

# SCOTTISH BIOMETRICS COMMISSIONER ACT 2020

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Code of practice*

#### *Section 7: Code of practice*

18. Section 7 provides that the Commissioner must, in furtherance of the Commissioner's general function in section 2(1), 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. Anything that the Commissioner does, including preparing the code of practice, should be in furtherance of their general function. This therefore reiterates that the Commissioner must prepare a code that supports and promotes 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.
19. Subsection (2) requires that 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. When making such provision in the code, the Commissioner must have regard to the provision made by relevant enactments. The purpose of these provisions is to ensure that provisions in the code regarding the destruction of biometric data do not duplicate or conflict with existing provisions regarding the destruction of biometric data. The term "relevant enactments" is defined in subsection (6). It should be noted that under section 14 of the Interpretation and Legislative Reform (Scotland) Act 2010, this definition also covers any other any enactments which apply any of the listed enactments. For example, this means that paragraph 7 of schedule 4 of the International Criminal Court (Scotland) Act 2001 (which applies section 18 of the Criminal Procedure (Scotland) Act 1995 – which forms part of Part 2 of that Act) would also be a relevant enactment.
20. Subsection (5) provides that sections 8, 10 and 12 apply to a revised draft code of practice prepared under subsection (1) as they would apply to a draft code of practice. This means that various rules about drafting and seeking approval for the code apply equally to drafting and seeking approval for any revised code. In addition, section 36 (interpretation) provides that, unless the context requires otherwise, a reference to the "code of practice" means the code for the time being in effect. That means that any provision in the Act about matters such as what the code of practice must contain applies equally to any revised code of practice.

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

21. Section 8 of the Act requires the Commissioner to have regard to the importance of certain matters listed in that section when preparing the code of practice. By virtue of section 7(5), this applies equally when revising the code of practice.

### ***Section 9: Effect of the code***

22. Subsection (1) of section 9 states that the constables and police staff of Police Scotland, the SPA and the PIRC must comply with the code of practice when exercising functions to which the code relates. Subsection (2) provides that 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. Subsection (3) provides that a failure by any persons listed under section 9(1) to comply with the code of practice does not itself give rise to grounds for any legal action (though it may give rise for grounds for the issuing of a compliance notice under section 23). Subsection (4) provides an enabling power for the Scottish Ministers to amend, by regulations, the list of persons who must have regard to any code of practice at subsection (1) – by adding, removing or altering a person or description of person. As noted at paragraph 6 above in relation to section 2, the term “person” has a wide meaning and includes bodies as well as individuals. Such regulations are subject to the affirmative procedure under section 37(2).

### ***Section 10: Consultation on the code***

23. Subsection (1) of section 10 lists a set of prescribed consultees whom the Commissioner must consult in preparing a draft code of practice prior to the process for approval of the code proceeding further under section 11 or (in the case of a code that is not the first code) 12. By virtue of section 7(5), this required consultation process applies equally when revising the code of practice. Subsection (1)(m) also allows the Commissioner to use their discretion to also consult anyone else they consider appropriate. Subsection (2) states that any consultation which was undertaken with consultees remains valid even if such consultation took place before this section came into force. This ensures that, once appointed, the Commissioner will be able to begin work on the code straight away.

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

24. Section 11 of the Act sets out the further procedures which will apply in relation to the first code of practice prepared by the Commissioner. Subsection (1) requires the Commissioner to first submit a copy of the draft code of practice to the Scottish Ministers for approval. Having gained the approval of the Scottish Ministers to the code, the Commissioner must then lay the draft code before the Parliament for consideration. Subsection (2) requires the Commissioner to have regard to any representations made to them within 60 days of laying the draft code of practice. Representations can then be made to the Commissioner by anyone though in practice it is likely that the primary source of representations will be parliamentarians. Subsection (3) provides that, in calculating the 60 day period, no account is to be taken of instances when the Parliament is dissolved or is in recess for more than four days. The additional parliamentary scrutiny and procedural steps which apply to the first code of practice under section 11 operate in addition to the requirement that any code can only be brought into effect by the Parliament approving affirmative regulations under section 13.

### ***Section 12: Approval of the code***

25. Subsections (1) to (3) of section 12 of the Act set out the arrangements for the approval process for the code of practice once the Commissioner has finalised a draft code after undertaking the consultation process set out above. The Commissioner must submit a copy of the draft code to the Scottish Ministers for approval. Should the Scottish Ministers decide not to approve the draft code, they must provide their reasons to the Commissioner. Any modifications made to the draft code by Scottish Ministers require to be agreed with the Commissioner. By virtue of section 7(5), this approval process applies equally when revising the code of practice. Steps can then be taken under section 13 to bring the approved draft code into effect.

***Section 13: Bringing the code into effect***

26. Section 13 states that any 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. Such regulations are subject to the affirmative procedure under section 37(2). While the regulations will not contain the code, the Scottish Ministers must lay a copy of the code before the Scottish Parliament at the same time as the regulations are laid. This is to ensure that the Parliament has the opportunity to consider the code of practice before approving the regulations that bring the code into effect. Once the date for coming into force has been approved by regulations, the Commissioner must publish the code.

***Section 14: Report on the code***

27. Section 14 provides that the Commissioner must keep the code of practice under review, prepare and publish a report on their findings, and lay a copy of such a report before the Scottish Parliament. It also provides that the first such report must be laid by the Commissioner before the Parliament no later than three years after the date on which the first code is brought into effect. Any subsequent reports are to be laid before the Parliament no later than four years after the date on which the last report was laid.

***Section 15: Complaints procedure***

28. Subsection (1) of section 15 of the Act requires the Commissioner to establish and retain a procedure by which an individual, or their representatives, can make complaints or other representations to the Commissioner about a breach of the code of practice in relation to that individual's biometric data. Subsection (2) provides that the procedure is to be available whether or not the individual has already instigated a complaint through the complaints mechanism of the body they are complaining about. In determining the complaints procedure, the Commissioner is to consult various persons under subsection (3). Under subsection (4), the Commissioner must publicise the procedure as the Commissioner considers appropriate and provide a copy of the procedure to anyone who asks for it. Subsection (5) provides that the Commissioner must keep the procedure under review and vary it whenever the Commissioner considers it appropriate to do so, having first consulted the prescribed consultees. Subsection (6) ensures that the rules about the availability of the procedure and the requirement to keep it under review and vary it as necessary apply equally to the revised procedure as they do to the initial one.