to comply with the order would be contempt of court.

The Commissioner is accountable to Parliament and must submit an annual report of his / her activities in fulfilling his functions. The Commissioner must also submit to Parliament his / her annual accounts, an annual budget, and a strategic plan every four years.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed: Dr Brian Plastow

Date: 7 September 2022

Brian Plastow

Scottish Biometrics Commissioner

Scottish Biometrics Commissioner's Office

Point of Contact:

Diego Quiroz

Operations Manager

Scottish Biometrics Commissioner

Bridgeside House

99 McDonald Road

Edinburgh

EH7 4NS

0131 202 1043

Email Diego.Quiroz@biometricscommissioner.scot

DRAFT