

# **SCOTTISH BIOMETRICS COMMISSIONER ACT 2020**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Information-gathering***

##### ***Section 16: Power to gather information***

29. Section 16 provides the Commissioner with the power to require the production of information from Police Scotland, the SPA and the PIRC (or from any other person who the Commissioner's functions are subsequently expanded to cover) in order to determine whether the bodies subject to the code of practice are complying with it, or for the purpose of exercising any of the Commissioner's other functions. When seeking information, the Commissioner is to specify the following: what information is to be supplied; the form the information is to be provided in; the date by which information is due; the place where a person is to supply any information which is to be supplied by personal statement; and the matters to which the information relates. Under subsection (3) a person is exempt from providing information to the Commissioner where, for example, that information would be covered by legal privilege or incriminate that person in a crime. Subsection (4) allows the Commissioner to change their mind and cancel (by notice in writing) an information request. Subsection (5) makes clear that unrecorded information, such as an oral statement, is information for the purposes of section 16. This means that information must be provided even if there is no written record of it.

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

30. Section 17 enables the Commissioner to apply to the Court of Session where any person to whom an information notice has been given does any of the following: refuses or fails to comply with any requirement specified in the notice; refuses or fails to answer any question asked by the Commissioner; or alters, suppresses, conceals or destroys any information that they have been told to produce. There is an exemption where there is a reasonable excuse for having done any of these things. The Commissioner may also apply to the Court if they believe a person is likely to do any of these things (without reasonable excuse). After receiving an application and hearing any evidence or representations on the matter, the court may make such an enforcement order as it considers appropriate and/or deal with the matter as if it were a contempt of court. This recourse to the court provides a way (subject to appropriate safeguards) for the Commissioner to obtain information from bodies to which the Commissioner's functions and the code of practice apply.

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

31. Section 18 provides that an oral or written statement made by a person required to provide it under section 16 is not admissible in any criminal proceedings against

that person. The effect of this is that individuals cannot incriminate themselves when responding to a requirement to provide information.

***Section 19: Offence of Commissioner's office disclosing confidential information***

32. Section 19 contains a confidentiality provision that covers the following: the Commissioner (including any former Commissioners); the Commissioner's staff (or past staff); and an agent (or former agent) of the Commissioner. These persons would be guilty of an offence if they knowingly disclosed information which had been obtained in the course of the Commissioner's activities, knowing that the information is not at the time of disclosure, and has not previously been, in the public domain. There is an exception under which disclosure is authorised where it is made with the consent of the person from whom the information was obtained, or where it is necessary for the purposes of exercising the Commissioner's functions, or where it is made for the purposes of legal proceedings (whether criminal or civil – and including the purposes of the investigation of any offence or suspected offence). A person guilty of an offence is liable to a fine on summary conviction or conviction on indictment. The fine on summary conviction is up to the statutory maximum, which is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 as the prescribed sum under section 225(8) of the Criminal Procedure (Scotland) Act 1995 (currently £10,000). The fine on indictment can be unlimited as section 211(1) of the 1995 Act makes any fine on conviction on indictment unlimited.