# Scottish Biometrics Bill 2019

A Bill for 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. (the Draft Bill)

**Current Status of the Bill**

This Scottish Government Bill was introduced by the Cabinet Secretary for Justice, Humza Yousaf MSP, on 30 May 2019. The Bill completed Stage 2 on 4 February 2020. The Parliament will consider Stage 3 amendments to the Bill on the afternoon of Tuesday 10th March 2020.

See [the Commission’s full submission](http://www.scottishhumanrights.com/media/1918/scottish-biometrics-commissioner-bill-response.docx) to the Justice Committee – Stage 1 Consideration of the Bill.

# Purpose of Paper

This briefing aims to inform Parliamentarians around proposed changes to the Scottish Biometrics Commissioner’s Bill and outline concerns of the Commission in relation to the *independence and enforcement powers* of the future Biometrics Commissioner.

The Commission welcomes the direction of travel the Scottish Government is taking in this area. In particular, the recognition on the face of the Bill that there is a need for a human rights based approach to the collection, use, retention and disposal of biometric data. This recommendation comes not only from the Commission, but from the Scottish Government’s [Independent Advisory Group (IAG),](https://www.gov.scot/publications/report-independent-advisory-group-use-biometric-data-scotland/) which was chaired by John Scott QC and made up of a multidisciplinary group of experts in this area including, Police Scotland, forensic experts, COPFS, Scottish Police Authority, the Information Commissioner’s Office and HMICS. The Biometrics Commissioner Bill is the product of the IAG recommendations to government.

This Bill provides the opportunity to support and prepare Scottish institutions, judiciary and citizens for the use of biometrics and forensic technology in a rights-compliant manner. However, we are concerned that there are significant departures from the IAG recommendations, which may weaken the functions of the new Biometrics Commissioner.

These are:

# 1. Independence

The Draft Bill creates certain measures that confer a role upon the Scottish Ministers which potentially interferes with the operational and financial independence of the Biometrics Commissioner. We are concerned that the provisions below do not deliver the necessary levels of independent oversight for the Biometrics Commissioner. These include:

* s5B Scottish Ministers to review the Powers and Functions of the Commissioner after 3 years then every 5 years;
* s6(2) and 6(3) The draft code of practice requires Scottish ministers approval before going before parliament
* s22(7) Scottish ministers have powers relating to the regulation of governance of the Ethics Advisory Group
* s23(A) Scottish ministers have the power to change meaning of biometric data

**Recommendation:**

The Biometric Commissioner requires full independence in order to effectively ensure public confidence in the use of biometric data in the context of policing and criminal justice. In particular:

- The draft code of practice should not be subject to Scottish ministers approval and should be established on the face of the Bill.

- Any regulation of governance of the Ethics Advisory Groups should be the remint of the Biometric Commissioner only.

- The Bill should outline matters relating to review of the Code and the definition of biometric data by the Scottish Parliament.

- There is no need for the Scottish Ministers to review the Powers and Functions of the Biometrics Commissioner as this is already implicit in the Scottish Parliament function of reviewing existing legislation.

# 2. Enforcement powers

The Draft Bill defines the Biometrics Commissioner general function as supporting and promoting the adoption of lawful, effective and ethical practices with regard to biometric data. We are concerned that this detracts from the primary role of the Biometrics Commissioner, which is promoting and ensuring compliance with the Code of Practice in the policing and criminal justice system in Scotland. This is crucial as the Code of Practice is the primary vehicle by which the Commissioner will deliver on the general function set out in Section 2(1) of the Bill. The Draft Bill has now been amended in order to replace ‘give due regard’ to the Code of Practice with ‘must comply with’ it.

While it is clear that the Draft Bill creates a requirement for law enforcement bodies to be compliant with the Code(s7(1)) it does not give the Commissioner sufficient enforcement powers to address directly the lack of compliance. S12 and s16 of the Draft Bill stops short of creating a sanction or effective enforcement powers for the new Commissioner. Where the Biometrics Commissioner finds a failure to comply with an information notice the only recourse that they have is to report the matter to the Court of Session to make a discretionary order for enforcement or deal with the matter as a contempt of court. This enforcement measure is both expensive and lengthy in Scotland. We suggest the Bill introduces a regime more similar to that operated by the Information Commissioner with direct enforcement powers. This is crucial in order to ensure accountability and public confidence in the proper and proportionate use of biometrics.

**Recommendation:**

The Biometrics Commissioner should have sufficient powers to enforce directly both the failure to comply with an information notice and the lack of compliance with the Code of Practice.