



# Scottish Biometrics Commissioner Act 2020

2020 asp 8

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 10th March 2020 and received Royal Assent on 20th April 2020**

An Act of the Scottish Parliament to establish the office of Scottish Biometrics Commissioner and to provide for its functions in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes.

VALID FROM 01/12/2020

## *Establishment*

### **1 Scottish Biometrics Commissioner**

- (1) The office of Scottish Biometrics Commissioner is established.
- (2) Schedule 1 makes further provision about the office.

VALID FROM 01/12/2020

## *Functions*

### **2 Functions**

- (1) The Commissioner's general function is to support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes by—
  - (a) the Police Service of Scotland,
  - (b) the Scottish Police Authority,
  - (c) the Police Investigations and Review Commissioner.

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- (2) But the Commissioner's general function does not extend to biometric data in relation to which the Commissioner for the Retention and Use of Biometric Material has a function under section 20 of the Protection of Freedoms Act 2012.
- (3) In exercising that general function, the Commissioner is to—
- (a) keep under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by or on behalf of the persons referred to in subsection (1),
  - (b) promote public awareness and understanding of the powers and duties those persons have in relation to the acquisition, retention, use and destruction of biometric data, how those powers and duties are exercised, and how the exercise of those powers and duties can be monitored or challenged,
  - (c) promote, and monitor the impact of, the code of practice.
- (4) In complying with subsections (3)(a) and (b), the Commissioner is to have regard to the technology used or capable of being used for the purpose of acquiring, retaining, using or destroying biometric data.
- (5) The Commissioner may, in particular—
- (a) carry out, commission or support any research the Commissioner considers appropriate,
  - (b) make recommendations in relation to any matter relevant to the Commissioner's general function.
- (6) In exercising the Commissioner's general function, the Commissioner must have regard to the interests of—
- (a) children and young persons, and
  - (b) vulnerable persons.
- (7) The Scottish Ministers may by regulations amend subsection (1) so as to add a person or description of person, vary an entry listed in it, or remove an entry.
- (8) For the purpose of this section—
- “children and young persons” means individuals under the age of 18 years,
- “vulnerable persons” means individuals who, by reason of their personal circumstances or characteristics, may have difficulty understanding matters relating to the acquisition, retention, use and destruction of their biometric data by or on behalf of the persons referred to in subsection (1).

### **3 Power to work with others**

The Commissioner may, in the exercise of the Commissioner's functions, work jointly with, assist or consult—

- (a) the Scottish Parliament,
- (b) the Scottish Ministers,
- (c) the Lord Advocate,
- (d) the chief constable of the Police Service of Scotland,
- (e) Her Majesty's Inspectors of Constabulary in Scotland,
- (f) the Scottish Police Authority,
- (g) the Police Investigations and Review Commissioner,
- (h) the Information Commissioner,

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- (i) the Commissioner for the Retention and Use of Biometric Material,
- (j) the Scottish Human Rights Commission,
- (k) such other persons as the Commissioner considers appropriate.

#### **4 General powers**

- (1) The Commissioner may do anything which appears to the Commissioner—
  - (a) to be necessary or expedient for the purposes of, or in connection with, the performance of the Commissioner's functions, or
  - (b) to be otherwise conducive to the performance of those functions.
- (2) Despite the generality of subsection (1), the Commissioner may pay fees and allowances to a person for advice, assistance or any other service only with the approval of the Parliamentary corporation.

#### **5 Duty to comply with directions**

- (1) The Commissioner must comply with any direction given to the Commissioner by the Parliamentary corporation in relation to—
  - (a) the location of the Commissioner's office,
  - (b) the sharing of premises, staff, services or other resources with any other officeholder or any public body,
  - (c) the form and content of the Commissioner's annual report under section 32,
  - (d) the process to be followed in appointing members of the advisory group established under section 33.
- (2) A direction under this section may vary or revoke a previous direction.
- (3) The Parliamentary corporation is to make any direction under this section publicly available.

#### **6 Report on the Commissioner's functions**

- (1) The Scottish Ministers must, before the expiry of the period of 12 months beginning with the day after the last day of the period to which the Commissioner's first strategic plan relates—
  - (a) prepare and publish a report on the Commissioner's functions, and
  - (b) lay a copy of the report before the Scottish Parliament.
- (2) In preparing the report, the Scottish Ministers must consult such persons as they consider appropriate.
- (3) The report must include an assessment of whether—
  - (a) the functions of the Commissioner remain appropriate,
  - (b) the powers conferred by sections 2(7) and 9(4) should be exercised.
- (4) The Scottish Ministers must, before the expiry of the period of 5 years beginning with the day after the day on which the most recent relevant document was laid before the Scottish Parliament—
  - (a) prepare and publish—
    - (i) a report on the Commissioner's functions, or

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- (ii) a statement setting out why they consider such a report to be unnecessary, and
  - (b) lay a copy of the report or statement before the Scottish Parliament.
- (5) Subsections (2) and (3) apply to a report under subsection (4)(a)(i) as they apply to a report under subsection (1).
- (6) In this section, “relevant document” means—
- (a) a report under subsection (1) or (4)(a)(i), or
  - (b) a statement under subsection (4)(a)(ii).

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### *Code of practice*

#### **7 Code of practice**

- (1) 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.
- (2) The code of practice must include provision about when biometric data must be destroyed in cases where a relevant enactment does not make such provision.
- (3) In making provision in accordance with subsection (2), the Commissioner must have regard to the provision made by relevant enactments.
- (4) The code of practice may make different provision for different purposes.
- (5) Sections 8, 10 and 12 apply to a revised draft code of practice as they apply to a draft code of practice.
- (6) For the purpose of this section, the following are “relevant enactments”—
  - (a) Part 2 of the Criminal Procedure (Scotland) Act 1995,
  - (b) section 56 of the Criminal Justice (Scotland) Act 2003,
  - (c) Chapter 4 of Part 4 of the Age of Criminal Responsibility (Scotland) Act 2019.

#### **8 Key considerations in preparing the code**

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.

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## **9 Effect of the code**

- (1) The following persons must comply with the code of practice when exercising functions to which the code relates—
  - (a) constables and police staff of the Police Service of Scotland,
  - (b) the Scottish Police Authority,
  - (c) the Police Investigations and Review Commissioner.
- (2) A court or tribunal in civil or criminal proceedings must take the code of practice into account when determining any question to which the code is relevant.
- (3) Failure to comply with the code of practice does not of itself give rise to grounds for any legal action.
- (4) The Scottish Ministers may by regulations amend subsection (1) so as to add a person or description of person, vary an entry listed in it, or remove an entry.
- (5) In this section, “constable” and “police staff” have the same meanings as in section 99(1) of the Police and Fire Reform (Scotland) Act 2012.

## **10 Consultation on the code**

- (1) In preparing a draft code of practice, the Commissioner must consult—
  - (a) the Scottish Ministers,
  - (b) the Lord Advocate,
  - (c) the Lord Justice General,
  - (d) the Faculty of Advocates,
  - (e) the Law Society of Scotland,
  - (f) the chief constable of the Police Service of Scotland,
  - (g) Her Majesty's Inspectors of Constabulary in Scotland,
  - (h) the Scottish Police Authority,
  - (i) the Police Investigations and Review Commissioner,
  - (j) the Information Commissioner,
  - (k) the Scottish Human Rights Commission,
  - (l) the Commissioner for Children and Young People in Scotland, and
  - (m) such other persons as the Commissioner considers appropriate.
- (2) For the purpose of subsection (1), it is immaterial that anything done by way of consultation was done before this section comes into force.

## **11 Further procedure in relation to the first code**

- (1) Having prepared a draft of the first code of practice with which the Commissioner, with the consent of the Scottish Ministers, wishes to proceed, the Commissioner must lay a copy of it before the Scottish Parliament.
- (2) In finalising a draft of the first code of practice, the Commissioner must have regard to any representations about it that are made to the Commissioner within 60 days of the date on which the copy of it is laid under subsection (1).

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- (3) In calculating the period of 60 days for the purpose of subsection (2), no account is to be taken of any time during which the Parliament is dissolved or in recess for more than 4 days.

## **12 Approval of the code**

- (1) Once the Commissioner has finalised a draft code of practice, the Commissioner must submit it to the Scottish Ministers for approval.
- (2) The Scottish Ministers may approve a draft code of practice—
  - (a) without modification, or
  - (b) with such modifications as they, with the consent of the Commissioner, consider appropriate.
- (3) If the Scottish Ministers do not approve a draft code of practice, they must give the Commissioner a statement of their reasons for not approving it.

## **13 Bringing the code into effect**

- (1) A code of practice approved under section 12(2) has no effect until the day appointed for the code by regulations made by the Scottish Ministers.
- (2) Ministers must, when laying before the Scottish Parliament a draft of an instrument containing such regulations, also lay a copy of the approved code of practice.
- (3) The Commissioner must publish the approved code of practice as soon as reasonably practicable after the regulations are made.

## **14 Report on the code**

- (1) The Commissioner must—
  - (a) keep the code of practice under review,
  - (b) prepare and publish a report on the Commissioner's findings, and
  - (c) lay a copy of the report before the Scottish Parliament.
- (2) The first report prepared under subsection (1) must be laid before the Parliament no later than 3 years after the date on which the first code of practice comes into effect.
- (3) Subsequent reports prepared under subsection (1) must be laid before the Parliament no later than 4 years after the date on which the last such report was laid.

## **15 Complaints about failures to comply with the code**

- (1) The Commissioner must provide for a procedure by which an individual, or someone acting on an individual's behalf, may make a complaint to the Commissioner that a person who is required by section 9(1) to comply with the code of practice has not done or is not doing so in relation to the individual's biometric data.
- (2) The procedure must provide for it to be available whether or not procedures—
  - (a) established by the person about whom the complaint is made, and
  - (b) which allow for the making of a complaint (or other representation) about the acquisition, retention, use or destruction of the individual's biometric data,

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have been or are being pursued.

- (3) In determining the procedure, the Commissioner must consult—
  - (a) the Scottish Public Services Ombudsman,
  - (b) the Information Commissioner,
  - (c) the persons about whom a complaint may be made, and
  - (d) such other persons as the Commissioner considers appropriate.
- (4) The Commissioner must give such publicity to the procedure as the Commissioner considers appropriate and must give a copy of the procedure to any person who requests it.
- (5) The Commissioner must keep the procedure under review and must vary it whenever, after consulting the persons mentioned in subsection (3), the Commissioner considers it appropriate to do so.
- (6) In subsections (2), (4) and (5), “the procedure” means the procedure for the time being in effect.

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### *Information-gathering*

#### **16 Power to gather information**

- (1) The Commissioner may require any person in relation to whom the Commissioner has functions under section 2(1) to supply information which the Commissioner reasonably requires for the purpose of—
  - (a) determining whether persons who are required by section 9(1) to comply with the code of practice have done or are doing so, or
  - (b) exercising any of the Commissioner's other functions.
- (2) Where a requirement is imposed under subsection (1), the Commissioner must give the person a written notice specifying—
  - (a) the information, or the nature of the information, which is to be supplied,
  - (b) the form in which it is to be supplied,
  - (c) the date on or by which it is to be supplied,
  - (d) in the case of information which is to be supplied by means of a statement in person, the place at which it is to be supplied, and
  - (e) the particular matters in connection with which it is required.
- (3) A person is not obliged under this section to provide information which that person would be entitled to refuse to provide in proceedings in a court in Scotland.
- (4) The Commissioner may revoke any requirement imposed under subsection (1) by giving written notice to the person to whom notice of the requirement was given.
- (5) In this section, “information” includes unrecorded information.

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## **17 Failure to comply with an information notice**

- (1) Where a person who is obliged to provide information in accordance with a notice issued under section 16—
  - (a) refuses or fails, without reasonable excuse, to comply with any requirement specified in the notice,
  - (b) attends to make a statement in person but refuses or fails, without reasonable excuse, to answer any question concerning the matters specified in the notice, or
  - (c) alters, suppresses, conceals or destroys, without reasonable excuse, any information which the person is required to produce,
 the Commissioner may report the matter to the Court of Session.
- (2) The Commissioner may also report the matter to the Court of Session where the Commissioner considers that a person who is mentioned in subsection (1) is likely to do any of the things specified in paragraphs (a) to (c) of that subsection.
- (3) After receiving a report under subsection (1) or (2) and hearing any evidence or representations on the matter, the Court may (either or both)—
  - (a) make such order for enforcement as it considers appropriate,
  - (b) deal with the matter as if it were a contempt of court.

## **18 Admissibility of statements in criminal proceedings**

An oral or written statement made by a person which the person was required to give under section 16 is not admissible in any criminal proceedings against that person.

## **19 Offence of Commissioner's office disclosing confidential information**

- (1) A person mentioned in subsection (2) commits an offence if—
  - (a) the person knowingly discloses any information which—
    - (i) has been obtained by or on behalf of the Commissioner for the purposes of exercising the Commissioner's functions, and
    - (ii) at the time of disclosure is not, and has not previously been, in the public domain, and
  - (b) the disclosure is not authorised by subsection (3).
- (2) The persons referred to in subsection (1) are persons who are or have been—
  - (a) the Commissioner,
  - (b) a member of the Commissioner's staff,
  - (c) an agent of the Commissioner.
- (3) For the purposes of subsection (1)(b), disclosure is authorised only so far as—
  - (a) it is made with the consent of the person from whom the information was obtained,
  - (b) it is necessary for the purpose of enabling or assisting the exercise of the Commissioner's functions under this Act, or
  - (c) it is made for the purposes of legal proceedings, whether criminal or civil (including for the purposes of the investigation of any offence or suspected offence).



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- (4) A person who commits an offence under subsection (1) is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum, or
  - (b) on conviction on indictment, to a fine.

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### *Reporting*

#### **20 Reports and recommendations**

- (1) If the Commissioner determines that a person who is required by section 9(1) to comply with the code of practice has not done or is not doing so, the Commissioner must prepare and publish a report about that failure unless the Commissioner considers that it is sufficiently minor not to merit it.
- (2) The Commissioner may prepare and publish a report about any other matter relating to the Commissioner's functions.
- (3) The Commissioner must lay a copy of any report published under subsection (1) or (2) before the Scottish Parliament.
- (4) A report prepared under subsection (1) may relate to separate failures by different persons.
- (5) A report under subsection (1) or (2) may include recommendations—
- (a) in relation to compliance with section 9(1),
  - (b) in relation to the technology used or capable of being used for the purpose of acquiring, retaining, using or destroying biometric data, and
  - (c) about any other matter relating to the Commissioner's functions.
- (6) The Commissioner must ensure that a report does not include any information that, in the Commissioner's opinion, it would be inappropriate to include on the ground that to do so—
- (a) would or might be unlawful,
  - (b) would or might prejudice the administration of justice, or
  - (c) would not be in the public interest.

#### **21 Requirement to respond to reports**

- (1) Where a report under section 20(1) or (2) includes a recommendation—
- (a) addressed to a person in relation to whom the Commissioner has functions under section 2(1), and
  - (b) relating to the technology used or capable of being used for the purpose of acquiring, retaining, using or destroying biometric data,
- the Commissioner must, in the report, impose on the person a requirement to respond to the recommendation.
- (2) Where a report under section 20(1) or (2) includes a recommendation—
- (a) addressed to a person in relation to whom the Commissioner has functions under section 2(1), and

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(b) which is not a recommendation to which the duty in subsection (1) applies, the Commissioner may, in the report, impose on the person a requirement to respond to the recommendation.

(3) Where a requirement to respond is imposed under subsection (1) or (2)—

(a) the Commissioner must give a copy of the report to the person to whom the recommendation is addressed, and

(b) the person must provide a written statement within such reasonable period as the Commissioner specifies.

(4) The statement must set out—

(a) what the person has done or proposes to do in response to the recommendation, or

(b) if the person does not intend to implement the recommendation (in full or in part), the reasons for that.

## **22 Publication of responses to reports**

(1) The Commissioner must—

(a) publish any statement provided in response to a requirement to respond imposed under section 21, and

(b) lay a copy of it before the Scottish Parliament.

(2) Subsection (1) does not apply if, or to the extent that, the Commissioner considers publication and laying to be inappropriate.

(3) In particular, the Commissioner must ensure that, so far as reasonably practicable, the version of the statement which is published and laid under subsection (1) does not include any information which would not, under section 20(6), be included in a report.

(4) The Commissioner may, in such manner as the Commissioner considers appropriate, publicise a failure to comply with a requirement to respond.

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### *Compliance notices*

## **23 Compliance notices**

(1) Where the Commissioner considers that a person who is required by section 9(1) to comply with the code of practice has not done or is not doing so, the Commissioner may issue a compliance notice to the person.

(2) A “compliance notice” is a notice requiring the person to whom it is issued to take the steps set out in the notice in order to address the person's failure to comply with the code of practice.

## **24 Content of a compliance notice**

A compliance notice must include—

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- (a) a statement of the grounds for issuing the notice, including a statement of—
  - (i) the provision of the code of practice which the Commissioner considers that the person has not complied with,
  - (ii) the act or omission which has caused the Commissioner to conclude that the code of practice has not been complied with,
- (b) details of the steps that the Commissioner requires the person to whom the notice is issued to take in order to—
  - (i) comply with the code of practice, or
  - (ii) ensure that the code of practice will be complied with in future,
- (c) the date of issue of the notice,
- (d) the period of time within which the required steps are to be taken,
- (e) information about the person to whom, and as to how and by when, any representations about the notice may be made,
- (f) an explanation of the consequences of failure to comply with the requirements of the notice.

## **25 Variation of a compliance notice**

- (1) The Commissioner may vary a compliance notice—
  - (a) so as to extend the period of time within which the required steps are to be taken, and
  - (b) with the consent of the person to whom the notice was issued, so as to modify the required steps.
- (2) A compliance notice may be varied at any time before the expiry of the period within which the required steps are to be taken.
- (3) A compliance notice is varied by—
  - (a) in the case of a variation under subsection (1)(a), issuing a notice in writing to the person to whom the compliance notice was issued,
  - (b) in the case of a variation under subsection (1)(b), agreement in writing between the Commissioner and the person to whom the compliance notice was issued.

## **26 Revocation of a compliance notice**

- (1) The Commissioner may revoke a compliance notice.
- (2) A compliance notice may be revoked—
  - (a) at any time before completion of the steps that are to be taken to comply with it,
  - (b) by issuing a notice in writing to that effect to the person to whom the compliance notice was issued.

## **27 Failure to comply with a compliance notice**

- (1) Where a person to whom a compliance notice has been issued refuses or fails, without reasonable excuse, to comply with the notice, the Commissioner may report the matter to the Court of Session.

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- (2) After receiving a report under subsection (1) and hearing any evidence or representations on the matter, the Court may (either or both)—
- (a) make such order for enforcement as it considers appropriate,
  - (b) deal with the matter as if it were a contempt of court.

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### *Accountability*

#### **28 Strategic plans**

- (1) The Commissioner must, in respect of each 4 year period—
  - (a) prepare and publish a strategic plan, and
  - (b) lay a copy of the plan before the Scottish Parliament before the beginning of the 4 year period to which it relates.
- (2) Before publishing a strategic plan, the Commissioner must consult on a draft of it with—
  - (a) the Parliamentary corporation, and
  - (b) such other persons as the Commissioner considers appropriate.
- (3) A strategic plan is a plan setting out how the Commissioner proposes to perform the Commissioner's functions during the period covered by the plan and, in particular, setting out—
  - (a) what the Commissioner's objectives and priorities are for that period,
  - (b) how the Commissioner proposes to achieve them,
  - (c) what the timetable is for doing so, and
  - (d) what the estimated costs are of doing so.
- (4) The Commissioner may, at any time, review and revise a strategic plan.
- (5) Where the Commissioner revises a strategic plan—
  - (a) subsections (1) to (4) apply to the revised strategic plan as they apply to the original strategic plan,
  - (b) the reference in subsection (1) to the 4 year period is to be read as a reference to the period to which the revised strategic plan relates.
- (6) In this section, “4 year period” means—
  - (a) the period of 4 years beginning with 1 April next following the coming into force of this section, and
  - (b) each subsequent period of 4 years.

#### **29 Budgets**

- (1) The Commissioner must, before the start of each financial year—
  - (a) prepare proposals for the Commissioner's use of resources and expenditure during the year (a “budget”), and
  - (b) by such date as the Parliamentary corporation determines, send the budget to it for approval.

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- (2) The Commissioner may, in the course of a financial year, prepare a revised budget for the remainder of the year and send it to the Parliamentary corporation for approval.
- (3) In preparing a budget or revised budget, the Commissioner must ensure that the Commissioner's resources will be used economically, efficiently and effectively.
- (4) A budget or revised budget must contain a statement confirming that the Commissioner has complied with the duty under subsection (3).

### **30 Accountable officer**

- (1) The Parliamentary corporation must designate the Commissioner or a member of the Commissioner's staff as the accountable officer for the purposes of this section.
- (2) The functions of the accountable officer are—
  - (a) signing the accounts of the expenditure and receipts of the Commissioner,
  - (b) ensuring the propriety and regularity of the finances of the Commissioner,
  - (c) ensuring that the resources of the Commissioner are used economically, efficiently and effectively, and
  - (d) where the accountable officer is not the Commissioner, the duty set out in subsection (3).
- (3) The duty referred to in subsection (2)(d) is a duty, where the accountable officer is required to act in a way that the accountable officer considers would be inconsistent with the proper performance of the functions specified in subsections (2)(a) to (c), to—
  - (a) obtain written authority from the Commissioner before taking the action, and
  - (b) send a copy of that authority as soon as possible to the Auditor General for Scotland.
- (4) The accountable officer is answerable to the Scottish Parliament for the performance of the functions in subsection (2).

### **31 Accounts and audit**

- (1) The Commissioner must—
  - (a) keep proper accounts and accounting records,
  - (b) prepare in respect of each financial year a statement of accounts, and
  - (c) send a copy of the statement to the Auditor General for Scotland for auditing.
- (2) The Commissioner must comply with any directions which the Scottish Ministers give the Commissioner in relation to the matters mentioned in subsection (1)(a) and (b).
- (3) The Commissioner must make the audited statement of accounts available, without charge, for inspection at all reasonable times.

### **32 Annual report**

- (1) The Commissioner must, in respect of each financial year—
  - (a) prepare and publish a report on the Commissioner's activities during that year, and

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- (b) lay a copy of the report before the Scottish Parliament before the expiry of the period of 7 months beginning with the last day of that year.
- (2) The report must include—
- (a) a review of issues identified by the Commissioner in the financial year as being relevant to the use of biometric data for criminal justice and police purposes,
  - (b) a review of the Commissioner's activity in that year, including the steps taken to fulfil each of the Commissioner's functions,
  - (c) any recommendations by the Commissioner arising out of such activity.

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### *Advisory group*

#### **33 Advisory group**

- (1) The Commissioner must establish and maintain an advisory group.
- (2) The purpose of the group is to give advice and information to the Commissioner about matters relating to the Commissioner's functions.
- (3) The members of the group are to be such persons as the Commissioner determines, subject to the approval of the Parliamentary corporation as to—
  - (a) the number of members, and
  - (b) the persons to be appointed.
- (4) The Commissioner may pay to members of the group such remuneration and allowances (including expenses) as the Commissioner, with the approval of the Parliamentary corporation, determines.
- (5) The procedure of the group is to be such as the Commissioner determines.

VALID FROM 01/12/2020

### *Meaning of key terms*

#### **34 Meaning of “biometric data”**

- (1) In this Act, “biometric data” means information about an individual's physical, biological, physiological or behavioural characteristics which is capable of being used, on its own or in combination with other information (whether or not biometric data), to establish the identity of an individual.
- (2) For the purposes of subsection (1), “biometric data” may include—
  - (a) physical data comprising or derived from a print or impression of or taken from an individual's body,
  - (b) a photograph or other recording of an individual's body or any part of an individual's body,

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- (c) samples of or taken from any part of an individual's body from which information can be derived, and
- (d) information derived from such samples.

### **35 Power to change meaning of “biometric data”**

The Scottish Ministers may by regulations modify section 34 so as to change, or clarify, the meaning of “biometric data” in this Act.

### **36 Interpretation**

In this Act, except where the context requires otherwise—

“code of practice” means the code of practice for the time being in effect by virtue of section 13,

“Commissioner” means the Scottish Biometrics Commissioner,

“Parliamentary corporation” means the Scottish Parliamentary Corporate Body.

## *Final provisions*

### **37 Regulations**

- (1) Any power of the Scottish Ministers to make regulations under this Act includes the power to make—
  - (a) incidental, supplementary, consequential, transitional, transitory or saving provision,
  - (b) different provision for different purposes.
- (2) Regulations under sections 2(7), 9(4), 13(1) and 35 are subject to the affirmative procedure.
- (3) Regulations under section 38—
  - (a) which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure,
  - (b) otherwise, are subject to the negative procedure.
- (4) This section does not apply to regulations under section 40(2).

### **38 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it.
- (2) Regulations under subsection (1) may modify any enactment (including this Act).

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**39 Application of public authorities legislation**

Schedule 2 amends other Acts so that their provisions apply to the office of Commissioner.

**40 Commencement**

- (1) This section and sections 37, 38 and 41 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under subsection (2) may—
  - (a) make different provision for different purposes,
  - (b) include transitional, transitory or saving provision.
- (4) Regulations under this section bringing section 28 into force may amend subsection (6) (a) of that section so that, instead of referring to the period of 4 years beginning with 1 April next following the coming into force of that section, it specifies the date on which the period actually begins.

**41 Short title**

The short title of this Act is the Scottish Biometrics Commissioner Act 2020.



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VALID FROM 01/12/2020

## SCHEDULE 1

(introduced by section 1)

### THE OFFICE OF SCOTTISH BIOMETRICS COMMISSIONER

#### *Status*

- 1 (1) The Commissioner—
- (a) is not a servant or agent of the Crown, and
  - (b) does not enjoy any status, immunity or privilege of the Crown.
- (2) The Commissioner is, as Commissioner, to be regarded as a juristic person distinct from the individual for the time being holding the office.
- (3) The Commissioner's staff are not to be regarded as civil servants.

#### *Appointment*

- 2 (1) The office of Commissioner is to be held by an individual appointed by Her Majesty on the nomination of the Scottish Parliament.
- (2) An individual may not be appointed to hold the office of Commissioner if the individual is disqualified under paragraph 3.
- (3) An individual who holds or has held the office of Commissioner may not be reappointed.

#### *Disqualification from appointment*

- 3 An individual is disqualified from holding the office of Commissioner if the individual is or, within the year preceding the date on which the appointment is to take effect, has been—
- (a) a member of the Scottish Parliament,
  - (b) a member of the House of Commons,
  - (c) a member of the House of Lords,
  - (d) a member of the European Parliament,
  - (e) a person who is, or who is a member, employee or appointee of, a person in relation to whom the Commissioner has functions under section 2(1).

#### *Tenure*

- 4 Subject to paragraph 5, the Commissioner holds office for such period, not exceeding 8 years, as the Parliamentary corporation determines at the time of appointment.

#### *Early termination*

- 5 (1) The Commissioner's appointment ends if—

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- (a) the Commissioner is relieved of office by Her Majesty at the Commissioner's request,
  - (b) the Commissioner becomes disqualified from holding office (see paragraph 3), or
  - (c) the Commissioner is removed from office in accordance with sub-paragraph (2).
- (2) The Commissioner may be removed from office by Her Majesty if—
- (a) either of the conditions in sub-paragraph (3) is met, and
  - (b) the number of members voting in favour of the resolution referred to in the condition in question is at least two thirds of the total number of seats for members of the Scottish Parliament.
- (3) The conditions are—
- (a) that—
    - (i) the Parliamentary corporation is satisfied that the Commissioner has breached the Commissioner's terms and conditions of appointment, and
    - (ii) the Parliament resolves that the Commissioner should be removed from office for that breach,
  - (b) the Parliament resolves that it has lost confidence in the Commissioner's willingness, suitability or ability to perform the Commissioner's functions.

*Validity of things done*

- 6 The validity of anything done by the Commissioner is not affected by—
- (a) a defect in the nomination of the Commissioner,
  - (b) the disqualification of an individual as the Commissioner after appointment.

*Remuneration and pensions, etc.*

- 7 (1) The Parliamentary corporation may pay the Commissioner such remuneration and allowances (including expenses) as the Parliamentary corporation determines.
- (2) The Parliamentary corporation must indemnify the Commissioner in respect of any liabilities incurred by the Commissioner in the exercise of the Commissioner's functions.
- (3) The Parliamentary corporation may pay, or make arrangements for the payment of, such pensions, allowances and gratuities to, or in respect of, any individual who holds or has held the office of Commissioner as the Parliamentary corporation determines.
- (4) Those arrangements may include—
- (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (5) The reference in sub-paragraph (3) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

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*Subsequent appointments etc.*

- 8 (1) A person who has ceased to be the Commissioner may not, without the approval of the Parliamentary corporation—
- (a) be employed or appointed in any other capacity by the Commissioner,
  - (b) be a person who is, or who is a member, employee or appointee of, a person in relation to whom the Commissioner has functions under section 2(1),
  - (c) hold any other office, employment or appointment or engage in any other occupation which, by virtue of paragraph 9(2)(a), that person could not have held or engaged in when Commissioner.
- (2) The restriction in sub-paragraph (1)—
- (a) starts when the person ceases to be the Commissioner, and
  - (b) ends on the expiry of the financial year next following the one in which it started.

*Other terms and conditions*

- 9 (1) The Parliamentary corporation may, subject to any provision made by this Act, determine the terms and conditions on which the Commissioner is appointed.
- (2) Those terms and conditions may—
- (a) prohibit the Commissioner from holding any other specified office, employment or appointment or engaging in any other specified occupation,
  - (b) provide that the Commissioner's holding of any such office, employment or appointment or engagement in any such occupation is subject to the approval of the Parliamentary corporation.
- (3) In sub-paragraph (2)(a), “specified” means specified (by name or description) in the Commissioner's terms and conditions.

*Temporary appointments*

- 10 (1) This paragraph applies during any period when—
- (a) the office of Commissioner is vacant, or
  - (b) the individual holding the office is for any reason unable to perform the Commissioner's functions.
- (2) The Parliamentary corporation may appoint an individual to act as the Commissioner during that period.
- (3) An individual is eligible for appointment under sub-paragraph (2) only if the individual—
- (a) is a member of the Commissioner's staff, or
  - (b) is not disqualified from holding the office of Commissioner under paragraph 3.
- (4) An individual appointed under sub-paragraph (2)—
- (a) is appointed on such terms and conditions, and for such period, as the Parliamentary corporation determines,
  - (b) while acting as Commissioner is to be treated as the Commissioner for all purposes except those of paragraphs 4, 5 and 7(3).

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- (5) An appointment under sub-paragraph (2) ends if—
- (a) the individual is relieved of office by the Parliamentary corporation at the individual's request, or
  - (b) the individual is removed from office by the Parliamentary corporation by notice in writing.

*Appointment of staff*

- 11 The Commissioner may, with the consent of the Parliamentary corporation as to numbers, appoint staff.

*Staff terms and conditions*

- 12 Staff appointed by the Commissioner are appointed on such terms and conditions as the Commissioner, with the approval of the Parliamentary corporation, determines.

*Staff pensions*

- 13 (1) The Commissioner may, with the approval of the Parliamentary corporation, pay or make arrangements for the payment of pensions, allowances and gratuities to, or in respect of, any individual who is or has been a member of staff of the Commissioner.
- (2) Those arrangements may include—
- (a) making payments towards the provision of those pensions, allowances and gratuities,
  - (b) providing and maintaining schemes for the payment of those pensions, allowances and gratuities.
- (3) The reference in sub-paragraph (1) to pensions, allowances and gratuities includes pensions, allowances and gratuities by way of compensation for loss of office.

*Authority to perform functions*

- 14 (1) The Commissioner may authorise any person to perform such of the Commissioner's functions (and to such extent) as the Commissioner determines.
- (2) The giving of authority under sub-paragraph (1) does not—
- (a) affect the Commissioner's responsibility for the performance of the functions,
  - (b) prevent the Commissioner from performing the functions.

SCHEDULE 2

*(introduced by section 39)*

APPLICATION OF PUBLIC AUTHORITIES LEGISLATION

*Scottish Public Services Ombudsman Act 2002*

- 1 In Part 2 of schedule 2 of the Scottish Public Services Ombudsman Act 2002 (Scottish public authorities liable to investigation), before paragraph 37 insert—

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“36A The Scottish Biometrics Commissioner.”.

*Freedom of Information (Scotland) Act 2002*

2 In Part 7 of schedule 1 of the Freedom of Information (Scotland) Act 2002 (other Scottish public authorities to which the Act applies), after paragraph 79A insert—

“79B The Scottish Biometrics Commissioner.”.

*Public Services Reform (Scotland) Act 2010*

3 In the Public Services Reform (Scotland) Act 2010—

- (a) in schedule 5 (Scottish public authorities with mixed or no reserved functions to which Part 2 order-making powers apply), after the entry relating to the Scottish Agricultural Wages Board insert— “ Scottish Biometrics Commissioner ”,
- (b) in schedule 6 (bodies for which request and consent required for use of Part 2 order-making powers), after the entry relating to the Commissioner for Children and Young People in Scotland insert— “ Scottish Biometrics Commissioner ”,
- (c) in schedule 8 (bodies required to provide information on exercise of public functions), after the entry relating to the Scottish Agricultural Wages Board insert— “ Scottish Biometrics Commissioner ”.

*Public Records (Scotland) Act 2011*

4 In the schedule of the Public Records (Scotland) Act 2011 (other authorities to which Part 1 applies), after the entry relating to the Scottish Agricultural Wages Board insert— “ Scottish Biometrics Commissioner ”.

*Procurement Reform (Scotland) Act 2014*

5 In Part 3 of the schedule of the Procurement Reform (Scotland) Act 2014 (other contracting authorities to which the Act applies), before paragraph 44 insert—

“43A Scottish Biometrics Commissioner”.

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**Changes to legislation:**

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