

# **SCOTTISH BIOMETRICS COMMISSIONER**



## **CONCEPT OF OPERATIONS**

### **DRAFT FOR PUBLIC CONSULTATION**

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## **Background**

1. In June 2017, the then Cabinet Secretary for Justice, Michael Matheson MSP, tasked an Independent Advisory Group (IAG), chaired by Solicitor Advocate John Scott QC, to consider the taking, use and retention of biometric data in policing. In February 2018, the report of the IAG was submitted to the Cabinet Secretary for Justice. The report made 9 recommendations, including that a Biometrics Commissioner for Scotland be established.

## **Introduction to Concept of Operations**

2. The purpose of this Concept of Operations document is to provide an initial information source setting out the suggested General Functions and powers of the proposed Scottish Biometrics Commissioner as the basis for public consultation. A more detailed version of this Concept of Operations document will be developed following analysis of the feedback received during that consultation.

3. The Concept of Operations describes how the creation of a Scottish Biometrics Commissioner offers the potential to deliver independent advice, support and guidance around the collection and use of biometric data in connection with justice and community safety activity within the devolved competence of the Scottish Parliament. That oversight will contribute towards improved public and parliamentary confidence in the current and future uses of biometric data.

4. The following chapters of this document describe our proposals for the Scottish Biometrics Commissioner in further detail and are designed to enable stakeholders to contribute meaningfully to the consultation exercise.

## SCOTTISH BIOMETRICS COMMISSIONER

### Statutory remit and strategic purpose of the Commissioner

5. The statutory remit of the Commissioner would be to provide independent advice, support and guidance in relation to the acquisition, use, retention and disposal of biometric data by Police Scotland and the Scottish Police Authority (SPA). It will also extend to the small number of other individuals who exercise the powers of Constable when retaining such materials or data within the devolved competence of the Scottish Parliament. The Biometrics Commissioner for Scotland will have a specific focus on ethical and human-rights considerations arising from the acquisition, retention, use and disposal of such data. The remit specifically excludes data protection matters which are reserved to the UK Parliament and which fall within the statutory remit of the UK Information Commissioner (ICO). The retention of biometric data on the grounds of UK national security is also excluded. Responsibility for these matters falls within the statutory remit of the Biometrics Commissioner for England and Wales.

6. The Scottish Biometrics Commissioner, who would be appointed on a statutory basis, would keep under review relevant matters likely to attract a significant degree of interest from the Scottish Parliament, the media and civil liberty organisations. The role would be high profile and public facing, requiring significant engagement with stakeholders who exercise legal powers in relation to biometric data and those affected by them.

### Defining 'Biometric Data'

7. For the purposes of the Commissioner's role, we define biometric data as:

***'any physical, biological, physiological or behavioural data, derived from human subjects, which have the potential to identify a known individual.'***

8. From this definition it is clear that 'biometric data' is a relatively broad and evolving concept. It encompasses what is often referred to as 'first-generation biometrics' such as fingerprints, DNA and custody photographs which have been commonly used in policing for many years. It includes biological samples and materials from which such biometric data can be obtained, including materials obtained initially for medical purposes which subsequently come into the possession of the police as part of a criminal investigation. It also includes new and emerging technologies (or 'second-generation biometrics') such as facial recognition software, remote iris recognition, and other behavioural biometrics such as voice pattern analysis. Finally, it includes data collected in other non-policing public sector contexts from citizens engaged in routine activity such as public space CCTV surveillance cameras, road safety enforcement cameras and automatic number plate systems, some of which can capture and store the facial images of citizens. Again, there will be instances when such data subsequently comes into the possession of the police to support their work.

9. It therefore follows from this definition that other forms of data routinely collected by Police Scotland and other relevant agencies such as the names, addresses, dates of birth or general physical descriptions of suspects or witnesses does not qualify as 'biometric data'. This is because such information does not render unique or distinct physical, biological, physiological or behavioural data.

## **Statutory remit of the Commissioner**

10. The Scottish Government will bring forward legislation to establish the Scottish Biometrics Commissioner on a statutory basis and set out the statutory functions and powers of the office holder.

11. The Commissioner's oversight role would extend to biometric data use in all aspects of policing subject to the competence of the Scottish Parliament. Specifically, this will include Police Scotland and the SPA. The Commissioner will also guide the practice of those other bodies who may collect biometric data whilst exercising powers of arrest for devolved purposes in Scotland, including the exercise of any of the powers and privileges of a Constable when investigating a matter under the direction of the COPFS. In the case of arrests made in Scotland by staff from bodies such as the Police Investigations and Review Commissioner (PIRC) or the UK National Crime Agency (NCA), the relevant biometric data capture will be authorised by arresting staff from the relevant body concerned but will be taken by Police Scotland or SPA staff before being stored on the relevant policing databases.

12. The Commissioner would be able to offer guidance to those bodies set out at paragraph 11 above and would hold those bodies to account through public reporting mechanisms and through offering support in their ethical use of biometric data – existing, emerging and future. The statutory role of the Commissioner will be described in terms of 'General Functions' in primary legislation.

## **General Functions of the Commissioner**

13. The 'General Functions' of the Commissioner will be determined following public and parliamentary consultation and debate. To assist in that process, it is provisionally recommended that the Commissioner would:

- have a general function of promoting compliance with an independently established framework of standards against which to measure the quality of systems and practices currently adopted. Those standards would be set out through Codes of Practice relating to the handling of biometric data. Such a Code has been published for views as part of this consultation.
- review any such Codes of Practice, making representations with a view to protecting the rights of children, vulnerable adults and protected characteristic groups, particularly where issues of consent arise.
- be able to begin investigations into the acquisition, retention, use and disposal of biometric data from their own mandate where an ethical or human rights concern has arisen. The Commissioner will not require access to biometric materials or databases but should have a statutory power to request specific information from those listed at paragraph 11. For example, the Commissioner might require information on biometric data volumes currently held in relation to children and young people, broken down by age and gender, to help assess the effectiveness of youth justice policy objectives. There would be a statutory requirement on relevant bodies to comply with such requests.
- conduct or assist with specific reviews requested by the Scottish Parliament or specified bodies / office holders including Scottish Ministers, the Lord Advocate, the Chief Constable of Police Scotland, the Board of the SPA, HMICS, and the PIRC.

- have a statutory authority to issue improvement notices where there are systemic breaches of Codes of Practice. Whilst there would be no enforcement power and no sanction for failing to comply with such an improvement notice, any instances of failure to act on an improvement notice within reasonable timescales would be reported to the Scottish Parliament through the annual reporting mechanisms of the Commissioner.
- report to the Scottish Parliament via an annual report and publish findings each year of the reviews undertaken and the outcome of reviews.
- submit, as appropriate, reports to international human rights and other relevant bodies pursuant to Scotland's international obligations and submit general recommendations to bodies on any matter relevant to the Commissioner's remit.
- commission research into the appropriateness of biometric retention policies and collaborate more broadly in academic research including the effectiveness of retention periods.
- involve an independent case review mechanism. In line with their statutory remit, the UK Information Commissioner will continue to consider concerns raised by members of the public regarding the accessing or handling of their personal information by Police Scotland, the SPA and those other individuals exercising powers of arrest in Scotland for devolved purposes. Should the Information Commissioner, in the course of considering an individual case, identify the potential for systemic learning and improvement in relation to the use of biometric data for justice and community safety purposes in Scotland, details may be shared with the Scottish Biometrics Commissioner. It would then be open to the Scottish Biometrics Commissioner to consider whether a specific review was required. The Scottish Biometrics Commissioner would have a statutory power to require specific information from those bodies listed at paragraph 11 to aid them in undertaking a review. This information would pertain to the taking of biometric data as opposed to the data itself. The Scottish Biometric Commissioner would publish their findings in a manner that protects the identity of any appellant. Whilst there would be no formal recourse in respect of the individual, it would be open to the Scottish Biometric Commissioner to issue an improvement notice.

14. The Commissioner would foster close working relationships with other relevant bodies and office holders in Scotland whose function might offer insights into biometric data use. These would include, for example, the Lord Advocate, HMICS, PIRC, the ICO, the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland.

15. The Scottish Biometrics Commissioner will also liaise with the Biometrics Commissioner for England and Wales who has a wider UK remit in terms of national security determinations relative to the retention of biometric data. Although the Scottish Biometrics Commissioner will have a distinct role, and within a different legal jurisdiction, the ethical and human rights considerations are universal. Close co-operation is seen as advantageous given the aggregation of Scottish biometric data to wider UK policing biometric databases maintained by the Home Office, with the associated implications for national, international, and inter-agency data sharing.

16. The Commissioner would also play a significant public education and public engagement role. It will be important that the public are provided with clear, jargon free information to help them understand the powers of certain bodies, the powers they (the public) have to hold those bodies to account, and how to exercise those powers. A Commissioner with a mission statement relating to public engagement and education would support the office holder to note the shifting expectations of the public and react to those changes with new guidance or public education initiatives.

### **Appointment of the Commissioner**

17. The Scottish Biometrics Commissioner will have independence of office, both operationally and financially, with the opportunity to shape the role further within the constantly evolving biometrics and forensics operating environment.

18. Whilst the demands of such a new post are difficult to quantify, some planning assumptions can be made through comparison with the role of the Biometrics Commissioner for England and Wales. That appointment operates on a part time (0.6 full time equivalent) basis. Remuneration is calculated pro rata with a full time equivalent salary between £115,000 and £125,000, depending on skills and experience. The post is a fixed term appointment for three years extendable by agreement.

19. Given the differing scale of Scotland, with a single primary police service, smaller population, and significantly smaller volumes of biometric data on retention, it is reasonable to assume that the Commissioner be appointed on a part-time basis but subject to post-implementation review after 12 months. A fixed term appointment for three years (extendable) is proposed. Remuneration would be set in line with public sector pay policy and reflect those terms and conditions afforded to comparable Commissioners. The Scottish Information Commissioner and Scotland's Commissioner for Children and Young People offer perhaps the best indication of likely cost, with each attracting a salary of £70,000 to £75,000.

20. In light of the above, it is reasonable to envisage a Scottish Biometrics Commissioner would attract salary in the region of £45,000.

### **Administrative support arrangements**

21. Given the part time nature of the envisaged post, there may be potential for back-office support to be provided to the Commissioner by an existing office holder and this will be explored further. As a minimum, the Commissioner will require proportional access to a secretariat and an administrative support function for routine correspondence and reviews as well as preparation of annual and other reports to the Scottish Parliament.