

Consultation on enhanced oversight of biometric data for justice and community safety purposes

Consultation document

Consultation open – 13 July 2018 – 01 October 2018

1. Background

Why we are consulting

1. The biometrics field is evolving rapidly and offers great potential in the identification and prevention of crime and the delivery of community safety.
2. However, the use of biometric data and technologies raises a range of ethical and human rights considerations. This public consultation therefore explores the potential to deliver independent and ethical oversight of the collection and use of such data in a justice and community safety context.

What do we mean by biometric data?

3. '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 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.
4. It is important for us to be clear about what we mean when we talk about biometrics, not least because the term has never previously been used in criminal justice legislation in Scotland. Accordingly, whenever we talk about 'biometric data' in this consultation, we are referring to any physical, biological, physiological or behavioural data derived from human subjects, which have potential to identify a known individual and which have been used by Police Scotland, the Scottish Police Authority (SPA) or other specified agencies in a justice and community safety context in Scotland.
5. While such agencies play a key role in the prevention and detection of crime, they also have a wider role in improving the safety and wellbeing of persons, localities and communities in Scotland. That is why, when we talk about the use of biometric data in this consultation, we refer to its use in both a justice and wider community safety context.
6. We have also chosen to define the term in this way because it is wide enough to cover any future technological or scientific developments in this ever-changing area.

What are we consulting on?

7. 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. A copy of the IAG report can be viewed on the Scottish Government website at <http://www.gov.scot/Resource/0053/00533063.pdf>.

8. The IAG made nine recommendations, further details of which are set out at section 2. Specifically, the Group called for:

- the establishment of a Scottish Biometrics Commissioner to provide independent oversight of the use of biometric data for justice and community safety purposes in Scotland; and
- a statutory code of practice covering biometric data and technologies.

9. This consultation sets out Government proposals on both these issues. It seeks views on a draft statutory Code of Practice concerning the use of biometric data and a concept of operations outlining the role of a Scottish Biometrics Commissioner. These draft documents have been informed by the IAG's report and developed with the support of Her Majesty's Inspectorate of Constabulary in Scotland (HMICS).

10. This consultation also marks an important early opportunity for national debate on the use of biometrics to promote justice and community safety. The Scottish Government is keen to ensure that as many people, communities and organisations as possible have the opportunity to contribute to the development of the policy and legislative framework in this area. This will ensure the right balance is struck between the delivery of justice, community safety, privacy, ethics and wider human rights.

11. Subject to the views expressed, we will seek to introduce primary legislation in the current parliamentary session to deliver these improvements.

12. The deadline for responses to this consultation is 1 October 2018.

2. Recommendations of the Independent Advisory Group on the Use of Biometric Data in Scotland

13. Whilst this consultation primarily focuses on proposals in response to the three recommendations of the IAG set out above, it is important that they are considered as part of a wider programme of planned improvements following that Group's work. A summary of that work can be found at **Annex A**.

3. A Statutory Code of Practice covering biometric data and technologies

Why do we need a Code of Practice?

Legislation governing retention of biometrics

14. The Criminal Procedure (Scotland) Act 1995 ('the 1995 Act') is the primary Scottish legislation allowing the retention of fingerprints and other biometric samples from a person arrested by the police. Sections 18 to 19C stipulate 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 samples. It should also be noted that Section 18G permits biometric data to be retained for reserved matters, notably under national security determinations. The existing law may be summarised as follows:

- fingerprint and DNA data from convicted persons can be retained indefinitely. This legal entitlement applies on the basis of a single criminal conviction for any type of offence, regardless of gravity;
- 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 the police apply for, and are granted, an extension by a Sheriff. For less serious offences, and where grounds are not established, there is no retention in relation to children;
- 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, with the Chief Constable able to apply to the Sheriff Court for further two-year extensions (there is no limit on the number of two-year extensions that can be granted in respect of a particular person's data); data may be retained for two years in relation to non-sexual or non-violent offences which are the subject of a 'Fiscal Offer' or fixed penalty notice from the police;
- data from individuals prosecuted for certain sexual and violent offences may be retained for three years (whether or not they are convicted), with the Chief Constable able to apply to the Sheriff Court for further two-year extensions (there is no limit on the number of two-year extensions that can be granted in respect of a person's data); and
- subject to the exception just stated, data from individuals arrested for any offences (and who have no previous convictions) must be destroyed immediately if they are not convicted or if they are given an absolute discharge.

15. Whilst the data obtained under those sections will account for a significant proportion of the biometric data held and used for justice and community safety purposes, biometric data is also captured by the police in other circumstances. For

example, there are situations where victims and witnesses agree to their biometric data being held in order to support investigative activity. In addition, police officers share their biometric data in order that they can be eliminated from investigations in circumstances where, for example, their fingerprints are found at the scene of an incident following their attendance in the course of their duties. Finally, there will be occasions where Police Scotland hold and use biometric data which has been provided by another agency, for example CCTV provided by a local council or data provided by an NHS Scotland Health Board.

16. It is important to note that, whilst intelligence products obtained by the police from crime scenes (for example, hair samples) do not themselves fall within the scope of the proposals in this consultation, any biometric data derived from those samples which is subsequently attributed to an individual would be relevant.

17. We believe there is scope to develop a more comprehensive framework of standards and guidance against which to measure the quality of systems and practices currently adopted for the management of the above data. The Code of Practice will address this gap without impacting the existing legislative framework. Rather it will seek to ensure that that is understood, and that the retention of biometric data is both necessary and proportionate, and in accordance with the law.

WHAT WILL FALL WITHIN THE SCOPE OF THE CODE OF PRACTICE?

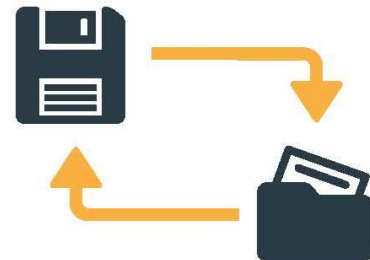
DATA OBTAINED UNDER THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995. THIS IS THE PRIMARY SCOTTISH LEGISLATION WHICH ALLOWS THE RETENTION OF FINGERPRINTS AND OTHER **BIOMETRIC** SAMPLES FROM A PERSON ARRESTED BY THE POLICE



BIOMETRIC DATA PROVIDED BY ANOTHER AGENCY, WHICH MAY INCLUDE CCTV IMAGES PROVIDED BY A LOCAL COUNCIL OR DATA PROVIDED BY A HEALTH BOARD



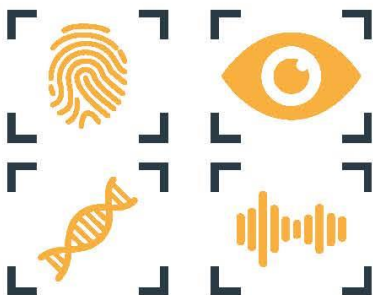
BIOMETRIC DATA DERIVED FROM CRIME SCENE SAMPLES



POLICE OFFICER BIOMETRIC DATA SHARED FOR CRIME SCENE ELIMINATION



BIOMETRIC DATA OF VICTIMS AND WITNESSES, HELD WITH THEIR AGREEMENT IN ORDER TO SUPPORT INVESTIGATIVE ACTIVITY



'SECOND-GENERATION BIOMETRICS' SUCH AS FACIAL RECOGNITION, REMOTE IRIS RECOGNITION AND VOICE PATTERN ANALYSIS

Question 1

Do you believe a statutory Code of Practice covering the acquisition, use, retention and disposal of biometric data for justice and community safety purposes is required?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

Who does the Code apply to?

Authorities to whom this Code should apply on a statutory basis

18. There will be a statutory power for Scottish Ministers to publish a Code of Practice. The Code of Practice will provide guidance in relation to the acquisition, retention, use and disposal of biometric data for justice and community safety purposes in Scotland and would apply on a statutory basis to Police Scotland and the SPA.

19. It would also apply to any other bodies who may collect biometric data whilst exercising powers of arrest for devolved purposes in Scotland. This will include the exercise of any of the powers and privileges of a Constable when investigating a matter under the direction of the Crown Office and Procurator Fiscal Service (COPFS) including, for example, where Police Scotland and SPA collect and store data on behalf of the Police Investigations and Review Commissioner (PIRC).

20. The Code of Practice does not extend to national security activity conducted in Scotland. Such matters fall within the jurisdiction of the UK Parliament and feature within the remit of the Biometrics Commissioner for England and Wales who has responsibility for certain matters related to UK national security.

Adoption by Police Scotland on a voluntary basis

21. Subject to the views expressed through this consultation we will encourage voluntary adoption of the Code of Practice by Police Scotland in order to test and refine its content prior to it being placed on a statutory footing.

Adoption by other public authorities in Scotland on a voluntary basis

22. Although the primary purpose of the Code of Practice is to ensure statutory regulation in relation to the above mentioned bodies, there are many other public bodies who collect biometric data from citizens engaged in routine activity. These include, for example, local authorities and others operating public space CCTV surveillance systems. In addition, biometric data is also collected and retained with consent in various health and education contexts.

23. We believe that many of the principles and practices set out in the Code will also be of interest to those organisations and for that reason we would encourage, as appropriate, their adoption on a voluntary basis.

The Private sector

24. The statutory requirement to comply with the Code of Practice will not apply directly to private sector organisations. However, where such an organisation is collecting, using or retaining biometric data on behalf of one of the bodies to whom the Code applies on a statutory basis, there should be a requirement made by the commissioning body to ensure the private sector organisation complies with the Code.

Question 2

Do you believe the proposed statutory Code of Practice is being applied to the correct individuals/agencies?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

What are the Code's principles?

General Principles

25. The Code of Practice will include a set of written rules or 'General Principles' outlining the responsibilities of those to whom it applies. Those General Principles embody wider legal, ethical, human rights, and data protection considerations including the special considerations to be made for children, vulnerable adults and protected characteristic groups.

26. The IAG, in their 2018 Report on the use of biometric data, advised Scottish Ministers on the General Principles that should be adopted. Specifically, they recommended that the acquisition, use, retention and disposal of biometric data, in addition to being lawful, proportionate, and necessary, should:

- enhance public safety and the public good;
- advance the interests of justice;
- demonstrate respect for the human rights of individuals and groups;
- respect the dignity of all individuals;
- take particular account of the rights of children;
- take particular account of the rights of other vulnerable groups and individuals;
- protect the right to respect for private and family life;
- encourage scientific and technological developments to be harnessed to promote the swift exoneration of the innocent, afford protection and resolution for victims, and assist the criminal justice process; and
- be based on validated evidence.

27. These General Principles form the basis of the proposed statutory Code of Practice and will be used by Police Scotland and the SPA as part of internal self-assessment processes, procedures, and governance mechanisms around the management of biometric data and their supporting technologies. These General Principles also provide a framework against which compliance may be assessed by the proposed Scottish Biometrics Commissioner.

Question 3

Do you believe the General Principles outlined in the statutory Code of Practice are the right ones?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

The draft Code

28. A suggested draft Code of Practice can be viewed at

www.gov.scot/Publications/2018/07/1877/downloads

Question 4

Do you believe the statutory Code of Practice covers all relevant issues which require consideration when decisions are being taken about the acquisition, use, retention and disposal of biometric data?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

4. A Scottish Biometrics Commissioner

Why do we need a Scottish Biometrics Commissioner?

29. As outlined earlier, it is widely accepted that the use of biometric data is critical to policing and community safety activity in Scotland. It is also accepted that the biometrics field is highly complex, with successful adoption of techniques often involving the careful consideration of a number of factors.

30. Whilst there is currently evidence of strong governance and practice within both Police Scotland and the SPA with regard to the use of such data and techniques, the establishment of a source of independent expert advice and support is likely to strengthen this further.

31. We believe that an independent Scottish Biometrics Commissioner would support the effective, proportionate and ethical use of such data, ultimately leading to better outcomes and maximising the value of biometric technologies.

The Evidence Base

32. The proposals in this consultation build on a significant body of existing work to explore the benefits of enhanced independent oversight in relation to biometrics.

33. In 2007, Professor Jim Fraser was asked by Scottish Ministers to review and report on the operation and effectiveness of the statutory regime governing fingerprint and DNA data, with his work informing subsequent amendments to the 1995 Act. His report also highlighted the need for the establishment of independent oversight arrangements in this area.

34. More recently, HMICS published its *'Audit and Assurance Review of the Use of the Facial Search functionality within the UK Police National Database (PND) by Police Scotland'* in January 2016. Through that report, HMICS recommended that the Scottish Government consider the establishment of a Scottish Biometrics Commissioner to provide independent oversight of biometric databases and records held in Scotland.

35. The IAG built on this evidence base when making their recommendations for strengthened oversight earlier this year. The fast paced evolution of relevant technology, as well as the particular scientific and human rights implications associated with biometrics, was fundamental to this conclusion.

36. There are a number of public bodies already undertaking investigative, enforcement and scrutiny activity which has some relevance to the use of biometric data and techniques in a justice and community safety context in Scotland. However, we believe those bodies do not currently have the remit or expertise to effectively address the gap outlined above.

37. As already outlined, HMICS play an important role in scrutinising policing in Scotland, as does PIRC. In the case of HMICS, we consider that the incorporation of the functions of a Scottish Biometrics Commissioner would fundamentally change

the purpose of that organisation and could dilute its effectiveness in undertaking wider scrutiny of policing in Scotland. This is a view shared by HMICS. In the case of PIRC, it is important to note that the Commissioner would have a role in advising and guiding the practice of that body. Clearly, their ability to do so in a way which is independent, both in practice and perception, would be hindered if they were to sit within PIRC.

38. Importantly, the UK Information Commissioner's Office has an important role to play in advising on data protection matters which are of direct relevance when processing biometric data. Other oversight bodies such as the Scottish Human Rights Commission also have a strong interest and it will be important for the Scottish Biometrics Commissioner to develop strong partnerships with those organisations.

39. When considering the value of a Scottish Biometrics Commissioner, it is helpful to examine the arrangements which exist elsewhere in the UK, with the appointment of a Biometrics Commissioner in England and Wales having delivered significant benefits in those jurisdictions. The latest annual report of the Biometrics Commissioner for England and Wales can be viewed on the Gov.uk website:

<https://www.gov.uk/government/publications/biometrics-commissioner-annual-report-2017>

Question 5

Do you believe a Scottish Biometrics Commissioner is required?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

What will the Commissioner do?

40. The Scottish Biometrics Commissioner will be established through primary legislation and will have statutory powers in relation to Police Scotland and the SPA.

41. The Commissioner will also oversee 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. This would include, for example, PIRC.

Question 6

Do you believe the Commissioner's statutory remit extends to the correct individuals/agencies?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

General Functions

42. As part of their 'general functions' 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. 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 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 PIRC.
- have a statutory power to issue improvement notices where there are systemic breaches of Codes of Practice. Whilst there would be no enforcement power and no official 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 on 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 information from those bodies listed at paragraphs 40 and 41 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.

43. The below Concept of Operations more fully describes the proposed role of the Scottish Biometrics Commissioner.

www.gov.scot/Publications/2018/07/1877/downloads

Question 7

Do you believe the proposed general functions of the Scottish Biometrics Commissioner are the right ones?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

Distinct approach to children

44. The Scottish Biometrics Commissioner will oversee an appropriately distinct and proportionate approach to the acquisition, retention, use and disposal of biometric data relating to children under the age of 18 in the criminal justice system. The number of children entering the criminal justice system in Scotland is small and we believe there are situations in which biometric data need not be captured in relation to each of these individuals.

45. The Commissioner will oversee a Code of Practice which will reflect the following:

- For children under 12 who, under the Age of Criminal Responsibility (Scotland) Bill, will no longer be capable of being held criminally responsible, biometrics will not be obtained except where they are needed for the investigation of a very serious incident. The capture or use of biometrics will have to be authorised by a Sheriff and biometric data taken from children under 12 will have to be destroyed as soon as they are no longer needed for the specific investigation and any resulting Children's Hearings System proceedings. They will not be placed on the Police Scotland Criminal History System (CHS) or the PND.
- For children aged 12 to 17 years, in each case, consideration should be given as to whether it is proportionate and necessary to obtain biometric data for the purposes of recording on the biometric databases, with the best interests of the child specifically considered in the decision making process, along with the child's offending behaviour. Where biometric data is obtained the reasons should be subject to review and scrutiny within a reasonable time frame, both internally by supervising officers and by the Scottish Biometrics Commissioner.

46. This approach will seek to minimise the number of children who have biometric data captured, reducing stigmatisation and improving life chances.

Question 8

Do you believe the proposed approach to the acquisition of biometric data from children and young people in the justice system is the right one?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

Potential beyond the Scottish justice landscape

47. It is clear that the Commissioner will require particular expertise and experience if they are to advise on the specific legal and scientific considerations which need to be made when using biometric data. We expect that this expertise may also prove valuable to agencies other than those falling within the statutory remit of the office holder. In this context, we are proposing that the Commissioner may also provide, on an administrative basis, advice to those other public and private sector organisations who collect biometric data.

48. It is also important to note that Police Scotland and the SPA use several common policing biometric databases maintained by the Home Office. We would therefore expect the Commissioner to represent Scottish interests through liaison with corresponding regulatory office holders in other parts of the UK.

How will the Commissioner be appointed and held accountable?

49. The Commissioner will play a central role in driving improvement and protecting the rights of individuals. If they are to do this in a way which commands the confidence of partners and the public, the role will have to be delivered in a way which is, and is seen to be, transparent, accountable and free of any undue influence.

50. Given that the above mentioned regulatory framework for biometrics is set at a national level and consistently applied across the country, it is clear that oversight of those arrangements is also best dealt with nationally. That oversight has to be delivered in a way which complements wider scrutiny arrangements and, for reasons outlined earlier, we believe the best way to achieve this is through an independent Scottish Biometrics Commissioner, liaising closely with other relevant bodies.

51. Whilst the Commissioner will play a key role in advising on and guiding the practice of service providers, their work will undoubtedly also inform the views of those policy makers with responsibility for setting the overarching regulatory framework for biometrics, including the legislative framework.

52. A transparent relationship with government, including specific protection for the independence of some functions, will therefore be crucial. It will help to foster a sense of trust in the organisation's ability to make impartial, professional decisions and ensure that confidence in the integrity of Ministers and the organisation is maintained.

53. A final decision on the appointment arrangements for the Commissioner has yet to be taken, including whether they are accountable to Scottish Ministers or the Scottish Parliament. A decision on this point will follow this consultation exercise.

Question 9

Do you have any views on the appointment and accountability arrangements for the Commissioner?

Please tick:

Yes / No / Don't know

Please expand on the reasons for your answer.

Consultation Questions

Statutory Code of Practice

1. Do you believe a statutory Code of Practice covering the acquisition, use, retention and disposal of biometric data for justice and community safety purposes is required?
2. Do you believe the proposed statutory Code of Practice is being applied to the correct individuals/agencies?
3. Do you believe the General Principles outlined in the statutory Code of Practice are the right ones?
4. Do you believe the statutory Code of Practice covers all relevant issues which require consideration when decisions are being taken about the acquisition, use, retention and disposal of biometric data?

Establishment of a Scottish Biometrics Commissioner

5. Do you believe a Scottish Biometrics Commissioner is required?
6. Do you believe the Commissioner's statutory remit extends to the correct individuals/agencies?
7. Do you believe the proposed general functions of the Scottish Biometrics Commissioner are the right ones?
8. Do you believe the proposed approach to the acquisition of biometric data from children and young people in the justice system is the right one?
9. Do you have any views on the appointment and accountability arrangements for the Commissioner?

APPENDIX 1

Scottish Government, June 2018

Progress Update on the Scottish Government's Response to the Report by the Independent Advisory Group on the Use of Biometric Data

This paper provides an update on progress against the advisory group's report, following the Scottish Government's response of March 2018. Each of the recommendations is responded to in turn.

Advisory group recommendations	Scottish Government response	Progress against the recommendation
<p>1. There should be national debate to improve public understanding of, and confidence in, the retention and use of biometric data in Scotland for policing, law enforcement and other public protection purposes. Ideally, this should start before and continue during the Scottish Government's public consultation, as well as featuring in ongoing discussion after consultation.</p>	<p>Accept. There is a risk that the considerable benefits arising from the use of biometric data and technologies are undermined if there is a lack of public understanding and confidence in the way they are used by the police. We will hold a public consultation later this year on our proposals to strengthen the legislative, governance and oversight framework which will seek views on the use of biometric data and technologies, including ethical and human rights aspects. The publication of the advisory group's report provides the opportunity to begin the public debate in Scotland.</p>	<p>Ongoing: The then Cabinet Secretary for Justice officially launched the IAG's report on 22 March and work is now underway to develop an engagement plan to drive a series of stakeholder engagement activities at key milestones.</p> <p>As part of this, we continue to explore opportunities for parliamentary engagement around our consultation proposals following summer recess. In the meantime, Scottish Government officials will undertake consultation events aimed at specific interest groups, bilateral meetings with key stakeholders and further engagement with members of the Scottish Youth Parliament's Justice committee. The IAG, chaired by John Scott QC, will continue to meet with a revised remit to support progress on this recommendation.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
<p>2. Legislation should establish a Code of Practice covering the acquisition, retention, use and disposal of DNA, fingerprints, facial and other photographic images (including custody images) and all existing, emerging and future biometrics for Police Scotland, the Scottish Police Authority and other bodies working in the field of law enforcement. The legislation should outline matters relating to review of the Code by the Scottish Parliament.</p>	<p>Accept. We intend to bring forward legislation on biometrics in the current Parliamentary session. This will enable us to introduce a statutory biometrics code of practice and progress other aspects of the advisory group’s report including establishing a statutory framework to govern and regulate police retention and use of facial images and use of facial recognition technology. A biometrics code of practice will complement existing law enforcement codes of practice in Scotland and provide a framework of ethical and human rights respecting principles against which the use of biometric data and technologies can be assured.</p> <p>Work is already underway to develop an outline code of practice and we will further develop and trial the code with Police Scotland and the Scottish Police Authority ahead of it being given a statutory basis.</p>	<p>Ongoing: It remains our intention to bring forward legislation on biometrics in the current Parliamentary session. The legislation would provide for a statutory Code of Practice, an outline of which is presented within this consultation for views.</p> <p>The Code describes the legal framework concerning the acquisition, retention, use and disposal of biometric data for justice and community safety purposes in Scotland. It will apply on a statutory basis to Police Scotland, the Scottish Police Authority (SPA) and those other individuals exercising the powers and privileges of a constable for devolved purposes in Scotland.</p>
<p>3. The Code of Practice should be the subject of detailed consultation. It should contain relevant human rights and ethical principles, address the implications of any presumption regarding retention and specify relevant procedures for applications from private citizens for deletion of biometric data. It should contain specific reference to validation of biometric technologies.</p>	<p>Accept. We will develop the detail of the code of practice through public consultation and further stakeholder engagement (see recommendation 1 above).</p>	<p>Ongoing: As part of this consultation, we have published a draft Code of Practice which describes the statutory responsibilities of those to whom the Code applies. The Code contains a set of General Principles which embody all relevant legal, ethical, human rights, and data protection considerations when using biometric data for policing and community safety purposes. It also outlines the special considerations to be made for children, vulnerable adults and protected characteristic groups.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
		<p>This Code of Practice requires that public bodies using biometric data for justice and community safety purposes should have internal validation systems, processes and procedures in place in respect of each biometric technology and database that they operate as part of internal governance regimes. Such validation mechanisms would be kept under review by the newly established Scottish Biometrics Commissioner.</p> <p>Following analysis of consultation responses, the draft Code of Practice will be further developed and finalised in the autumn. Police Scotland will then pilot the Code of Practice to assess the extent to which the General Principles and associated guidance contained therein assist in relation to the overall governance regime around biometric technologies and data. Should unanticipated practical or operational difficulties be identified, the Code will be further defined as necessary prior to the appointment of the Scottish Biometrics Commissioner.</p>
<p>4. Distinct policies should be formulated for the acquisition, retention, use and disposal of the biometric data of children aged between 12 and 17. In each case involving a child, consideration should be given to the proportionality and necessity of obtaining biometric data for the purposes of recording on the biometric</p>	<p>Accept. In many areas of policing decisions are based on an assessment of risk on a case by case basis and this recommendation is based on a proposal put forward by Police Scotland. We agree with the advisory group that there are strong arguments for taking a different approach to children aged between 12 and 17 to ensure</p>	<p>Ongoing: Police Scotland will lead on the development of a new policy and a new investigative options and decision making model in relation to whether and in what circumstances it is necessary to acquire or retain biometric data from 12-17 year olds.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
<p>databases, ensuring that the best interests of the individual child are taken into account in the decision making process. Where the decision is to obtain and retain biometric data, the reasons should be recorded and subject to review and scrutiny. Appropriate consideration should be given, and adaptation made, in the treatment of the data of those (children and adults) with specific vulnerabilities.</p>	<p>that their biometric data is taken, used and retained in a proportionate manner that reduces any unintended negative risks or consequences. This approach is consistent with other Scottish policy approaches including <i>Getting it Right for Every Child</i> and the <i>Whole System Approach for Children and Young People who Offend</i>. The Age of Criminal Responsibility (Scotland) Bill which was introduced on 13 March 2018 sets out arrangements for taking and using biometric data from children under 12.</p> <p>We will liaise with Police Scotland, SPA and other stakeholders to develop a more proportionate approach to taking, using, retaining and disposing of biometric data from children and adults with specific vulnerabilities.</p>	<p>Police Scotland have established a Short Life Working Group (SLWG) to develop the work required to progress this recommendation. This new policy will also implement any new arrangements required as a result of anticipated changes to the minimum age of criminal responsibility (MACR).</p> <p>The Scottish Government will continue to engage with Police Scotland and SPA on progress, with Police Scotland submitting update reports on progress at relevant stages.</p>
<p>5. 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.</p>	<p>Accept. This recommendation links to recommendation 7. We will review current legislation in the light of the developing evidence base and any relevant legal judgments.</p>	<p>Planned: The Scottish Biometrics Commissioner will ensure that the retention of biometric data by Police Scotland, the Scottish Police Authority and other specified bodies is necessary and proportionate, and in accordance with the law.</p> <p>Once appointed, the Commissioner will play a key role in developing the evidence base to inform any future decisions on rules around the retention of biometric data, including those set out through the Criminal Procedure (Scotland) Act 1995.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
<p>6. There should be a presumption of deletion of biometric data after the expiry of prescribed minimum retention periods.</p>	<p>Accept. We agree that a guiding principle should be that biometric data should only be retained for the purposes prescribed in law and that data should not be retained in circumstances where an accused person (who has no previous convictions) is not subsequently convicted or where there are no proceedings.</p> <p>Currently, custody images are retained on the Criminal History System and on custody systems. While the deletion of records from the Criminal History System complies with the existing legal framework in relation to DNA and fingerprints, at the time of the HMICS report in 2016, there was no national custody IT system in place in Scotland and Police Scotland were retaining custody images on the different custody systems of the eight legacy police forces. Legacy systems do not have the functionality or flexibility to identify and remove custody images of people who are not convicted/not proceeded against. Therefore, images were, and are, retained by Police Scotland under general data retention policies for a minimum period of one (current year) + six years. This means that photographs of people are routinely retained by Police Scotland for a period of up to seven years, including those of individuals not convicted of any offence.</p> <p>Police Scotland rolled out a new national custody solution in 2017 to manage custody episodes in a single and consistent way across Scotland. Police</p>	<p>Ongoing: Police Scotland has committed to reviewing current DNA Database and Criminal History System biometric weeding arrangements to align retention/weeding as appropriate. The SLWG has been appointed to progress this work. Police Scotland will review policy decisions as a result of the SLWG and make any relevant recommendations for change as a result.</p> <p>Since the publication of the 2016 HMICS Audit and Assurance Review of the use of the Facial Search functionality within the UK Police National Database (PND), Police Scotland has successfully delivered a new national custody episode management system and is currently exploring a technical solution which will enable custody images to be automatically weeded from that system when the corresponding image is similarly deleted from the Criminal History System. This development, once delivered, will fully address concerns previously identified by HMICS.</p> <p>Police Scotland will continue to report on progress with this work at appropriate stages.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
	<p>Scotland have indicated that the new custody software will have the technical capability to remove and dispose of the custody images of individuals who are not convicted/not proceeded against in a way that is consistent with the existing legal framework in relation to DNA and fingerprints.</p> <p>We will liaise with Police Scotland to identify a technical solution to enable full implementation of this recommendation in relation to custody images held on the national custody system. Police Scotland has confirmed that all custody images of unconvicted individuals held on legacy custody systems will be deleted by 2023 under the existing data retention policy.</p>	
<p>7. Evidence should be gathered from which continuing assessment can be made about appropriate periods of retention of biometric data. Public consultation should include specific questions on retention periods.</p>	<p>Accept. The advisory group note that developing the robust evidence required to point to a specific timescale for retention of biometric records has proved challenging in the past. The risk of offending or reoffending can be driven by a range of factors, many specific to the individual. Therefore, it is not possible to determine a timescale for retention that will eliminate the risk of an individual offending after records have been deleted. The most effective way to achieve proportionality is to base it on an assessment of the risk an individual poses and the value that biometric retention has in the investigation of each case. However, any approach needs to be</p>	<p>Planned: The Scottish Biometrics Commissioner will ensure that the retention of biometric data by Police Scotland, the Scottish Police Authority and other specified bodies is necessary and proportionate, and in accordance with the law.</p> <p>Once appointed, the Commissioner will play a key role in developing the evidence base to inform any future decisions on rules around the retention of biometric data.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
	<p>designed in such a way that is operationally deliverable for justice bodies.</p> <p>There is clearly a need to better understand the benefits of using and retaining biometrics to ensure that policy and practice is proportionate and justifiable. A number of Scottish universities have expertise in this field and the advisory group report also highlights forthcoming work by the Biometric Commissioner’s Office to review cases where applications to retain DNA and fingerprints have been granted to assess subsequent investigative value and reconviction rates.</p> <p>We will work with stakeholders to review and strengthen the evidence base and develop proposals for further work to build our understanding of the benefits of using and retaining biometric data.</p>	
<p>8. There should be legislation to create an independent Scottish Biometrics Commissioner. The Commissioner should be answerable to the Scottish Parliament, and report to the Parliament. The Commissioner should keep under review the acquisition, retention, use and disposal of all biometric data by the police, SPA and other public bodies. The Commissioner should promote good practice amongst relevant public and private bodies, and monitor compliance with the Code of Practice.</p>	<p>Accept in principle. As highlighted above, the biometrics field is evolving rapidly and the use of biometric data and technologies for law enforcement purposes raises a range of human rights and ethical considerations. The ten year Policing Strategy published by the Scottish Police Authority and Police Scotland in 2017 sets expectations for greater use of new and emerging technologies. Governance and oversight needs to keep pace with developments to ensure that their use balances law enforcement and ethical</p>	<p>Ongoing: This consultation seeks views on an independent Scottish Biometrics Commissioner. The results of this consultation will inform further development of proposals and the delivery of primary legislation focussing on biometrics in this parliamentary session.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
	<p>considerations.</p> <p>The policy of Scottish Ministers is that the number of new public bodies should be kept to a minimum and, as the advisory group note in their report, there is a strong presumption against setting up entirely new bodies. A rigorous assessment has to take place to evidence the need for a new public body, before consideration is given to developing formal proposals. Parliamentary Commissioners are appointed by the Scottish Parliamentary Corporate Body (SPCB) with the approval of the Scottish Parliament. Any proposed additions to this group are discussed with the relevant Parliamentary authorities given the SPCB's oversight of these office holders.</p> <p>We will progress this recommendation in the context of the Scottish Government's policy on establishing new public bodies and subject to wider public consultation and agreement from the Scottish Parliament appoint a Commissioner with responsibility for biometrics.</p>	
<p>9. An ethics advisory group should be established as part of the oversight arrangements. This group should work with the Commissioner and others to promote ethical considerations in the acquisition, retention, use and disposal of biometric technologies and biometric data.</p>	<p>Accept. We agree that an ethics advisory group would provide a valuable forum for considering the ethical impact on society, groups and individuals of taking, using and retaining biometric data and using biometric technologies. We agree with the biometrics advisory group that an ethics group should advise Scottish Ministers</p>	<p>Planned: The Scottish Government will later this year consult the IAG on proposals to establish an <i>Ethics Advisory group on Biometrics for Scotland</i> which would work with the Commissioner and others to promote ethical considerations in the acquisition, retention, use and disposal of biometric technologies and biometric data.</p>

Advisory group recommendations	Scottish Government response	Progress against the recommendation
	<p>on a non-statutory basis. We will develop proposals for its remit and membership in discussion with stakeholders, drawing on the connections and relationships that have been developed through the work of the advisory group.</p>	



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