

**CONSULTATION ON ENHANCED
OVERSIGHT OF BIOMETRIC DATA
FOR JUSTICE AND COMMUNITY
SAFETY PURPOSES**

**ANALYSIS OF RESPONSES
REID-HOWIE ASSOCIATES LTD.**

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EXECUTIVE SUMMARY

This summary presents the main findings of an analysis of written responses and meeting outputs relating to the Scottish Government's consultation on enhanced oversight of biometric data for justice and community safety purposes.

The consultation ran from 13th July 2018 until 1st October 2018.

Background

In June 2017, the then Cabinet Secretary for Justice established an Independent Advisory Group (IAG) to consider the taking, use and retention of biometric data in policing. The report made 9 recommendations, among which were:

- A statutory Code of Practice¹ covering biometric data and technologies.
- The establishment of a Scottish Biometrics Commissioner to provide independent oversight of the use of biometric data for justice and community safety purposes in Scotland².

The consultation set out the Scottish Government's proposals relating to these recommendations, and sought participants' views of their delivery.

A total of 89 written submissions were received. The largest number (78, or 88%) were from individuals, with a smaller number (11, or 12%) from organisations (including: 6 public sector organisations; 4 third sector organisations; and a professional body).

The Scottish Government also arranged meetings with four groups of stakeholders (a stakeholder symposium; equalities groups; police workforce; and the Scottish Youth Parliament Justice Committee).

The main findings from these sources are summarised below, and further details are given in the main report.

The need for, and scope of, a statutory Code of Practice (Qs 1 and 2)

A large majority of the written respondents to Question 1³ expressed agreement with the proposal that a statutory Code of Practice covering the acquisition, use, retention and disposal of biometric data for justice and community safety purposes is required. This view was also expressed in all of the meetings.

Many respondents made additional comments, and most of these related to the benefits of having a statutory Code of Practice. These included that this would: provide regulation in the light of changing biometric technologies and increasing use of such data; protect rights

¹ Referred to in this summary as the Code.

² Referred to in this summary as the Commissioner.

³ Where the patterns of views are given in the question summaries, these relate to written respondents who addressed the specific question, unless otherwise stated. Where clear overall views of a specific question were identified at a meeting, these are noted separately.

and interests; promote an appropriate approach to biometrics; provide a clear framework and strong governance; and improve understanding of the issues.

A few respondents mentioned concerns or problems with the proposal, which focused on their overall concerns about the collection, use and retention of biometric data.

Several identified suggestions or requirements for the Code, including: clarity (e.g. of definition; criteria; complaints mechanism; and delineation from other roles); guidance and staff training; enforcement powers; stakeholder involvement; flexibility and review; a separate Code for children and young people; and a need to address discrimination and promote equality.

There were mixed views of whether the proposed statutory Code of Practice is being applied to the correct individuals / agencies, although a slightly higher proportion of respondents to Question 2 expressed disagreement with this than expressed agreement.

Most written respondents, and participants in three of the meetings made additional comments. Among these, a small number commented on the benefits of the proposed coverage or reiterated their support for this.

Several identified concerns or problems, particularly with the proposal that the Code should only apply to certain individuals / agencies involved in biometrics; and its proposed voluntary adoption by other public authorities.

The largest number of comments focused on individuals / agencies for inclusion. The most frequent suggestion was that the Code should cover all of those who collect, use, store or dispose of biometric data. Among specific suggestions, the most frequent was the inclusion, on a statutory basis, of the private sector. A few respondents also suggested statutory coverage of additional public bodies generally, or those mentioned in the Code. Several specific issues for clarification relating to the coverage of the Code were also identified.

The general principles and content of a statutory Code of Practice (Qs 3 and 4)

Almost three quarters of respondents to Question 3 expressed agreement that the general principles outlined in the statutory Code of Practice are the right ones. Participants in the meetings where this was discussed also expressed positive views of these.

Most respondents made additional comments, and the most common related to the benefits of the proposed principles. These included: positive aspects of the overall approach (e.g. as clear; flexible; comprehensive; and inclusive); the positive impact of the principles (e.g. on governance and accountability); and support for specific aspects of the principles.

Several respondents, and participants in two of the meetings identified concerns or problems, which related to: the effectiveness of the principles; perceived gaps (e.g. eliminating discrimination / promoting equality); or concerns about specific principles (including difficulties with the validation of evidence).

A small number of additional suggestions or requirements were mentioned, such as: specific principles for inclusion; the importance of data protection-related considerations; the need for further guidance (including practical examples); clarification of some issues; and support for the implementation of the principles.

Most respondents to Question 4 did not express a clear “yes” or “no” view about whether or not 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, but made comments. Among those who did express a clear view, these were evenly split.

Many written respondents, and participants in all of the meetings, made comments relevant to the content of the draft Code, whether or not they expressed an overall view of whether or not it covers all relevant issues.

These focused on providing views and suggestions about many different elements of the draft Code, including: definitional issues; coverage; legislative issues; the overall approach and principles; privacy by design; information to be provided to people; review and appeals; children and vulnerable adults and groups; and compliance.

Many specific suggestions were made, which are detailed fully in the main report.

The need for, and scope of a Scottish Biometrics Commissioner (Qs 5 and 6)

A large majority of respondents to Question 5 expressed agreement that a Scottish Biometrics Commissioner is required. This view was also expressed in all of the meetings.

Many made additional comments, most of which focused on the benefits of a Scottish Biometrics Commissioner. These included that this would: address a current gap in provision; promote a joined-up approach; strengthen existing governance; oversee current biometrics activity in the light of changes and developments; provide protection; promote compliance and accountability; and reflect evidence and experience.

A small number of respondents expressed general disagreement with the need for a Commissioner, or stated that they did not consider that such a role would be appropriate or effective.

Several respondents made additional suggestions or mentioned requirements for the post, the most common being to emphasise that this should be established through primary legislation, with the powers enshrined in law. Other requirements were seen to be that the Commissioner should have: adequate powers and resources; independence; expertise; support; and links to the Biometrics Commissioner for England and Wales. A few respondents suggested other ways the role could be undertaken.

Just under half of the respondents to Question 6 did not express a clear “yes” or “no” view of whether or not the Commissioner’s statutory remit extends to the correct individuals / agencies, but made comments. Among those who did express a clear view, a higher proportion expressed agreement that it does extend to the correct individuals / agencies than expressed disagreement with this.

Most written respondents, and participants in three of the meetings made additional comments. Among these, several made comments on the benefits of the proposed coverage of the Commissioner’s statutory remit, or particular aspects of this.

A small number identified concerns or problems, including: the lack of mandatory compliance for some; and the lack of a sufficiently wide remit for the Commissioner in terms of the individuals / agencies covered (given the involvement of others in the collection, use, retention and disposal of biometric data).

The largest number of comments, however, focused on individuals / agencies for inclusion in the Commissioner's remit. While a few suggested general extension of the remit, several suggested extension of the remit to cover all those who collect, use, store or dispose of biometric data. Among specific suggestions were the inclusion of: the private sector; local authorities; education; health; public sector buildings and public offices; research institutions and researchers; and workplaces. A small number of other suggestions were made for further clarification.

The functions of a Scottish Biometrics Commissioner, and the specific approach to children and young people (Qs 7 and 8)

The majority of respondents to Question 7 did not express a clear "yes" or "no" view about whether or not the proposed general functions of the Scottish Biometrics Commissioner are the right ones, but made comments. Among those who did express a clear view, a higher proportion expressed agreement that they are the right ones than expressed disagreement.

Many written respondents, and participants in all of the meetings, made comments relevant to the Commissioner's proposed functions, whether or not they expressed an overall view of whether or not these are the right ones.

Comments focused on providing views and suggestions about many different elements of the proposed functions, as described in the draft Concept of Operations. These included the overall functions and coverage, as well as those relating to: enforcement and compliance; children, vulnerable adults and protected characteristic groups; reporting; research; independent case review; links to other relevant bodies; and awareness raising. One respondent also commented on the support arrangements for the functions.

Many specific suggestions were made, which are detailed fully in the main report.

Just over half of the respondents to Question 8 expressed agreement that the proposed approach to the acquisition of biometric data from children and young people in the justice system is the right one. This view was also expressed in all of the meetings.

Most made additional comments, some of which reiterated overall support for the approach, or specific aspects of this (e.g. the emphasis on proportionality; the person-centred, case-by-case approach; consideration of a child's best interests; and review and scrutiny of biometric data held on 12-17 year olds).

A few respondents raised concerns or problems with aspects of the approach. These were: a potential administrative burden; a perceived need for the protection of the public to outweigh concerns about stigmatisation of the child in cases involving serious crimes; and the lack of perceived negative impact (and the potential future value) of holding some biometric data.

Several respondents and meeting participants made additional suggestions or mentioned requirements relating to the proposed approach, including a need for: clarity about data retention; synchronisation of the approach with the outcomes of other ongoing work; and the provision of further guidance. Other suggestions included that: there should be more explicit emphasis on proportionality and necessity; the proposed approach should not be limited to the justice system; the approach should be applied to the use of children's biometrics in schools; and there should be a balance between the new regime and the severity of the crime.

Appointment and accountability arrangements for a Scottish Biometrics Commissioner (Q9)

Respondents to Question 9 commented on both the appointment and accountability arrangements for a Scottish Biometrics Commissioner, although there was no proposal with which to express agreement or disagreement.

The most common theme in relation to the appointment of a Scottish Biometrics Commissioner was the need for independence. A few comments were also made on: the overall approach (e.g. that it should be: transparent; handled conscientiously; and similar to arrangements for other Commissioners in Scotland); and the need for the postholder to have the appropriate skills, experience, knowledge and salary.

The most common suggestion in relation to accountability was that the Commissioner should be accountable to the Scottish Parliament (e.g. to ensure independence and promote trust). A small number of other views were expressed, including that the Commissioner should be accountable to Scottish Ministers or the Government, or that the existing approach for other Commissioners should be extended.

A few respondents commented on specific aspects of the processes for accountability, with suggestions including to: take further steps to ensure legal accountability; subject the Commissioner to regular independent audits and report on these; provide transparent complaints and appeals processes; and establish a Board comprising relevant experts.

Other issues raised

Several respondents, and participants in all of the stakeholder meetings, made further comments which did not relate directly to a specific question (or were made in addition to their responses to specific questions).

These included comments on: the nature of the respondent organisation or its role; the consultation itself; the respondent's involvement in continuing dialogue; overall views of the issues covered; clarification of a query; and a small number of additional suggestions (e.g. that there should be: consistency with other legislation; consistent meanings, standards and practice across the UK; and promotion and awareness raising of the provisions).

1. Background and context

- 1.1. This report presents the findings of an analysis of responses, provided in writing and through a series of stakeholder meetings, to the Scottish Government's consultation on enhanced oversight of biometric data for justice and community safety purposes.
- 1.2. The consultation ran from 13th July 2018 until 1st October 2018, and sought views on the potential to deliver independent and ethical oversight of the collection and use of such data in a justice and community safety context.

Background

- 1.3. The Scottish Government believes that biometric data⁴ is a rapidly evolving field which offers great potential in identifying and preventing crime and delivering community safety. It also recognises, however, that the use of biometric data and technologies raises a range of ethical and human rights considerations.
- 1.4. In June 2017, the then Cabinet Secretary for Justice established an Independent Advisory Group (IAG) to consider the taking, use and retention of biometric data in policing. The report made 9 recommendations, among which were:
 - A statutory Code of Practice⁵ covering biometric data and technologies.
 - The establishment of a Scottish Biometrics Commissioner to provide independent oversight of the use of biometric data for justice and community safety purposes in Scotland⁶.
- 1.5. These recommendations were the focus of this consultation.

The consultation

- 1.6. The consultation set out the Scottish Government's proposals on the two recommendations noted above. The proposals were informed by the IAG's report and developed with the support of Her Majesty's Inspectorate of Constabulary in Scotland (HMICS).
- 1.7. The Scottish Government sought to ensure that the consultation provided an opportunity for early national debate on the issues, with participation by as many people, communities and organisations as possible.
- 1.8. It was intended that, subject to the views expressed, primary legislation would be introduced in the current Parliamentary session to deliver the proposals.

⁴ This was defined in the consultation as "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". Reference to the use of biometric data includes its use in both a justice and wider community safety context.

⁵ Referred to in this report as the Code.

⁶ Referred to in this report as the Commissioner.

- 1.9. A consultation document⁷ was issued, providing details of the following:
- The background (including: the definition of biometric data; and the scope of the consultation).
 - The recommendations of the Independent Advisory Group on the Use of Biometric Data in Scotland.
 - The development of a statutory Code of Practice covering biometric data and technologies (including: the reasons for the need for a Code; who the Code applies to; the principles of the Code; and a draft Code (which was made available alongside the consultation document)).
 - The appointment of a Scottish Biometrics Commissioner, including: the reasons for the need for a Commissioner; what the Commissioner will do; and how the Commissioner will be appointed and held accountable (with a Concept of Operations for the role made available alongside the consultation document).
- 1.10. Respondents were asked to address 9 questions, 8 of which contained a closed (“yes”, “no” or “don’t know”) element inviting them to express agreement or disagreement with an issue, as well as a request to expand on the reasons for their answer. One question was open, asking for respondents’ views.
- 1.11. The questions explored respondents’ views of:
- The Code of Practice:*
- The need for a Code of Practice (Question 1).
 - The individuals / agencies covered by the Code (Question 2).
 - The general principles in the Code (Question 3).
 - The content of the draft Code (Question 4).
- The Scottish Biometrics Commissioner:*
- The need for a Scottish Biometrics Commissioner (Question 5).
 - The individuals / agencies covered by the Commissioner’s statutory remit (Question 6).
 - The general functions of the Commissioner (Question 7).
 - The proposed approach to the acquisition of biometric data from children and young people in the justice system (Question 8).
 - The appointment and accountability arrangements for the Commissioner (Question 9).
- 1.12. A full list of the questions is provided at Annex 1.
- 1.13. Responses could be submitted using the Citizen Space consultation portal, or via email. A response form was provided, on which respondents could record their answers, and they were also asked to complete a Respondent Information Form (RIF) giving their details.

⁷ Scottish Government (2018). *Consultation on enhanced oversight of biometric data for justice and community safety purposes*. Edinburgh: Scottish Government (available at <https://consult.gov.scot/safer-communities/use-of-biometric-data/consultation>)

Submissions and respondents

1.14. A total of 89 written responses were received. These responses are set out by category in Table 1 (below). A full list of respondents is provided at Annex 2.

Table 1. Respondents by category

Category	No.	% ⁸
Individual	78	88
Organisations	11	12
<i>of which:</i>		
<i>Public sector (6)</i>		
<i>Third sector (4)</i>		
<i>Professional body (1)</i>		
	89	

- 1.15. As is clear from the table, the largest number of written responses received (78, or 88%) were from individuals, with a smaller number (11, or 12%) from organisations (including: 6 public sector organisations; 4 third sector organisations; and a professional body).
- 1.16. Respondents⁹ provided their views in different ways. Just over a quarter (25, or 28%) completed the response form on the Citizen Space consultation portal, and followed the questions posed (although not all respondents answered every question).
- 1.17. A further five respondents (6%) provided their response by letter or email, but followed the format of the response form (with these respondents again, answering some, or all of the questions).
- 1.18. The largest proportion of respondents, however (59, or 66%), submitted their response by letter or email, but did not follow the format of the response form, and did not usually specify the question numbers to which they were addressing their comments (although it was generally implicit in their qualitative response).
- 1.19. Most of the responses overall (67, or 75%) were treated as confidential, either because the respondent requested this explicitly, or because they did not submit a Respondent Information Form.
- 1.20. A number of the individual responses were submitted following a meeting of a Scotland-wide group with a specific interest in these issues, at which members were given information about the consultation.
- 1.21. In addition to the written consultation, the Scottish Government arranged meetings with four groups of stakeholders to discuss the consultation issues. These meetings were:

⁸ Percentages in tables in the report do not always sum to 100% due to rounding.

⁹ Where the term “respondent” is used, this refers to one response, even where that response may represent the views of a number of contributors.

Table 2. Participation in meetings

Date	Meeting	Attendees
28 th August 2018	Stakeholder symposium	26
9 th October 2018	Equalities groups	4
10 th October 2018	Police workforce	4
22 nd October 2018	Scottish Youth Parliament Justice Committee	10

1.22. The outputs from these meetings (which were provided by each of the facilitators in the form of qualitative written summaries of the views expressed at each meeting) have been included at the relevant points in the analysis.

Analysis of the data and presentation of the information

1.23. The analysis of the data involved a number of stages, which were:

- Design of an Excel spreadsheet to include the data for each question from the Citizen Space portal.
- Allocation of the material from the “non-standard” written responses and the outputs of the meetings to the relevant questions.
- Quantitative analysis of the pattern of respondents by type and nature of response (as detailed above).
- Quantitative analysis of the responses to the closed parts of the questions (“yes” / “no” / “don’t know”) from the Citizen Space portal responses.
- Preparation, from the qualitative material in the database, of a series of Word documents, containing all of the responses to each question.
- Preparation of a series of Word documents containing the outputs from the meetings in response to each question.
- Identification, from the qualitative material, of implied “yes” / “no” / “don’t know” views from the non-standard responses and, where appropriate, from the meetings.
- Identification of the overall pattern of views, taking the “count” of views expressed in Citizen Space and the “implied” views from other written responses together.
- Identification, from the qualitative material from both the written responses and the meeting outputs, of the key themes and sub-themes for each question.
- Summary of the findings and preparation of this report.

1.24. It should be borne in mind that the overall patterns of views presented in this report are based largely on qualitative data (given that this was the format of most of the responses). The only fully quantitative material comes from those responses submitted via Citizen Space, where the respondents gave a specific “tick box” view and completed a response form.

1.25. As such, it is impossible to provide a definitive number of respondents who made comments on each of the questions, or who expressed a particular view. Some points were made at a number of different questions, some comments relating to one issue were made in response to another question, and some issues were raised within a wide-ranging response covering many issues. In some cases, this required judgement about the question under which to include each point.

1.26. It is possible, however, to identify the broad proportion of respondents who addressed each question, as well as to identify the overall balance of views in the

“yes” / “no” / “don’t know” elements, using a combination of quantitative and qualitative means, as detailed below.

- 1.27. It is possible to do a straightforward “count” of the “yes” / “no” / “don’t know” responses from the Citizen Space material. Additionally, however, some of those who responded by letter or email identified or inferred clearly in their response their overall agreement or disagreement with specific issues raised at individual questions. In these cases, their views could also be identified at the relevant questions. This allows the overall patterns (including these views) to be given.
- 1.28. As such, however, it is important to stress that the proportions identified as addressing a question, or as expressing particular views should be taken to be “around” those proportions identified, rather than being definitive numbers. This reflects the qualitative nature of the analysis, as well as the need for some subjective judgement in assessing the views.
- 1.29. In relation to the meetings, given the nature of the outputs, these have not been included in the quantitative analysis, but where the material from the meeting indicated that the participants generally agreed with a proposal, this has been noted.
- 1.30. The remainder of the material, derived from the additional comments made at each question (where written respondents were asked to expand on the reasons for their answer) and from the outputs of the meetings was analysed qualitatively. From this information, emerging themes and patterns were identified, along with the range and depth of views in each case.
- 1.31. This qualitative material is presented in the report using qualitative terms (e.g. “a small number”; “a few”; “several”; “many”; “most” etc.) to describe the themes and other issues raised. This reflects the qualitative nature of the material, and the fact that the focus of the analysis was to identify the nature and range of views expressed, rather than to “weigh” the responses.
- 1.32. Where reference is made to “respondents” these are respondents to the written consultation. Those who took part in the meetings are referred to as “meeting participants” or similar.
- 1.33. It should be noted that, given that not all of the respondents addressed each question (and not all of those who addressed each question made additional comments), even where there are “common themes”, or where several, or many respondents raised a specific issue, this did not represent a majority of respondents overall. If a theme was raised by the majority of respondents overall, this is identified specifically.
- 1.34. It should also be noted that some responses (including the material from the meetings) represented the views of more than one organisation or individual, and that respondents were self-selecting, so it would not be appropriate to generalise from these views.
- 1.35. In relation to the meetings, particular issues raised in individual meetings are presented in the report, whether or not these views were shared by all participants in the meeting.

- 1.36. It should also be noted that the report cannot provide a compendium of the material received, nor can it present each individual point, given the level of detailed information provided. The themes and issues raised are summarised, however, even where they were identified by only a small number of respondents. The full text of the responses can be viewed on the Scottish Government website, where respondents gave permission for their responses to be published¹⁰.
- 1.37. The wording used to present the qualitative material sometimes follows the wording of the response closely, to ensure that the intended meaning is represented accurately (although it is not presented as a full “quote”). Direct quotations of detailed individual responses are not used in the report, as this might imply that the views of one respondent carried more weight than another.
- 1.38. The report does not list the types of respondent identifying each individual theme or raising specific issues in each case, as, given the preponderance of individual respondents, it was impossible to identify meaningful variations in views by category. Additionally, the identification of respondents by type, given the small number of organisations, could potentially compromise confidentiality.
- 1.39. The remainder of the report presents the findings of the consultation analysis, as follows.
- Chapter 2: The need for, and scope of a statutory Code of Practice (Qs 1-2).
 - Chapter 3: The general principles and content of a statutory Code of Practice (Qs 3-4).
 - Chapter 4: The need for and scope of a Scottish Biometrics Commissioner (Qs 5-6).
 - Chapter 5: The functions of a Scottish Biometrics Commissioner, and the specific approach to children and young people (Qs 7-8).
 - Chapter 6: Appointment and accountability arrangements for the Commissioner and other issues raised (Q9 and additional comments).

¹⁰ Insert reference

2. The need for, and scope of, a statutory Code of Practice

- 2.1. This section covers the findings relating to the need for, and scope of a statutory Code of Practice (Questions 1 and 2).

Question 1

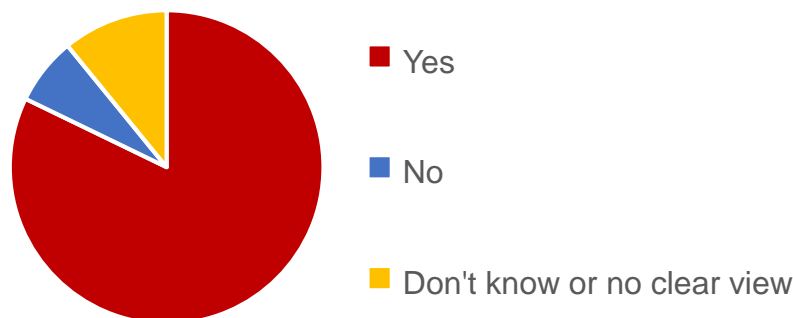
- 2.2. The consultation document suggests that a statutory Code of Practice covering the acquisition, use, retention and disposal of biometric data for justice and community safety purposes would develop a more comprehensive framework of standards and guidance against which to measure the quality of systems and practices currently used for the management of biometric data.
- 2.3. The document notes that this will not impact on the existing legislative framework, but would enable understanding of this, and help ensure that the retention of biometric data is necessary, proportionate, and in accordance with the law.
- 2.4. Question 1 asked:

*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.*

Overall views

- 2.5. Just over half of the respondents to the written consultation (46, or 52%) addressed this question¹¹.
- 2.6. The pattern of views¹² expressed by these respondents was as follows:

Chart 1: Pattern of views, Question 1



- 2.7. As is clear from Chart 1, the majority (around 83%) either ticked “yes” or expressed agreement with the view that a statutory Code of Practice covering the acquisition,

¹¹ Where proportions of those who addressed a question are given, these refer to respondents to the written consultation. The number of meetings in which the question was discussed is noted separately.

¹² Where references are made to the pattern of views at a question, these relate to written respondents who addressed the specific question, unless otherwise stated. Where clear overall views of a specific question were identified at a meeting, these are noted separately.

use, retention and disposal of biometric data for justice and community safety purposes is required.

- 2.8. A small proportion (around 7%) either ticked “no” or expressed disagreement with this.
- 2.9. In a few cases (around 11%), the respondent either ticked “don’t know” or their overall view could not be inferred from their response, although they made comments relevant to Question 1.
- 2.10. The need for a statutory Code of Practice was also discussed in all of the stakeholder meetings, where there was general agreement that this is required.
- 2.11. Most respondents to Question 1, and participants in these meetings made additional comments. The following broad themes emerged:
 - Benefits of a statutory Code of Practice (the most common theme).
 - Concerns or problems with a statutory Code of Practice or aspects of biometric data.
 - Suggestions or requirements for a statutory Code of Practice.
- 2.12. Further details of the comments relating to each of the themes are provided below.

Benefits of a statutory Code of Practice

- 2.13. Most of the additional comments at Question 1 related to perceived benefits of a statutory Code of Practice, and this was by far the most common theme. While some respondents and meeting participants expressed or reiterated their general support for this, or stressed the overall importance of developing such a Code, some more specific benefits were also highlighted.
- 2.14. Among these, a very common sub-theme related to the developing nature of biometric technologies and the increasing collection, use and storage of biometric data. It was suggested that this demands the highest operating standards and suggests a need for regulation.
- 2.15. A further common sub-theme was that a statutory Code would help to ensure the protection and implementation of the fundamental rights and interests of individuals and society. Specific mention was made of the protection of: privacy; liberty; information; safety and security; and protection against the potential misuse or harmful effects of biometric technologies or data (e.g. discriminatory practices; inaccuracy; or unauthorised use).
- 2.16. One respondent stated that, as well as protecting individuals’ rights, the Code should also provide protection to organisations holding such data for a legitimate purpose.
- 2.17. Another perceived benefit, mentioned by several respondents, and participants in one of the meetings, was that a statutory Code of Practice would help to promote an appropriate approach to the acquisition, use, retention and disposal of biometric data. Comments included that it would help to ensure that this was: legal; proportionate; transparent; and ethical; and that it would:
 - Provide flexibility within overarching legislation.

- Promote police accountability.
- Lead to improved policy making.
- Help those developing new technology to work towards known standards.

2.18. A few respondents stated that a statutory Code of Practice would provide a clear and agreed framework and strong governance, and that it would help to:

- Address gaps between legislation and implementation.
- Consolidate and set out the current law.
- Ensure that the rules are enforced.
- Prevent issues arising that would require referral to legislation or non-compliance procedures.

2.19. A few written respondents, and participants in one of the meetings, expressed the further view that a statutory Code of Practice would have a positive impact on understanding and perceptions of biometric data, including that it would:

- Increase public understanding and awareness.
- Improve or maintain public trust and promote confidence in the justice system.
- Improve understanding among all parties of the proper procedures and rights involved; and provide reassurance for those from whom samples have been taken.
- Provide more detailed guidance to practitioners.

2.20. A small number of respondents, and participants in one of the meetings, also stated that such a Code would:

- Address a perceived existing shortfall in the regulation of biometrics in Scotland.
- Bring wider benefits to policing, justice and community safety (e.g. challenge police practice; improve public participation; and evidence innocence as well as criminality).
- Be consistent with previous findings and recommendations (e.g. those of the IAG).

Concerns or problems with a statutory Code of Practice or aspects of biometric data

2.21. A few respondents mentioned concerns or problems with the proposal to develop a statutory Code of Practice. These related to overall concerns about biometric data in general, or particular aspects of this¹³. These were identified by a very small number of respondents in each case, and the views expressed included that:

- The collection, use and retention of biometric data is inappropriate.
- Specific forms of biometric data are inappropriate or problematic (e.g. CCTV).
- Biometric data should not be collected or held without consent.

2.22. One respondent provided detailed personal information about their own experiences and the problems they had faced.

¹³ Issues relating to the actual nature or content of the Code are discussed at Question 4.

Suggestions or requirements for a statutory Code of Practice

2.23. Several respondents, including participants in three of the meetings, made additional suggestions, or identified perceived requirements for such a Code. Those mentioned included:

- Clear criteria for the collection, use and retention of biometric data.
- A clear definition of biometric data (including “first” and “second generation”).
- Investigator guidance; staff training; and a recording framework.
- Enforcement powers to underpin a statutory Code.
- Clarity of the complaints mechanism.
- Avoidance of overlaps with other governance mechanisms and provision of clarity of respective roles and responsibilities (with delineation, for example, in relation to the Information Commissioner’s Office).
- Involvement of citizens and other stakeholders in establishment and continuing scrutiny of the Code.
- Flexibility and future-proofing.
- Regular review and updating.
- A separate Code for children and young people.
- Recognition of existing inequalities and specification of a requirement and commitment to address discrimination and promote equality.

2.24. Some of these issues were also identified in responses to Question 4 (relating to the content and coverage of the Code) and are discussed in more detail later.

Question 2

2.25. The consultation document suggests that the Code of Practice will apply on a statutory basis to Police Scotland and the SPA. It will 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 the powers and privileges of a Constable when investigating a matter under the direction of the Crown Office and Procurator Fiscal Service (COPFS), including where Police Scotland and the SPA collect and store data on behalf of the Police Investigations and Review Commissioner (PIRC). The Code will not extend to national security activity conducted in Scotland.

2.26. It also states that voluntary adoption of the Code by other public bodies who collect biometric data (e.g. local authorities and others operating public space CCTV; and health and education organisations) will be encouraged. Where a private sector organisation is collecting or using biometric data on behalf of one of the bodies to whom the Code applies on a statutory basis, the commissioning body should make a requirement to ensure the private sector organisation complies with the Code.

2.27. Question 2 asked:

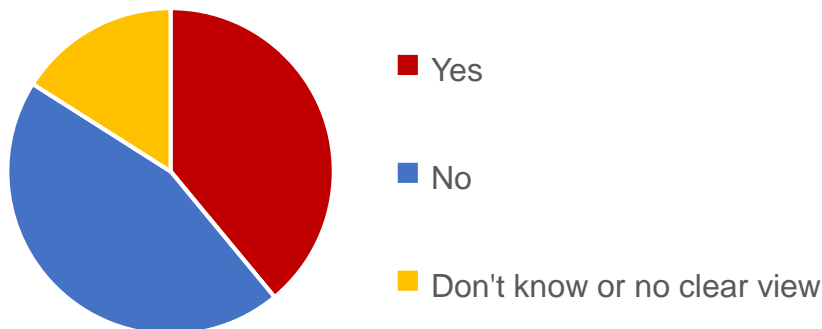
*Do you believe the proposed statutory Code of Practice is being applied to the correct individuals/agencies? Please tick: Yes / No / Don't know
Please expand on the reasons for your answer.*

Overall views

2.28. Just over a third of respondents to the written consultation (31, or 35%) addressed this question.

2.29. The pattern of views expressed by these respondents was as follows:

Chart 2: Pattern of views, Question 2



2.30. As is clear from Chart 2, views were mixed. Just under half (around 45%) either ticked “no” or expressed disagreement with the suggestion that the proposed statutory Code of Practice is being applied to the correct individuals / agencies.

2.31. A slightly smaller proportion (around 39%) either ticked “yes” or expressed their agreement that the proposed statutory Code of Practice is being applied to the correct individuals / agencies.

2.32. In around 16% of cases, the respondent either ticked “don’t know” or their overall view could not be inferred from their response, although they made comments relevant to Question 2.

2.33. Participants in three of the stakeholder meetings also made comments relevant to Question 2, while not expressing an overall view of the “yes” / “no” question.

2.34. Most respondents to Question 2, and participants in these stakeholder meetings made additional comments, and the following broad themes emerged:

- Benefits of the current proposed coverage of the Code.
- Concerns or problems with the proposed individuals / agencies covered.
- Individuals / agencies for inclusion (the most common theme).
- Additional suggestions or requirements.

2.35. Additionally, one respondent reiterated their personal negative experiences, and another expressed their general disagreement with the collection of biometric data without consent¹⁴.

2.36. Further details of the comments relating to each of the themes are provided below.

Benefits of the current proposed coverage of the Code

2.37. A small number of respondents (who generally agreed with the current proposed coverage of the Code) and participants in one of the meetings, commented on the benefits of this, including that the individuals / agencies mentioned for inclusion are appropriate and relevant.

2.38. A few more specific additional positive comments were made, and one respondent, for example, expressed specific agreement with the proposal to encourage the

¹⁴ These overall concerns were noted at Question 1 and will not be presented at each subsequent question.

voluntary adoption of the Code by others. A few emphasised the specific need to protect biometric data being used in the judicial process.

- 2.39. One respondent qualified their positive view, stating that, while they considered the starting point for the inclusion of individuals / agencies to be correct, they believed that more controls may be required for other bodies which collect biometric data.

Concerns or problems with the proposed individuals / agencies covered

- 2.40. Several respondents, and participants in one of the meetings, identified concerns or problems relating to the individuals / agencies proposed for inclusion. Those mentioned most frequently were: the proposal that the Code should only apply to certain of the individuals / agencies involved in biometrics; and the voluntary adoption of the Code by other public authorities.
- 2.41. Comments included that this could: lead to only partial achievement of the aims and objectives; create mistrust, confusion and resentment among those required to comply; and leave gaps and potential for inappropriate practice outwith the governance structure. It was also suggested that it would not serve the interests of Scottish citizens.
- 2.42. A few respondents expressed concern about the extent of involvement in biometrics by other organisations not covered by the statutory Code under the current proposals. It was suggested, for example, that this extends beyond the criminal justice and community safety field, to include others in the public and private sectors. It was also suggested that their involvement will continue to increase, and one respondent stated that the boundaries between “obvious” agencies and others may be blurred.
- 2.43. A few respondents mentioned the potential impact on individuals of the use of biometric data (while unrelated to a crime) by organisations not covered by the Code. One respondent stated that members of the public are unaware of the implications of the processing of biometric data and suggested that the Scottish Government has a role and obligation to safeguard their fundamental rights and interests, beyond the criminal justice context.
- 2.44. One respondent expressed specific concern about the voluntary adoption of the Code by Police Scotland in the first instance, as well as its voluntary adoption by public space CCTV operators. Participants in one meeting raised a concern that issues of training and cultural education with Police Scotland could present a barrier to implementation of the requirements.
- 2.45. A small number of additional concerns were raised about a perceived lack of clarity with aspects of the proposed coverage. These included that:
- The proposed list suggests a narrower purpose than those identified in the Code (e.g. with the exclusion of local authorities, given their role in community safety).
 - It is unclear whether or not the functions of Police Scotland would be governed differently depending on whether or not they are operating under the instructions of the Crown Office and Procurator Fiscal Service (COPFS).
 - It could be complicated to make a distinction between public and private organisations (e.g. where the public has a right of access).

Individuals / agencies for inclusion

- 2.46. Several respondents, and participants in two of the meetings, identified individuals / agencies for inclusion in the coverage of the Code, and this was the most common theme at this question.
- 2.47. Among these comments, the most frequent suggestion was that the Code should apply to all organisations that collect, use, store or dispose of biometric data. One stated specifically that the remit should extend beyond justice and community safety purposes.
- 2.48. Some respondents suggested more specific types of individual / agency for inclusion. Among these, the most common was the private sector. Concerns were expressed about issues such as: the lack of accountability of private companies; the implications of private procurement of police-used technology (particularly if not fit for purpose); and the validation of procurement and contracting. One respondent stated that the safeguards placed on a private body after the collection storage and processing of such data has taken place are currently insufficient.
- 2.49. Among the suggestions made were that the Code should apply to any private company providing raw biometric data under contract to law enforcement agencies. It was also suggested that it should cover private databases and / or those in the private sector who design and deliver technology.
- 2.50. One respondent, however, expressed the view that the mandatory inclusion of all private sector bodies would not be beneficial, as they are already subject to data protection legislation, and this would stifle innovation and create regulatory burdens.
- 2.51. A small number of respondents suggested other organisations for inclusion in the statutory coverage of the Code. These included other public bodies generally, and those mentioned in the draft Code for voluntary compliance.
- 2.52. Participants in one meeting, however, expressed mixed views about the inclusion of local authorities / CCTV operators and broader devolved agencies. There was a shared view that they should all have independent oversight, but not necessarily that this should be by one body. There was also seen to be a need for criminal justice to be kept separate from other oversight systems.
- 2.53. Participants in another meeting suggested that Housing Associations should be included in the coverage of the Code. One written respondent suggested that researchers (academic and commercial) should sign up to it.
- 2.54. One written respondent, and participants in one meeting, suggested that the coverage of the Code could be extended in due course beyond the current proposals.

Additional suggestions or requirements

- 2.55. Several respondents, and participants in one of the meetings, identified additional suggestions or perceived requirements relating to the application of the Code.
- 2.56. Most were issues for further consideration or clarification relating to those covered by the Code, including:
 - The overall coverage of the Code in terms of individuals and agencies.

- The Scottish Government's intentions relating to the possible extension of the Code to cover other areas (e.g. education, health and the private sector).
- The status of the Code when it is being applied on a voluntary basis (i.e. whether, once an organisation adopts it on a voluntary basis, adherence then becomes mandatory; and whether it could be adopted in part or only in its entirety).
- The private sector / law enforcement interface (para 16 of the draft Code).
- The obligations on police and private bodies when biometric data is processed at the police request, or when private sector processing feeds into police work.
- Whether the Code would apply to private sector bodies delivering services involving biometric data on behalf of public sector bodies or office-holders subject to the Code.
- Whether public bodies would be required to adopt the Code, for example, where biometric data may be obtained in an education setting from children but may later be used for justice purposes.
- The coverage of the provision relating to those who may collect biometric data whilst exercising powers of arrest for devolved purposes in Scotland.
- The operation of the Code in devolution grey areas (e.g. data requested from the UK Border Agency).
- The applicability of the Code to UK national organisations operating in Scotland (e.g. British Transport Police; the National Crime Agency and the Border Agency), including any Brexit implications.

2.57. One respondent suggested that the Code could refer to the Community Justice (Scotland) Act for a list of public authorities to adopt it on a voluntary basis. They stated that this would link the two pieces of legislation, and avoid creating another list of partners in the field of community justice and safety. Another suggested considering the definition of "competent authority" in Part 3 of the Data Protection Act 2018, containing the rules for processing personal data for law enforcement purposes.

2.58. Participants in one meeting mentioned a need for flexibility of coverage, as technology matures.

2.59. A few additional issues for consideration or clarification were also raised at Question 2 which related to other aspects of the content and coverage of the Code (discussed further at Question 4). These were:

- The purposes covered by the Code, the extent of these purposes and the remit.
- The guidance that will be given to law enforcement when the source of biometric data has not abided by the principles of the Scottish Biometrics Commissioner.
- The remit and interactions of the Code with mobile phone technology, behaviours and sociometric data.
- The operation of the legislation and Code relating to biometrics coming into and leaving the jurisdiction of Scotland (and issues such as whether it applies to visitors, non-residents etc.).
- Issues relating to national security (with a need to take account of the progress of the Counter Terrorism and Border Security Bill; and to clarify the extent of a Scottish Biometrics Commissioner's role in relation to biometric data obtained on national security grounds).

2.60. A few respondents stated that there is a need for sanctions for non-compliance or breach of the Code (discussed further at Question 4).

3. The general principles and content of a statutory Code of Practice

3.1. This section presents the findings relating to the general principles and content of a statutory Code of Practice (Questions 3 and 4).

Question 3

3.2. The consultation document suggests that it is intended that the Code should include a set of General Principles. These are 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.
- Be based on validated evidence.

3.3. Question 3 asked:

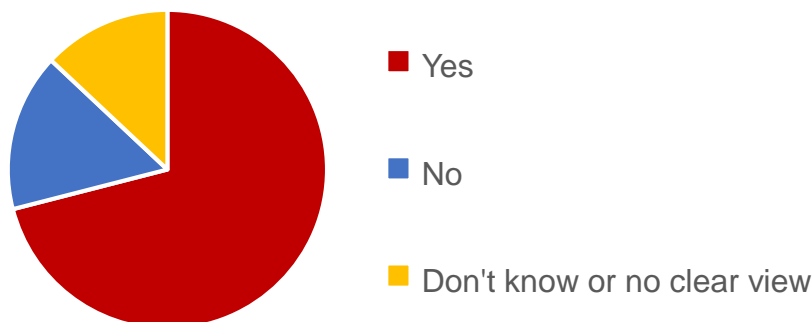
*Do you believe the General Principles outlined in the statutory Code of Practice are the right ones? Please tick: Yes / No / Don't know
Please expand on the reasons for your answer.*

Overall views

3.4. Just over a third of respondents to the written consultation (31, or 35%) addressed this question.

3.5. The pattern of views expressed by these respondents was as follows:

Chart 3: Pattern of views, Question 3



3.6. As is clear from Chart 3, almost three quarters (around 71%) either ticked “yes” or expressed agreement that the general principles outlined in the statutory Code of Practice are the right ones.

- 3.7. Under a fifth (around 16%) either ticked “no” or expressed disagreement with this.
- 3.8. In around 13% of cases, the respondent either ticked “don’t know” or their overall view could not be inferred from their response, although they made comments relevant to Question 3.
- 3.9. Participants in three of the stakeholder meetings also made comments relevant to Question 3, and these were generally positive views of the proposed principles.
- 3.10. Most written respondents to Question 3, and participants in these meetings, made additional comments. Three broad themes emerged:
 - Benefits of the proposed principles (the most common theme).
 - Concerns or problems with the proposed principles.
 - Suggestions or requirements.
- 3.11. Further details of the comments relating to each of the themes are provided below.

Benefits of the proposed principles

- 3.12. The most common theme at Question 3 was the identification of benefits of the proposed principles. Most of these comments related to positive aspects of the overall approach, such as, for example, that the principles are seen to be:
 - Thoroughly thought through.
 - In good moral standing.
 - Correct.
 - Clear.
 - Flexible and responsive to future challenges.
 - Broad and comprehensive.
 - Inclusive.
- 3.13. It was also suggested that they should assist with governance and accountability of biometric technologies and forensic procedures.
- 3.14. One respondent expressed the view that a principle-based approach is more appropriate than additional hard rules, which would add to already complex regulations. Another stated that the proposed principles would not be unduly burdensome, as they are framed around, and adopt many aspects of data protection and rights obligations, with which compliance is already expected. The same respondent stated that the proposed principles would not stifle innovative uses of biometric technologies and data in the justice and community safety context.
- 3.15. Some comments focused on support for the overall assertion (in para 43 of the draft Code) that the acquisition, use, retention and disposal of biometric data must be lawful, proportionate and necessary. A few respondents expressed specific support for a rights-based approach.
- 3.16. While most of the comments on perceived benefits focused on the overall approach, a few written respondents, and participants in one meeting, commented on the benefits or importance of specific principles. These focused on the principles relating to the need for the acquisition, use, retention and disposal of biometric data to:

- Demonstrate respect for the human rights of individuals and groups (principle 3).
- Respect the dignity of all individuals (principle 4).
- Take particular account of the rights of children (principle 5).
- Take particular account of the rights of other vulnerable groups and individuals (principle 6).
- Protect the right to respect for private and family life (principle 7).
- Be based on validated evidence (principle 9).

Concerns or problems with the proposed principles

- 3.17. Several respondents (including a small number who expressed overall support for the principles) and participants in two of the meetings identified concerns or problems with the proposed principles.
- 3.18. Most of these related to their perceived effectiveness and impact, and included comments that the principles:
- Do not go far enough.
 - Will not resolve the issues.
 - Are embedded in a framework to which there is no accountability, making them unenforceable and meaningless.
- 3.19. One written respondent expressed a concern that the Code may be forgotten or overruled in some cases. Another stated that it will be a challenge to achieve a balance when principles may pull in different directions (e.g. where retention of samples or data for a longer period may help the interests of justice, but an individual may feel it is disproportionate).
- 3.20. One respondent expressed concern that none of the principles refer to eliminating discrimination or advancing equality. They noted that the Scottish Government, Police Scotland, and the SPA are bound by the Public Sector Equality Duty, which requires not only that public bodies eliminate unlawful discrimination, harassment and victimisation, but also advance equality of opportunity between different groups.
- 3.21. A small number of respondents, and participants in two meetings, mentioned concerns or problems with specific principles. One written respondent, for example, stated that calibrating the effectiveness of biometrics (i.e. the public good achieved, referred to in principle 1) against negative consequences is complex, and may not be conceptually helpful.
- 3.22. One written respondent, and participants in two meetings, expressed concerns about principle 9 (the need for the acquisition, use, retention and disposal of biometric data to be based upon validated evidence). Comments included that:
- The principle is quite “broad brush”.
 - Validation can be challenging, given the rate of change.
 - There is doubt about whether true validation of biometric technologies can be achieved.
 - There are issues around the validation of facial recognition technology and other emerging environments.
 - Algorithms are subject to extensive legal protection as trade secrets / commercial property.

Suggestions or requirements

- 3.23. A small number of additional suggestions or perceived requirements relating to the proposed principles were identified.
- 3.24. Among these, a few respondents, and participants in one meeting suggested additional issues for inclusion, such as:
- A clear requirement to bear public acceptability in mind at all times.
 - Explicit inclusion of eliminating discrimination and advancing equality.
 - Inclusion of a principle stating that systems should be subject to review on a regular basis.
 - Inclusion of specific reference to the need for robust security measures for the acquisition, use, retention and disposal of biometric data.
- 3.25. One respondent stressed the importance of data protection-related considerations in the collection and processing of data (outlined in para 47 of the draft Code) and another stated that there is a need to include the management of data.
- 3.26. Participants in one meeting stated that there is a need for consideration of the practicality of the proposed approach, and who will decide what is proportionate.
- 3.27. A few written respondents, and participants in one meeting, also suggested that there should be further guidance on the principles and their implementation (including practical examples in relation to compliance and the provision of case studies).
- 3.28. A small number of other issues for clarity were identified, as follows:
- The balance between public and private interests.
 - The meaning of proportionality, and how to apply this in practice (with the suggestion that some typical scenarios could be developed in an ancillary document).
 - The principle of validation, who will provide this, and the role of the Commissioner.
 - The definition of legal use.
- 3.29. Two respondents suggested that principle 3 (to demonstrate respect for the human rights of individuals and groups) and / or principle 5 (to take particular account of the rights of children) should be extended to include the processing of children's biometric data in schools (particularly, in the view of one respondent, the use of fingerprinting).
- 3.30. Some suggestions were also made about the implementation of the principles, including that:
- The use of the term "with due regard" (in para 45 of the draft Code) is weak, with a need for firmer requirements to assist accountability and transparency.
 - Compliance with the principles must be supported by stronger powers of enforcement and investigation and through civil / criminal action.
 - Continuous review of the principles (e.g. by the Scottish Biometrics Commissioner) is vital.

- There is a need for a broad definition of biometric data, to include algorithms applied to biometric data and models derived from biometric data (and issues relating to definition are discussed in more detail at Question 4 below.)

Question 4

3.31. The Scottish Government prepared a suggested draft Code of Practice, which was made available alongside the consultation document¹⁵.

3.32. Question 4 asked:

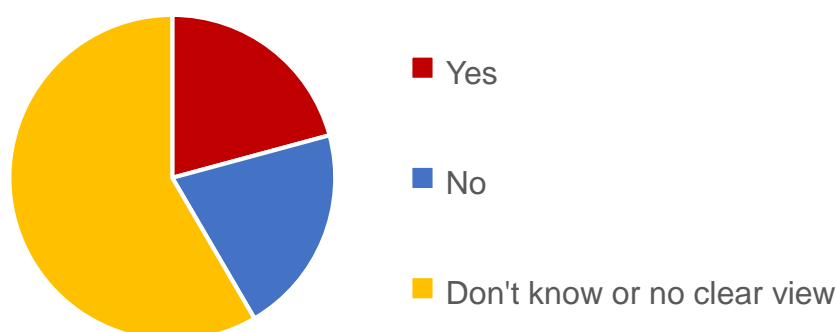
*Do you believe the statutory Code of Practice covers all relevant issues which require consideration when decisions are being taken about the acquisition, use, retention and disposal of biometric data? Please tick: Yes / No / Don't know
Please expand on the reasons for your answer.*

Overall views

3.33. Just under two thirds of respondents to the written consultation (58, or 65%) addressed this question.

3.34. The pattern of views expressed by these respondents was as follows:

Chart 4: Pattern of views, Question 4



3.35. As is clear from Chart 4, in almost two thirds of these cases (around 59%), the respondent either ticked “don’t know” or their overall view could not be determined from their response, although they made comments relevant to Question 4. The wide-ranging nature of the question (i.e. whether the Code covers all relevant issues) means that, although respondents sometimes expressed their views of particular aspects of the Code, these could not be assumed to imply actual overall agreement or disagreement with the question as a whole.

3.36. Where, however, respondents to this question did express agreement or disagreement, or this could be inferred clearly from their response, their views were found to be mixed. Just over a fifth of those who addressed this question (around 21%) either ticked “yes” or expressed agreement that 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.

3.37. Similarly, just over a fifth (around 21%) either ticked “no” or expressed disagreement.

¹⁵ www.gov.scot/Publications/2018/07/1877/downloads

- 3.38. Participants in all of the stakeholder meetings also made comments relevant to Question 4, while not expressing an overall view of the “yes” / “no” question.
- 3.39. Most respondents to Question 4, and participants in all of the meetings made comments, most of which focused on views and suggestions about different elements of the Code (reflecting the nature of the question).
- 3.40. These were:
- Definitional issues.
 - Coverage of the Code.
 - Legislative issues.
 - Overall approach and principles.
 - Privacy by design.
 - Information to be provided to people.
 - Review and appeals.
 - Children and vulnerable adults and groups.
 - Compliance.
- 3.41. A few respondents made other comments or suggestions, and one stated that they had been unable to view the draft Code.
- 3.42. Further details of the comments relating to each of the themes are provided below. For ease of reference, these have been presented in an order which is broadly consistent with their location in the draft Code.

Definitional issues

- 3.43. Several respondents, and participants in one of the meetings made comments on the definition of biometric data.
- 3.44. Part 1 (para 6) of the Draft Code contains the following proposed definition:
- “any physical, biological, physiological or behavioural data, derived from human subjects, which have the potential to identify a known individual”.*
- 3.45. Para 7 provides further details to note that this covers both “first-generation biometrics” (such as fingerprints, DNA and custody photographs); biological samples and materials from which such biometric data can be obtained; “second-generation” biometrics (such as facial recognition software; remote iris recognition and other behavioural biometrics such as voice pattern analysis); and data collected in other non-policing public sector contexts (such as public space CCTV cameras, road safety enforcement cameras and automatic number plate systems).
- 3.46. Most of the comments on definitional issues focused on the value of having a broad, general definition of biometrics to cover all biometrics (including those used historically, and new and emerging practices). Additional comments were that this is better than regulating specific biometric attributes when new technologies are introduced, and helps enable “future-proofing”.
- 3.47. Participants at one meeting, however, expressed mixed views of this issue, with some agreeing with the need for a generic definition, while others believed that it would be beneficial to have an exhaustive list of the scope of the definition.

- 3.48. A few written respondents raised a small number of specific concerns or issues with the proposed definition. One stated, for example, that the general public may not understand the scope of the term “biometric data”, and this could lead to difficulties (e.g. in comprehension by juries). Another queried the slight variation in definition from that contained in the IAG report (noting that the one in the draft Code uses the term “known individual”, whereas the IAG report did not use the word “known”).
- 3.49. A small number of respondents and meeting participants made additional suggestions about the definition, which included to:
- Ensure that it is consistent, clear and well-presented.
 - Contextualise the term biometrics (given its history) and improve understanding.
 - Produce simple guides, in accessible terms, setting out the scientific background on particular topics (e.g. DNA), or explain each subset with examples.

Coverage of the Code

- 3.50. Several respondents, and participants in two of the meetings made comments about coverage of the Code, although Question 2 also examined respondents’ specific views of the proposed individuals / agencies to be covered (as described in paras 2.25-2.60 above).

Individuals / agencies covered

- 3.51. Some of the comments focused on particular concerns about the individuals / agencies covered, or reiterated points raised previously. Views included that:
- The Code does not fully consider the relationship and interface between commercial and state surveillance.
 - Not all relevant organisations may be covered in para 15 (which details those other public bodies who collect biometric data from citizens engaged in routine activity).
- 3.52. A small number of respondents, and participants in one of the meetings, made additional suggestions about individuals / agencies to be covered, including to:
- Review the content and clarify those subject to the Code.
 - Recognise and clarify different stakeholder roles and statutory obligations.
 - Include biometric data processing by any data controller.
 - Allow consideration of biometrics beyond the criminal justice context.
 - Clarify the private sector and law enforcement interface (and one respondent suggested promoting voluntary compliance in the private sector).

Other aspects of coverage of the Code

- 3.53. A small number of comments were also made about other aspects of coverage of the draft Code.
- 3.54. A few respondents made specific reference to particular types of biometric data they considered relevant. Among these, one stated that data stored elsewhere (e.g. medical data such as babies’ blood spots; or commercial data such as the results of genetic ancestry tests) have the potential for use by bodies covered by the Code. Another stated that, while the Code appears to relate mainly to data held on

databases, every policing body will also have productions (e.g. bloodstained clothing; and items containing DNA).

- 3.55. Participants in one meeting clarified that the Code would not apply to anonymised biometric data, such as unsolved crime stains. One written respondent queried whether the Code covers clones and cobra.
- 3.56. A few made comments on those whose biometric data (and its collection and use) would be covered by the Code. These included concerns that:
- There is an apparent categorisation of people into “ordinary citizens” and “criminals”.
 - Data should not be held for people who do not commit offences.
 - The Code appears to focus on people suspected or accused of an offence, and does not recognise the volume of biometric data taken from witnesses for elimination purposes.
- 3.57. A small number of suggestions were also made, which were that:
- Data stored elsewhere should be included in the coverage of the Code.
 - Productions which contain biometric data which could be used to identify an individual should be included.
 - The role of procurement in ensuring the ethical use of biometric data should be examined.
 - The selection of watchlists for live facial recognition should be subject to impartial oversight and accountability mechanisms.
 - The Code should make provision for data being used for a secondary purpose.
 - Separate treatment should be given to the application of algorithms.

Legislative issues

- 3.58. Part 2 of the draft Code of Practice covers the law, human rights and data protection issues. It states that the Code will assist in ensuring that the legal framework surrounding the acquisition, retention, use and disposal of biometric data as part of the criminal justice process in Scotland is understood, and that the retention of biometric materials and data by the relevant bodies is necessary, proportionate and in accordance with the law. The main provisions of the legislation governing the retention of biometrics are outlined.
- 3.59. The draft Code notes that nothing contained in it will alter or otherwise affect any provision in statute which makes express provision as to the acquisition, use, retention or disposal of biometric data for justice and community safety purposes in Scotland. Additionally, nothing will alter or otherwise affect any existing rule of law or legal test about the admissibility of evidence with regard to any form of biometric data.
- 3.60. As noted in para 1.4, the Scottish Government’s proposals also include the intention to establish a Scottish Biometrics Commissioner. The draft Concept of Operations for the Commissioner (para 6) states that this will be on a statutory basis, and para 12 notes that their statutory role will be described in terms of general functions in primary legislation. The draft Concept of Operations also states that It is proposed that this role will include promoting compliance with the standards set out in Codes of Practice.

- 3.61. Several written respondents stressed the need for the regulation of biometrics to be established in primary legislation. Comments included that this would: convey legitimacy; enable full and open democratic debate and scrutiny; and establish a proper regime prescribed by law. Some also suggested that the legislation should: define the scope of biometrics; establish and define the powers of a Scottish Biometrics Commissioner; and establish automatic deletion when statutory retention periods have elapsed.
- 3.62. Participants in one of the meetings stated that there is a need to consider what will be set out in primary, as opposed to secondary legislation, in order to keep up with advances.
- 3.63. The most common theme for comments, however, related to para 29 of the draft Code, which states that the Code establishes a presumption of deletion for biometric data (in circumstances where the subject has no previous convictions) following the expiry of the relevant retention periods as prescribed or permitted in law.
- 3.64. Several respondents expressed support for the adoption of a presumption of automatic deletion of biometric data when statutory retention periods are met. Comments included that this would help ensure that: data are not kept longer than permitted; only biometric data that are necessary are retained; and the burden is not on the individual to exercise their rights. A few respondents stated that this would avoid people who do not commit offences being treated as “criminals”.
- 3.65. One respondent, however, stated specifically that, in their view, the Code appeared to fall short of implementing the IAG recommendation that “there should be a presumption of deletion of biometric data after the expiry of prescribed minimum retention periods”.
- 3.66. A few made more general comments about the need for timely destruction of data (e.g. after it has been used for the purpose for which it was gathered; or in an investigation where no action is taken). Participants in one meeting also discussed some considerations relating to retention times, and views expressed included that the retention times are not arbitrary, and there is a need for a proportionate approach.
- 3.67. One written respondent made specific comments on para 30 of the draft Code, which refers to legacy custody systems and historic data. They noted that indefinite retention of records of convicted and non-convicted persons without a specified, legitimate purpose has never been legal. It was suggested that there is a need to ensure adequate protection from accessing legacy custody systems and historic data, and to clarify aspects of the provisions in para 30.
- 3.68. A small number of other comments were made. Participants in one meeting stated that the Code should explicitly reflect the UN Convention on the Rights of the Child (UNCRC). One written respondent stated that the Code provides an opportunity to ensure that existing law and practices are clearly understood. Another commented specifically that the Code does not reflect the change in legislation in relation to Double Jeopardy cases.

Overall approach and principles

3.69. Part 3 of the draft Code covers general principles and ethical considerations. Several respondents, and participants in two of the meetings made comments about the overall approach, and / or principles. Question 3 also examined respondents' specific views of the general principles (as described in paras 3.2-3.30 above).

Overall approach

3.70. Several respondents, and participants in two of the meetings commented on the general nature of the approach in the draft Code. Views included, for example, that the Code is comprehensive, wide and detailed; and that it will allow the opportunity to debate the issues, and ensure that Scotland keeps up to date with developments in biometrics.

3.71. One respondent expressed the view that the point in para 40 of the draft Code, stating that it is "equally important to ensure that what is done is informed by considerations of what should be done, as opposed to merely considerations of what can be done", is vital, and should be kept constantly under consideration.

3.72. One commented on the importance of consultation, stating that the use of biometrics must be based on engagement with the communities affected, and public authorities seeking to use biometrics should work together with the relevant local communities, on the basis of trust.

3.73. A few respondents, and participants in one meeting, stated that the Code should be future-proofed. Comments included that there is a need to:

- Retain flexibility (with reasons including to: revisit and update the Code; ensure that it will not need to be frequently revised in the light of technological and scientific advances; and be able to deal with changes in the law).
- Recognise that the Code will develop over time and establish a formal review procedure.

3.74. One respondent expressed the view that the draft Code is not currently fit for the future, as the provisions do not consider the future uses and harms posed by the use of biometric technologies across all sectors adequately.

Principles

3.75. A small number of respondents made comments on the actual principles (discussed previously, as noted, in Question 3). Comments included, for example, support for, or emphasis on the importance of the overall requirement that the acquisition, use, retention and disposal of biometric data should be necessary, and proportionate; or specific principles, including:

- Public safety and the public good (principle 1).
- Furthering justice (principle 2).
- A rights-based approach, with a focus on the human rights of individuals and groups (principle 3); and particular account of the rights of children (principle 5) and other vulnerable groups and individuals (principle 6).

3.76. One respondent suggested that the need for robust security measures for the acquisition, use, retention and disposal of biometric data should be articulated clearly in the principles.

Implementation of the general principles

3.77. A few respondents, and participants in one of the meetings, made comments on aspects of the implementation of the general principles (covered in paras 45 and 46 of the draft Code). Comments included support for, or the importance of:

- Impartiality / non-discrimination (bullet 1).
- Openness and transparency (bullet 4).
- Minimal intrusion (bullet 5).

3.78. Additionally, participants in one meeting: stressed the importance of consistency in the approach and assessment; identified a need to ensure that the Code does not stifle the use of data for prevention purposes; and raised a question about whether there should be minimum criteria for offences where data should be taken.

Considerations regarding the collection and processing of biometric data

3.79. Some comments were also made about considerations regarding the collection and processing of biometric data (detailed in paras 47 and 48 of the draft Code).

3.80. One written respondent expressed the view that the statement relating to bullet 8 (policies relating to the weeding and disposal of data) is too vague. Participants in one of the meetings also discussed this issue and mentioned the potential for technical solutions for the weeding of data, to enable automated reminders to prompt human decision-making. In the same meeting, it was suggested that there are more effective procedures in England and Wales than in Scotland to prevent the retention of contaminated samples.

3.81. Additionally, as noted previously, several respondents commented on the importance of a presumption of automatic deletion of biometric data when statutory retention periods are met (see para 3.64).

Validity and reliability of techniques

3.82. A few respondents made comments relating to the validity and reliability of biometric techniques (paras 49-51 of the draft Code). One stressed the importance of the effective use of biometrics, while another mentioned the importance of the requirement that bodies to whom the Code applies should have internal validation systems, processes and procedures in place (para 51).

3.83. A few expressed the view that there is a lack of information currently available on the effectiveness of biometrics, and that this is difficult to measure. One written respondent stated that there is no specific guidance on how such effectiveness will be measured or demonstrated.

3.84. Another mentioned a finding of international research, showing that some biometric technologies such as facial recognition software have been found to contain discriminatory identification algorithms which can have a negative impact on minority ethnic people through misidentification. They expressed concern about this, and suggested that:

- Paras 49-51 should be amended to ensure that bodies to whom the Code applies explicitly incorporate eliminating discrimination in their validation systems.
- The Code should state that no new biometrics technology could be validated (e.g. considered “scientifically sound”) and used in Scotland if that technology is shown to have a discriminatory effect.

3.85. A small number of other suggestions were made, which were that there should be:

- More detail on the public “goods” that are to be achieved and how these will be measured.
- A requirement that data and research is undertaken publicly and transparently.
- Clarification of how the role of the Scottish Biometrics Commissioner in keeping validation mechanisms under review relates to the role of the Forensic Regulator.

Privacy by design

3.86. A small number of respondents made comments or suggestions on “privacy by design” issues (outlined in Part 4 of the draft Code, covering Data Protection Impact Assessments [DPIAs]).

3.87. Comments included a perceived need to ensure that the requirements of data protection legislation relating to privacy by design are fully respected, and a general view from one of the respondents that Part 4 of the draft Code is helpful, as far as it goes.

3.88. Suggestions included to:

- Develop a standard procedure for carrying out DPIAs, to promote consistency.
- Include a link in para 56 to the ICO’s guidance for conducting a DPIA and submitting it where required.

Information to be provided to people

3.89. A few comments were made about Part 5 of the draft Code, focusing on information to be provided to people.

3.90. Para 57 of the draft Code states that it is important that the public are provided with clear, jargon-free information to help them understand: the powers that bodies have; the rights the public have to hold these bodies to account; and how to exercise those rights. One respondent suggested that:

- The Code of Practice should be made available in all police stations and online.
- Police Scotland should ensure that it is readily available on its website and is straightforward for members of the public to find, access, and search.
- A simple English version or a summary should be considered.

3.91. Participants in one of the meetings suggested that there should be a clear public message about one of the purposes of the use of data being to support swift exoneration, as well as to prove guilt.

3.92. Participants in another meeting expressed the view that the Code should make provision for educating young people about their rights.

- 3.93. One written respondent made comments about para 59 of the draft Code, which states that the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA18) require individuals to be informed about the collection and use of their personal data. They expressed the view that all decisions not to inform individuals that their biometric data is collected should be recorded and provided to the Scottish Biometrics Commissioner as a matter of policy, and the Commissioner should review any such decisions as part of the independent oversight process.
- 3.94. Para 61 of the draft Code states that bodies to whom the Code applies must introduce a biometrics information sheet, or other means of informing persons whose biometric data is captured as part of the criminal justice process. One respondent noted that the Code does not explicitly say how, or in what circumstances the sheet should be provided, and suggested that:
- The Code should explicitly state that persons whose biometric data is captured should automatically be given a copy of the biometrics information sheet in the language that they understand.
 - As well as the sheet, persons whose biometric data is captured should be verbally informed of their rights under the Code and applicable laws.

Review and appeals

- 3.95. A small number of respondents made comments on the biometric data review and appeals process (described in Part 6 of the draft Code).
- 3.96. In relation to appeals (para 64), one respondent expressed support for the provision that there should be a clear appeal process for individuals who consider that there have been breaches of the acquisition, use or retention of their biometric data. Another stated that organisations already need to deal with complaints about the processing of their own personal biometric data under data protection law.
- 3.97. One respondent commented on para 68, stating that the Information Commissioner is bound by a statutory duty of confidentiality. It was suggested that there is a need to avoid any expectation that the Information Commissioner will forward details of systemic problems with individual data controllers, but that it is more likely that the Information Commissioner would provide a summary of general issues relating to the processing of biometric data in relevant sectors.
- 3.98. Suggestions made were that:
- Para 64 should be reworded to clarify what is required under the Code that is different to, or separate from, the requirements of data protection law.
 - The rights relating to appeal must not usurp any rights available under the relevant data protection or other legislation.
 - Para 68 should be reworded to reflect the concerns expressed in para 3.97.

Children and vulnerable adults and groups

- 3.99. Part 7 of the draft Code covers children and vulnerable adults and groups. As noted previously, some respondents expressed support for the principles relating to the need to take particular account of the rights of these groups.
- 3.100. Participants in one of the meetings stated specifically that the Code should articulate the separate regime for children and young people.

- 3.101. One written respondent made additional comments about children. These related to para 72 of the draft Code, which refers to the provisions for children under 12 who, under the Age of Criminal Responsibility (Scotland) Bill will no longer be capable of being held criminally responsible. The respondent stated that they were pleased that this specifically covers the investigation of children under the age of 12, in the context of a different age of criminal responsibility.
- 3.102. The respondent also noted that any cases which require the processing of biometric data under the age of criminal responsibility will be complex and difficult, and are likely to have a lasting impact on those involved. As such, they stated that it is right that there are specific protections in place relating to them.
- 3.103. They requested, however, that the Code be framed in terms of the age of criminal responsibility, rather than the age of 12, stating that they would hope that, if 12 were to be agreed as a minimum age, then work would be ongoing to determine whether it could, or should be raised further.
- 3.104. Another respondent, and participants in one of the meetings, raised issues relating to other protected characteristic groups (mentioned in para 77 of the draft Code).
- 3.105. There was, for example, a concern that some groups are disproportionately affected by the collection and retention of biometric data, which can compound and increase other institutional or societal discrimination or bias (as was noted by the IAG). Groups identified included:
- Minority ethnic groups (with over-representation of some minority ethnic groups in the UK DNA database).
 - People with mental illnesses (with over-representation in the UK DNA database).
 - LGBT people.
- 3.106. As noted in para 3.84, one written respondent raised a concern about the potential for discrimination in some biometric technologies such as facial recognition software, which may have a negative impact on minority ethnic communities. They also stated specifically that the current proposals do not include an appropriate focus on underlying inequalities faced by non-white communities in Scotland.
- 3.107. Participants in one of the meetings raised a concern that photographs and DNA samples might contain identifying information relating to transgender transition, and expressed the view that this requires extremely careful handling in order to avoid 'out-ing' individuals unnecessarily. They also suggested that it has practical implications for police operations, if assumptions about the gender of suspects will be made based on DNA information.
- 3.108. It was also noted that LGBT people have a higher prevalence of mental health problems such as depression and anxiety than is the case in the wider population. As such, it was suggested that the over-representation of people with mental illnesses in the database (noted above) may indirectly discriminate against them (if these issues are included in the coverage of the term within the IAG report).
- 3.109. Suggestions included to:
- Acknowledge, and discuss in the Code, existing inequalities faced by minority ethnic communities in relation to the collection and use of biometric data.

- Ensure that there is oversight of who has access to identifying information, and that this is proportionate (to address concerns about unnecessary “out-ing” relating to transgender transition).
- Make a commitment to discussing ways to reduce disparity and promote equality in future policies.

Compliance

3.110. Several respondents made comments about oversight by the Commissioner, and compliance with the Code of Practice (covered in Part 8 of the Code).

3.111. Some related to the general importance of oversight and accountability, while a few raised specific issues, including that:

- Apart from in the case of children and young people, there is no consideration of the need for further oversight of police decisions to collect biometrics.
- Identifying best practice (para 83 of the draft Code) is difficult, as it is transitory, contentious and legally and culturally specific.
- There are difficulties in measuring effectiveness (mentioned in para 3.83 above).

3.112. A few respondents raised issues about how compliance will be promoted, and how the Code will be enforced. Concerns related to:

- A lack of guidelines on compliance enforcement powers.
- A lack of an appeals process for improvement notices.
- The potential for the Code to be disregarded and / or ineffective.

3.113. A few respondents made additional suggestions about oversight and compliance, which were that:

- The governance process must be accountable and subject to oversight.
- Measures should be put in place to handle and recognise any system breach, and for the subsequent control of information.
- The Commissioner should have greater powers in relation to a breach of the Code.
- Provision for prohibition notices in cases of breaches should be considered.
- Misuse of data should be punishable.
- There should be continuing judicial review of those agencies in the public domain who seek to use these forms of data.
- There should be clarity of how the process for the Commissioner to serve improvement notices would work (para 84).

4. The need for, and scope of a Scottish Biometrics Commissioner

4.1. This section presents the findings relating to the need for, and scope of a Scottish Biometrics Commissioner (Questions 5 and 6).

Question 5

4.2. The consultation document suggests that the establishment of a source of independent expert advice and support, in the form of a Scottish Biometrics Commissioner, would further strengthen the current strong governance and practice within Police Scotland and the SPA, and would support the effective, proportionate and ethical use of biometrics data. The document states that this would lead to better outcomes and maximise the value of biometric technologies.

4.3. A significant body of existing work exploring the benefits of enhanced independent oversight in relation to biometrics is also cited, and the document notes that the appointment of a Biometrics Commissioner in England and Wales has delivered significant benefits there. It also suggests that, although a number of public bodies are already undertaking investigative, enforcement and scrutiny activity of some relevance to the use of biometric data, these bodies do not have the specific remit or expertise required.

4.4. Question 5 asked:

Do you believe a Scottish Biometrics Commissioner is required?

Please tick: Yes / No / Don't know

Please expand on the reasons for your answer.

Overall views

4.5. Most respondents to the written consultation (73, or 82%) addressed this question.

4.6. The pattern of views expressed by these respondents was as follows:

Chart 5: Pattern of views, Question 5



4.7. As is clear from Chart 5, the majority (around 89%) either ticked “yes” or expressed agreement that a Scottish Biometrics Commissioner is required.

4.8. Around 4% either ticked “no” or expressed disagreement with this.

- 4.9. In around 7% of cases, the respondent either ticked “don’t know” or their overall view could not be inferred from their response, although they made comments relevant to Question 5.
- 4.10. The issue was also discussed in all of the stakeholder meetings, where there was a general view that a Scottish Biometrics Commissioner is required.
- 4.11. Most respondents to Question 5 and these meeting participants made additional comments. The following broad themes emerged:
- Benefits of a Scottish Biometrics Commissioner (the most common theme).
 - Concerns or problems with a Scottish Biometrics Commissioner.
 - Suggestions or requirements.
- 4.12. Further details of the comments relating to each of the themes are provided below.

Benefits of a Scottish Biometrics Commissioner

- 4.13. Most of the additional comments made at Question 5 related to perceived benefits of a Scottish Biometrics Commissioner. This was by far the most common theme, and was raised by a majority of written respondents overall, as well as being highlighted by meeting participants.
- 4.14. Within this theme, many respondents and meeting participants expressed or reiterated their support for such provision. Most mentioned the specific need for a Scottish Biometrics Commissioner, while some referred to a need for an independent body (or, in a few cases, an office or organisation) to oversee biometric data in Scotland.
- 4.15. A further very common sub-theme, mentioned by many respondents, was that the development of a Scottish Biometrics Commissioner would fill a current gap in provision. It was noted, for example, that the rest of the UK already has a Biometrics Commissioner, and, although their remit is UK-wide for matters of national security, it only extends to England and Wales for other criminal matters. It was suggested that this leaves a gap in protections in Scotland.
- 4.16. A small number of respondents expressed the view that there is a lack a joined-up approach in the regimes relevant to biometrics in Scotland, and that a Commissioner would help address this. One respondent stated that establishing a source of independent advice and support would strengthen the already strong existing governance and practice within Police Scotland and the SPA (noted in the consultation paper) further.
- 4.17. Another common sub-theme among the perceived benefits of a Scottish Commissioner related to the nature of current activity in biometrics in Scotland. A number of factors were seen to make it important to oversee such activity, and to ensure that the data is used responsibly and securely. These were seen to include:
- The increasing role of biometrics in Scotland.
 - The changing and evolving nature of biometrics technology.
 - The complexity of the field.
 - The high level of data collection and use in Scotland.
 - The potential for misuse of the data (and associated harmful consequences).

- 4.18. Several respondents also stated that a Commissioner would provide protection (e.g. of individuals' fundamental rights and interests; citizens' data; and their privacy). Participants in one meeting noted that the technology can also be used to support exoneration of individuals.
- 4.19. It was further suggested that the establishment of a Scottish Biometrics Commissioner would enable the Scottish Government to have independent control of the regulation of biometrics, and to take action to provide safeguards. One respondent stated that it would also allow tailored guidance to be provided to police in Scotland.
- 4.20. A further perceived benefit, highlighted by several respondents, was that a Commissioner would promote compliance and accountability. Comments included, for example, that:
- There is a need to ensure that the use of biometric data remains lawful and for the correct intended purpose, and that there is accountability.
 - The Code of Practice involves positive obligations and will need an active regulator and oversight.
 - There will be a need for an authority in the event of any dispute.
- 4.21. Some respondents expressed the view that such a post would reflect existing evidence and experience, such as from:
- Previous reports on biometrics issues in Scotland.
 - The Information Commissioner model.
 - The experience of the importance of the role of the Biometrics Commissioner in England and Wales.
- 4.22. A small number of additional benefits were identified, by a few respondents in each case, and by participants in one of the meetings. These included that a Scottish Biometrics Commissioner would help to ensure:
- Clarity and transparency.
 - Assessment of the validity of techniques.
 - Public understanding and trust.
 - Maintenance of Scotland's reputation.

Concerns or problems with a Scottish Biometrics Commissioner

- 4.23. A small number of respondents expressed general disagreement with the need for a Commissioner, or stated that they did not consider that such a role would be appropriate or effective.

Suggestions or requirements

- 4.24. Several respondents made additional suggestions, or identified perceived requirements for a Scottish Biometrics Commissioner.
- 4.25. As noted previously, the draft Concept of Operations for the Commissioner (para 10) states that the Scottish Government will bring forward legislation to establish the Scottish Biometrics Commissioner on a statutory basis and set out the statutory functions and powers of the office holder. Among the perceived requirements mentioned, the most common was the emphasis that this post should be

established through primary legislation, and that the powers should be enshrined in law. It was suggested that this would provide an opportunity for public debate, and establish an effective regime in Scotland.

- 4.26. A few respondents stated that the Commissioner should be given adequate powers and resources, and one expressed the view that the Commissioner in England and Wales is hamstrung by a lack of resources and powers to undertake further research or commission further work. Another respondent suggested specifically that those bodies that collect biometric data should provide the funding for the post.
- 4.27. Other perceived requirements (identified by single, or a few respondents in each case) were that the Commissioner should have:
- Independence.
 - Expertise.
 - Support from the wider community.
 - Links to the Commissioner in England and Wales, and clarity of how the interaction or overlap between the two roles will operate.
- 4.28. A small number of respondents suggested other ways in which the proposed role could be undertaken in Scotland, including that:
- It could be subsumed within other government roles.
 - It could, or should be undertaken by the Scottish Information Commissioner.
 - An independent oversight board could be a more comprehensive governance arrangement.
 - The semi-independent National DNA Database (NDNAD) Strategy Board and Biometrics and Forensics Ethics Group could assume the functions of the Commissioner (as there is some overlap between the functions).
- 4.29. One respondent expressed the view that that there may be a more encompassing need for a Scottish Forensic Science and Biometrics lead.

Question 6

- 4.30. It is proposed that the Scottish Biometrics Commissioner will have statutory powers in relation to Police Scotland and the SPA. They 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.

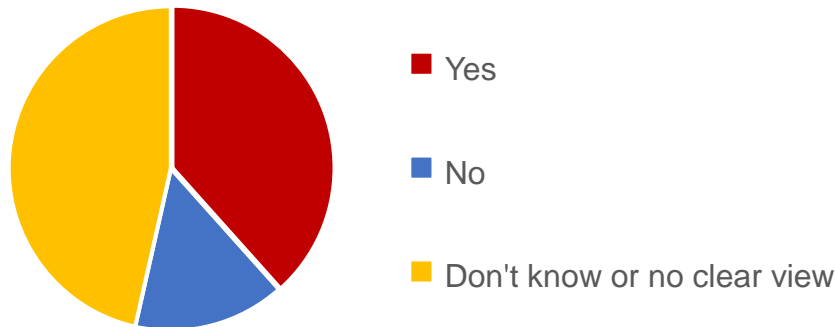
- 4.31. Question 6 asked:

*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.*

Overall views

- 4.32. Just under half of respondents to the written consultation (39, or 44%) addressed this question.
- 4.33. The pattern of views expressed by these respondents was as follows:

Chart 6: Pattern of views, Question 6



- 4.34. As is clear from Chart 6, in just under half of these cases (around 46%), the respondent either ticked “don’t know” or their overall agreement or disagreement could not be determined from their response, although they made comments relevant to Question 6.
- 4.35. Over a third (around 38%) either ticked “yes” or expressed agreement that the Commissioner’s statutory remit extends to the correct individuals / agencies.
- 4.36. Around 15% either ticked “no” or expressed disagreement with this.
- 4.37. While the most common theme (as will be clear below) was the identification of individuals / agencies for inclusion, this could not be taken to infer overall disagreement with the question, as, for example, some of those who expressed agreement or ticked “don’t know” also identified others for inclusion.
- 4.38. Participants in three of the stakeholder meetings also made comments relevant to Question 6, while not expressing an overall view of the “yes” / “no” question.
- 4.39. Most respondents to Question 6, and participants in these meetings made additional comments. Four themes were identified.
- 4.40. The themes were:
- Benefits of the coverage of the proposed individuals / agencies.
 - Concerns or problems with the proposed individuals / agencies covered.
 - Individuals / agencies for inclusion (the most common theme).
 - Additional suggestions or requirements relating to the coverage of the Commissioner’s remit.
- 4.41. Further details of the comments relating to each of the themes are provided below.

Benefits of the proposed individuals / agencies to be covered

- 4.42. Several respondents, and some meeting participants made comments on the benefits of the proposed coverage of individuals / agencies in the Commissioner’s statutory remit. Among these, some reiterated their overall agreement or stated generally that they believed these agencies to be adequate, relevant and correct.
- 4.43. A few respondents expressed agreement with particular aspects of the proposed coverage, including that: the Code (and remit) would extend to bodies collecting biometric data whilst exercising powers of arrest for devolved purposes; and that there would be oversight of the requirement for a private sector organisation

collecting, using or retaining biometric data on behalf of one of the bodies to whom the Code applies on a statutory basis to comply with the Code.

- 4.44. One respondent expressed the view that their own organisation would be likely to comply voluntarily with the Code.

Concerns or problems with the proposed individuals / agencies covered

- 4.45. A small number of respondents mentioned concerns or problems with the proposed individuals or agencies covered.
- 4.46. Among these, a few expressed concerns about the lack of mandatory compliance for some (mentioned previously at Question 2) and the lack of a sufficiently wide remit for the Commissioner, in terms of the individuals / agencies covered. A small number stated that there is a lack of clarity about which organisations are within the remit. One noted a lack of mention of statutory enforcement of the statutory powers in relation to Police Scotland.
- 4.47. A few respondents expressed specific concern that other individuals and agencies, not covered by the Commissioner's statutory remit are currently involved in the collection, use, retention and disposal of biometric data. It was also suggested that, while there is a lot of evidence and practice of the use of this data in a criminal justice context, the research and evidence base in other areas is developing, and it is likely that the involvement of other sectors will increase. One respondent expressed specific concern about the collection of data in one setting (e.g. education) which could later be used for justice purposes.

Individuals / agencies for inclusion in the Commissioner's remit

- 4.48. The largest number of comments, however, focused on the identification of individuals / agencies which respondents or meeting participants believed should be included in the Commissioner's remit.
- 4.49. Among these, a few respondents stated generally that the Commissioner's remit should be expanded to other public or private sector bodies, or that the Commissioner should have some oversight beyond the criminal justice and community safety context. One respondent expressed the view that extending the remit would help to anticipate future developments in biometric technologies, and ensure that the regulation of biometric technology and data in Scotland is up to date and future-proof.
- 4.50. Several respondents expressed the view that the Commissioner's remit should be extended to include all agencies which collect, use and retain biometric data or all data controllers. Some respondents, and participants in one meeting stated that the proposed coverage could be expanded in the future, to cover additional individuals / agencies who collect and use biometric data.
- 4.51. Several respondents, and participants in two of the meetings identified specific individuals / organisations which they believed should be included in the Commissioner's remit (either at the start or in the future), and these were:
- Commercial companies and the private sector.
 - Local authorities.
 - Education, including schools.

- Health.
- Public sector buildings and public offices.
- Research institutions and researchers.
- Workplaces.

4.52. Participants in one meeting stated that there is a need for the Commissioner to actively engage other sectors. Participants in another, however, expressed mixed views about the inclusion of local authorities / CCTV and broader devolved agencies (such as health and education), reflecting the view they expressed in relation to the coverage of the Code. Although they believed that these organisations should have independent oversight, they did not necessarily believe it should be through one body (although they did believe that criminal justice should be separate from other oversight systems).

4.53. One written respondent stated more generally that the Commissioner's remit should cover those individuals / agencies subject to the Code. Another stated that the Commissioner should have sufficient powers to investigate and report breaches of the legislation, and they highlighted police records as a specific area of concern.

Additional suggestions or requirements relating to the coverage of the Commissioner's remit

4.54. A small number of respondents identified other suggestions or perceived requirements relating to the coverage of the Commissioner's remit. These included the view that:

- The Commissioner should consider the use of biometrics in devolved areas in Scotland and assess the relevance of the Code of Practice and their remit in the light of this (discussed further at question 7).
- There is a need for clarity about whether voluntary adoption of the Code will bring the adopting body within the scope of the Commissioner's remit.

5. The functions of a Scottish Biometrics Commissioner, and the specific approach to children and young people

5.1. This section presents the findings relating to the functions of a Scottish Biometrics Commissioner, and the specific approach to children and young people (Questions 7 and 8).

Question 7

5.2. The consultation document outlines some aspects of the proposed role of the Scottish Biometrics Commissioner, stating (in summary) that they 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.
- Review any 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.
- Conduct or assist with specific reviews requested by the Parliament or specified bodies/office holders.
- Have a statutory power to issue improvement notices where there are systemic breaches of Codes of Practice.
- 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.
- Commission research into the appropriateness of biometric retention policies and collaborate more broadly in academic research.
- Involve an independent case review mechanism.

5.3. It is also suggested that the Commissioner would provide advice to other public and private sector organisations who collect biometric data; and that they would liaise with corresponding regulatory office holders in other parts of the UK.

5.4. The Scottish Government prepared a Concept of Operations to describe the proposed role of the Scottish Biometrics Commissioner more fully, which was made available alongside the consultation document¹⁶.

5.5. Question 7 asked:

*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.*

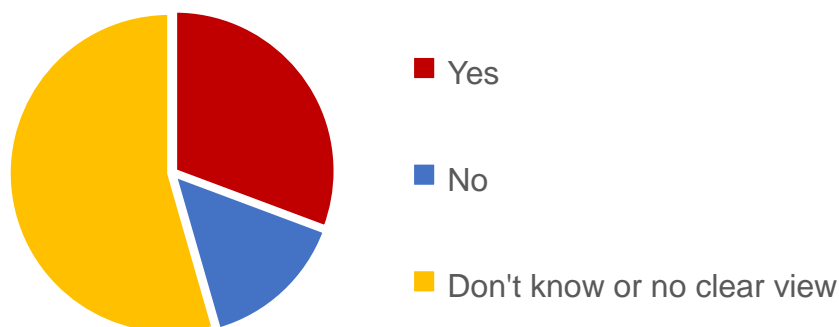
¹⁶ www.gov.scot/Publications/2018/07/1877/downloads

Overall views

5.6. Just under two thirds of respondents to the written consultation (55, or 62%) addressed this question.

5.7. The pattern of views expressed by these respondents was as follows:

Chart 7: Pattern of views, Question 7



5.8. As is clear from Chart 7, the majority (around 55%) either ticked “don’t know”, or their overall view could not be determined, although they made comments relevant to Question 7. As at Question 4, the wide-ranging nature of the question (in this case, whether the proposed general functions of the Scottish Biometrics Commissioner are the right ones) means that, although respondents sometimes expressed their views of particular aspects of the proposed functions, these could not be assumed to imply overall agreement or disagreement with the question as a whole.

5.9. Around a third of respondents to this question (around 31%), either ticked “yes” or expressed agreement that the proposed general functions of the Scottish Biometrics Commissioner are the right ones.

5.10. Around 15% either ticked “no” or expressed disagreement with this.

5.11. Participants in all of the stakeholder meetings also made comments relevant to Question 7, while not expressing an overall view of the “yes” / “no” question.

5.12. Most respondents to Question 7, and participants in these meetings, made additional comments, most of which focused on views and suggestions about a range of different aspects of the proposed functions, reflecting the nature of the question. These were:

- Overall functions and coverage.
- Enforcement and compliance.
- Children, vulnerable adults and protected characteristic groups.
- Reporting.
- Research.
- Independent case review.
- Links to other relevant bodies.
- Awareness raising.
- Support arrangements.

5.13. Further details of the comments relating to each of the themes are provided below. For ease of reference, these have been presented in an order which is broadly consistent with their location in the draft Concept of Operations.

Overall functions and coverage

5.14. The draft Concept of Operations sets out the proposed functions of a Scottish Biometrics Commissioner. The overall approach and general remit are described in paras 5-6 and 10-12 of the draft, and many of the additional comments at Question 7 focused on the overall role (rather than the more specific functions set out in para 13 of the draft).

5.15. Some of these comments were general positive views, including that the functions:

- Are comprehensive and wide-ranging.
- Are appropriate and cover the essential areas in the use of forensic biometrics.
- Could enable the development and maintenance of a high-quality regime governing the use of biometric data.

5.16. Several respondents commented on the need for, and importance of continuing oversight and monitoring of biometric data in Scotland (as discussed at Question 5). A few stated specifically that it is important for the Commissioner's role to encompass the assured deletion of records once the retention periods have expired.

5.17. While most of the general views of the overall proposed functions and coverage of the draft Concept of Operations were positive, a few raised issues or concerns with the proposals, or the document as a whole.

5.18. One respondent, for example, raised a concern that the draft Concept of Operations does not address the issue that some groups in the UK are disproportionately affected by the collection and retention of biometric data; nor does it address the concern that some biometric technologies (e.g. facial recognition) can have a discriminatory impact. These issues were also raised in one of the meetings, and were summarised at Question 4 in relation to the Code of Practice (see para 3.82).

5.19. One respondent expressed general negative views of the effectiveness of existing ombudsman posts.

5.20. Some respondents made additional observations or suggestions about the Commissioner's overall functions and coverage. One, for example, stated that the statutory remit and list of functions does not make clear whether the Commissioner's scope will extend to the scrutiny of, and advice on, Scottish Government polices and programmes where biometric devices and data might be involved (e.g. the Online Identity Assurance Programme for public services).

5.21. Some also made specific suggestions about the overall functions and scope of the proposed role, which included to:

- Widen the scope of the post to include forensic science.
- Incorporate the role into a wider "Sensitive Data Commissioner".
- Include horizon scanning in the functions.
- Enable more extensive powers for the Commissioner (e.g. to include coverage of other individuals / organisations) and ensure the sufficiency of the powers.

- Review the functions periodically.
- 5.22. Participants in one of the meetings stated that the remit of the Commissioner should be flexible, in order to expand in the light of future developments.
- 5.23. One written respondent stated that the overall success of the role will depend on the exercise of the functions by the Commissioner, particularly where there is a need for discretionary decision making.

Enforcement and compliance

- 5.24. Another common theme on which comments were made was the proposed role of the Commissioner in relation to promoting compliance. Para 13 (bullets 1 and 5) of the draft Concept of Operations states that the Commissioner will 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; and will have a statutory power to issue improvement notices where there are systemic breaches of Codes of Practice.
- 5.25. Participants in one of the meetings emphasised this aspect of the Commissioner's role, and the importance of ensuring compliance with the Criminal Procedure (Scotland) Act 1995. They also stressed the need for the role to cover upholding standards and holding individuals / agencies to account.
- 5.26. A few respondents expressed concern about the lack of statutory enforcement or compliance powers and / or the lack of sanctions for the Commissioner, and participants in one meeting raised the question of what would happen if no action was taken following an improvement notice. Some written respondents stated that the lack of enforcement powers or sanctions would render the proposed Commissioner "toothless" and defeat the purpose of the role and Code of Practice.
- 5.27. Participants in another meeting expressed the view that, if an individual or agency did not comply with the Code of Practice, this would be covered by existing procedures and processes. They also raised a question, however, about the Commissioner's role in validation, how they would undertake their remit to ensure quality of evidence, and what would happen if they were unsatisfied with the standard of a particular technology in use.
- 5.28. Several respondents, and participants in two meetings, made suggestions about enforcement and compliance, some of which were general comments about a need for: stronger powers of enforcement; statutory powers to enforce the Code of Practice; and adequate measures to ensure compliance.
- 5.29. More specific suggestions included to:
- Clarify the remit in relation to ensuring quality.
 - Extend promoting compliance beyond the criminal justice context.
 - Strengthen the function of promoting compliance to one of maintaining compliance.
 - Strengthen the Commissioner's powers (e.g. to include the power to: issue fines; impose other sanctions; refer for judicial review; and make recommendations).
 - Establish an appeals route for improvement notices (in view, for example, of the impact on an individual / organisation's reputation).

5.30. One respondent stated that infringement of the regulations should be referred automatically to the Procurator Fiscal.

Children, vulnerable adults and protected characteristic groups

5.31. A few respondents made comments on the Commissioner's proposed functions in relation to children, vulnerable adults and protected characteristic groups. Para 13 (bullet 2) of the draft Concept of Operations states that the role of the Commissioner will include to review any 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.

5.32. Question 8 below explores respondents' specific views of the proposed approach to the acquisition of biometric data from children and young people.

5.33. A small number of respondents stated generally that they welcomed the Commissioner's role in assisting in protecting the rights of children, vulnerable adults and protected characteristic groups (as well as their role in protecting citizens' rights, discussed previously).

5.34. As noted above, however, a concern was raised by one written respondent and participants in one of the meetings that the draft Concept of Operations does not address the disproportionate impact of the collection and retention of biometric data on some groups in the UK (see paras 3.105 - 3.109); nor the potential discriminatory impact of some biometric technologies (see paras 3.84 and 5.18).

5.35. Participants in one meeting suggested that the Commissioner could have a particular role in holding the police accountable in relation to the specific needs of minority ethnic communities in Scotland.

Reporting

5.36. Several respondents made comments on the Commissioner's reporting function. Para 13 (bullet 6) of the draft Concept of Operations states that one of the general functions of the Commissioner will be to report to the Scottish Parliament via an annual report and publish findings each year of the reviews undertaken and the outcome of reviews.

5.37. Among the comments made, one respondent stated that the Concept of Operations is too vague about how the Commissioner will report their findings to the Scottish Parliament and the public. They also expressed concern about the lack of discussion of ethnicity in the annual report of the Biometrics Commissioner for England and Wales. Another respondent expressed a general concern that the proposed annual reporting mechanism may not be adequate.

5.38. The remainder of the comments focused on specific suggestions. Several respondents, for example, stated that the Commissioner should prepare a report on the current situation in relation to biometrics in Scotland as a matter of priority. It was suggested that they should explore and report upon all aspects of public life involving biometrics (including: police records; schools and other education sector organisations; health; workplaces; public offices etc.) and that a report should cover issues such as:

- The implications of biometrics in these areas.

- The Commissioner's own role as a regulator.
 - Recommendations for appropriate regulation and monitoring.
- 5.39. One respondent, and participants in one of the meetings suggested that the Concept of Operations should include specific plans to analyse and publish regular statistical updates relating to the collection, use, retention and disposal of biometrics data of minority ethnic individuals in Scotland. It was also suggested that the Commissioner should be required to include detailed statistics at both a national and a local policing level.
- 5.40. One respondent made a number of further suggestions about statistical data, including that:
- All information published regarding biometrics data should be able to be disaggregated by: personal characteristics (including ethnicity); reason for the collection of data; and location, to allow the analysis of trends and identification of potential discrimination.
 - Both locally collected statistics and reports by the Commissioner to the Scottish Parliament should be published online at least quarterly, rather than at the end of each reporting year, given the fast-moving nature of the technology and the high risk of unequal treatment.

Research

- 5.41. Some respondents, and participants in one of the meetings made comments on the Commissioner's proposed functions in relation to research. Para 13 (bullet 8) of the draft Concept of Operations states that the functions will include commissioning research into the appropriateness of biometric retention policies and collaborating more broadly in academic research.
- 5.42. A few respondents mentioned the importance of the Commissioner having powers to commission, fund, undertake, or authorise research, in order, for example, to:
- Enable them to continually review techniques and ensure that Scottish regulation of biometrics is adequate and future-proof.
 - Assist them in promoting compliance with the general principles in the Code of Practice beyond the criminal justice context.
 - Establish and monitor effectiveness.
- 5.43. Several respondents suggested that the Commissioner should conduct research into the use of biometrics in all aspects of public life (as noted above in relation to reporting).
- 5.44. Participants in two of the meetings stated that the Commissioner's role should include engaging with the development of technology. Participants in one also expressed the view that the role should also involve keeping up to date with ongoing legal developments.

Independent case review

- 5.45. A small number of respondents, and participants in two of the meetings made comments on the proposed independent case review mechanism. Para 13 (bullet 9) of the draft Concept of Operations states that the general functions of the Commissioner will involve such a mechanism.

- 5.46. Participants in one of the meetings sought clarity that it was not being suggested that the Commission would review cases in the same way as the Commissioner in England and Wales, but that this function would continue to be carried out by Sheriffs.
- 5.47. Participants in another meeting stated that they did not want the Commissioner to be an appeal route which allowed the police to overturn Sheriffs' decisions, but that they were happy for the Commissioner to be an appeal route for individuals.
- 5.48. A small number of written respondents expressed concern that, although an independent case review mechanism is envisaged, this will only be the case if the Information Commissioner refers the complaint to the Scottish Biometrics Commissioner (which, in their view, would not satisfy a standard of independence).
- 5.49. Specific suggestions were that:
- If someone makes a complaint about the collection, use and retention of their biometric data, it should be to the Biometrics Commissioner (and for them to investigate) rather than the Information Commissioner.
 - The role of the Scottish Biometrics Commissioner and the Information Commissioner should be clarified, including how the Scottish Biometrics Commissioner would know whether to exercise the independent case review mechanism.
 - There could be a Memorandum of Understanding whereby any complaints about handling of biometric data are shared with the Scottish Biometrics Commissioner by the Information Commissioner, giving the Scottish Biometrics Commissioner the opportunity to exercise the case review.
- 5.50. Participants in one of the meetings expressed the view that all cases where biometric data is captured from children should go to the Commissioner for review.

Links to other relevant bodies

- 5.51. A small number of respondents, and participants in all of the meetings, made comments on links to other relevant bodies. Paras 14 and 15 of the draft Concept of Operations make reference to the Commissioner fostering close working relationships with other relevant bodies and office holders.
- 5.52. Those mentioned in the draft which are in Scotland include: the Lord Advocate; HMICS; PIRC; the ICO; the Scottish Human Rights Commission; and the Children and Young People's Commissioner Scotland. Participants in one of the meetings emphasised a specific need for a close working relationship with the Children and Young People's Commissioner Scotland.
- 5.53. The draft document also states that the Commissioner will liaise with the Biometrics Commissioner for England and Wales, who has a wider UK remit in terms of national security determinations relative to the retention of biometric data. Participants in one meeting stated that a close and collaborative relationship between the two Commissioners is essential, and that the need for this relationship to adapt as technology requires should be considered in drafting the final Code.
- 5.54. Participants in two other meetings raised questions relating to the Scottish Biometrics Commissioner's powers in relation to devolution "grey areas" and whether there would be engagement with agencies such as the Ministry of Defence

and the National Crime Agency. It was suggested that the relationship between the Commissioner and existing devolved and reserved agencies should be clarified.

- 5.55. Participants in two meetings made reference to the opportunity for the creation of an independent Ethics Advisory Group, and it was suggested that the relationship between the Commissioner and such a Group should be considered. It was suggested in one of the meetings that the Commissioner should shape such a group, and in another that it would be important to ensure that community and minority ethnic voices were included in its composition.
- 5.56. A further suggestion in one of the meetings was that the Commissioner should have access to independent legal advice.
- 5.57. Additional comments, from meeting participants and written respondents, included suggestions that the Commissioner should develop links to:
- The Information Commissioner (e.g. to incorporate data protection principles and protections, and gain a full understanding of the challenges that biometric technologies pose to fundamental rights and interests).
 - An Ethics Advisory Group.
 - Academia (e.g. technical; legal; social scientific).
 - Civil society and communities.
- 5.58. It was also suggested in one of the meetings that the “fit” with health and the private sector should also be considered fully, and in another that the Commissioner should work collaboratively with the police.
- 5.59. Participants in one meeting expressed the view that a Memorandum of Understanding (MoU) will be required between the Scottish Biometrics Commissioner and the Biometrics Commissioner for England and Wales. They suggested this could be based on existing good practice models of cooperation between Her Majesty’s Inspectorate of Constabulary (HMIC) and HMIC Scotland. They also suggested that an MoU could outline the relationship between the Commissioner and the ICO.

Awareness raising

- 5.60. Para 16 of the draft Concept of Operations states that the Commissioner would play a significant public education and public engagement role, and a small number of respondents and some meeting participants made comments on this.
- 5.61. Participants in one of the meetings, for example, stated that they considered public education to be part of the role. Participants in another stated that the functions should cover awareness raising.
- 5.62. Additionally, as noted in para 5.57, one of the suggestions made in relation to the development of links was the need to ensure engagement with civil society and communities.

Support

- 5.63. One respondent commented on support arrangements. Para 21 of the Draft Concept of Operations states that, given the part-time nature of the post envisaged, there may be potential for back office support to be provided to the Commissioner

by an existing office holder. It also states that the Commissioner will require proportional access to a secretariat and administrative support function.

5.64. One respondent expressed the view that the Commissioner's functions will need to be exercised by a well-staffed Commissioner's office.

Question 8

5.65. The consultation document suggests that the Commissioner would 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, which would be contained in a Code of Practice to reflect the following:

- For children under 12, 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.

5.66. Question 8 asked:

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.

Overall views

5.67. Around a third of respondents to the written consultation (29, or 33%) addressed this question.

5.68. The pattern of views expressed by these respondents was as follows:

Chart 8: Pattern of views, Question 8



- 5.69. As is clear from Chart 8, just over half (around 55%) either ticked “yes” or expressed agreement that they believed that the proposed approach to the acquisition of biometric data from children and young people in the justice system is the right one.
- 5.70. Just under a third (around 31%) either ticked “no” or expressed disagreement with this.
- 5.71. In around 14% of cases, the respondent either ticked “don’t know” or their overall view could not be inferred from their response, although they made comments relevant to Question 8.
- 5.72. The issue was also discussed in all of the stakeholder meetings, where there was a general view that that the proposed approach to the acquisition of biometric data from children and young people in the justice system is the right one.
- 5.73. Most respondents to Question 8, and some of the meeting participants made additional comments. Three themes were identified:
- Benefits of the proposed approach to the acquisition of biometric data from children and young people in the justice system.
 - Concerns or problems with the proposed approach to the acquisition of biometric data from children and young people in the justice system.
 - Suggestions or requirements (the most common theme).
- 5.74. Further details of the comments relating to each of the themes are provided below.

Benefits of the proposed approach to the acquisition of biometric data from children and young people in the justice system

- 5.75. Some of the written respondents, and participants in all of the meetings reiterated or expressed their general agreement with the proposed approach to the acquisition of biometric data from children and young people in the justice system, or with specific aspects of this.
- 5.76. One written respondent, and participants in two of the meetings expressed specific support for the emphasis on ‘proportionality’ and the focus on a person-centred, case by case approach and consideration of the best interests of the child when deciding whether it is appropriate to take biometric data from a child aged 12-17. It was suggested that this is consistent with the general approach in Scotland, which involves a desire to keep children out of the criminal justice system.
- 5.77. One written respondent also stated that the proposals appear to align with a commitment to ensuring that:
- Any stigma or labelling attached to offending or being involved with the Children’s Hearings System is minimised or addressed.
 - Care experience does not continue to be a predictor of negative life chances.
- 5.78. Positive comments were also made about the proposed review and scrutiny of biometric data held on 12-17 year olds. One respondent stated that there appear to be adequate additional safeguards in place, particularly relating to this. Another welcomed the review and scrutiny approach, stating that the Commissioner can

play an important role in monitoring how judgements are exercised in individual cases.

- 5.79. One respondent added a proviso to their agreement with the proposed approach, stating that it is dependent on a clear presumption that the state should not seek to maintain DNA evidence obtained from children routinely.

Concerns or problems with the proposed approach to the acquisition of biometric data from children and young people in the justice system

- 5.80. A few respondents mentioned concerns or problems with the proposed approach to the acquisition of biometric data from children and young people in the justice system.
- 5.81. A small number expressed general disagreement with the proposed approach, or the actual acquisition of biometric data from children and young people.
- 5.82. A few expressed concerns about particular aspects of the approach. Comments included that:
- The case-by-case approach could lead to an administrative burden on database managers and to public security and / or privacy risks.
 - If a crime is sufficiently serious, and there is a risk of re-offending, the protection of the public should outweigh concerns about stigmatisation of the individual child.
 - In some instances (e.g. having a DNA profile held on the Scottish DNA database from someone under 18) this has no discernible impact on future life chances (as it is held securely and is not made public) and it could prove useful if they commit further crimes when over 18.

Suggestions or requirements

- 5.83. Several respondents, and participants in two of the meetings made suggestions or identified perceived requirements relating to the proposed approach to the acquisition of biometric data from children and young people in the justice system.
- 5.84. A few respondents suggested the need for clarity about the retention of the data, or further consideration of this issue. Specific suggestions included that the approach should be to collect and then discard this (noting that this appears to be the proposed approach); and that a “bright-line rule”¹⁷ on retention periods, informed by empirical research, may be more effective and proportionate, while avoiding difficulties of implementation.
- 5.85. A further written respondent stated that it would, in their view, be inappropriate to align timescales in relation to the retention of biometric data. They cited ongoing work relating to the age of criminal responsibility and to the rehabilitation of offenders and protection of vulnerable groups, and stated that this is addressing complex considerations about the offending behaviour of children and young

¹⁷ A bright line rule is a clearly defined rule or standard in the United States, composed of objective factors, leaving little or no room for varying interpretation. Such rules are usually standards established by courts in legal precedent or by legislatures in statutory provisions (Wikipedia).

people. They expressed the view that any details of biometric data collection and retention need to be synchronised with the outcomes of this work.

- 5.86. One respondent stated that there is a need to ensure consistency with the proposed Age of Criminal Responsibility (Scotland) Bill, which also deals with the acquisition and retention of biometric data, and another suggested that the proposed Code of Practice should be specifically referenced in that Bill.
- 5.87. Participants in one meeting stated that there is a need to ensure fairness by having transparent guidelines across the country. They also suggested that there may be a need for a panel to review this.
- 5.88. A few respondents, and participants in two of the meetings, identified specific issues for further clarity or guidance, including:
- How the proposed approach for children aged 12-17 will work and who will make the decisions in different situations about whether biometric data should be collected.
 - How the proposed approach for children aged 12-17 will operate in custody suites, and how officers will make the decisions (with the suggestion that it could be emphasised that arresting officers will have to justify the collection of biometric data to senior officers and the Biometrics Commissioner).
 - Whether a young person's mental health will be taken into account and will impact on the decision on what biometric data is taken.
 - How the Commissioner will oversee the proposed approach.
 - How the Code of Practice may distinguish between a child who is suspected of a crime and other children (e.g. in a class) whose fingerprints may need to be taken to eliminate them from suspicion.
- 5.89. One written respondent stated that there should be more explicit emphasis on proportionality and necessity.
- 5.90. Another respondent stated that the approach to the acquisition of biometric data should not be limited to the justice system. They provided a detailed account of the nature of the principles of the Children's Hearings System in Scotland, and the focus on meeting the needs of children and young people in trouble through a holistic and integrated system, whether concerns relate to welfare or behaviour.
- 5.91. Another expressed the view that the proposed approach should be applied to the use of children's biometrics in schools. They stated that the data logged against a child's biometric is largely unknown, and has the potential to be accessed by justice agencies without the knowledge of the child or parent.
- 5.92. Participants in one of the meetings stated there is a need for a balance between the new regime and the severity of the crime. One written respondent suggested that there should be an opportunity to apply the rules for children aged 12-17 to those under the age of 12, and to apply the full rules for all children under 18, in special circumstances (i.e. where a crime is sufficiently heinous to warrant this).

6. Appointment and accountability arrangements for a Scottish Biometrics Commissioner and other issues raised

- 6.1. This section presents the findings relating to the appointments and accountability arrangements for a Scottish Biometrics Commissioner (Question 9). It also summarises a small number of additional comments made during the consultation.

Question 9

- 6.2. The consultation document states that the Scottish Biometrics Commissioner's role would have to be delivered in a way that is transparent, accountable and free of any undue influence.
- 6.3. It also notes that oversight should be at a national level, and that it should be delivered in a way that complements wider scrutiny arrangements. The document suggests a need for a transparent relationship with government, with specific protection for the independence of some functions.
- 6.4. It also notes that a final decision on the appointment arrangements, including whether the Commissioner would be accountable to Scottish Ministers or the Scottish Parliament, has not yet been taken.
- 6.5. Question 9 asked:

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.

Overall views

- 6.6. Just over a quarter of respondents to the written consultation (24, or 27%) addressed this question. Participants in two of the stakeholder meetings also made comments relating to these two issues.
- 6.7. As there was no specific proposal on which their agreement or disagreement was sought (other than asking whether or not they had any views on the appointment and accountability arrangements for the Commissioner) all of the comments focused on these two areas.
- 6.8. Further details relating to each are provided below.

Appointment

- 6.9. Several respondents, and participants in one of the meetings, made comments on the appointment of a Scottish Biometrics Commissioner. Among these, a few reiterated their general views of the need for a Commissioner, or the nature or scope of the post. These have been discussed previously and will not be repeated here.
- 6.10. The most common theme in relation to the appointment of the Commissioner was the need for independence, with several respondents emphasising the importance

of this. A small number stated specifically that the Commissioner should be free from political alliances and interference. One stated that they should be appointed independently of any business interests, and another that they must be independent of the police / SPA (with no prior employment by those, or other policing bodies operating in Scotland).

- 6.11. A small number of respondents commented on the overall approach to the appointment of the Commissioner, including the view that this should be:
- Transparent (although one questioned whether the relationship with government would be transparent).
 - Handled in a conscientious way.
 - Similar to the arrangements for Scottish Information Commissioner, and Scotland's Commissioner for Children and Young People.
- 6.12. A few respondents made comments on perceived requirements of the postholder, suggesting that the Commissioner should be:
- Experienced.
 - Able to assess all the impacts of biometrics in everyday life.
 - Able to demonstrate their understanding of biometrics (including current and future usage).
 - Knowledgeable (with the technical knowledge to enable them to collaborate between public service, private business, academia and the general public).
- 6.13. Participants in one of the meetings questioned whether the proposed salary of the Commissioner is at the right level.

Accountability

- 6.14. Several respondents, and participants in one of the meetings commented on aspects of accountability. These included, for example, the general importance of accountability, the view that data protection and safety of data are linked to this concept; and the view that there are challenges in ensuring full and meaningful accountability.
- 6.15. Most of the comments, however, focused on suggestions relating to the body to which the Commissioner should be accountable, or the role of specific bodies in accountability.
- 6.16. The most common suggestion (albeit from a small number of written respondents overall) was that the Commissioner should be accountable to the Scottish Parliament. Participants in two of the meetings also stated that the Commissioner should be appointed by the Parliament. Further comments (from written respondents and some meeting participants) included that this route would help to: ensure independence; remove the political element; and promote greater trust than would be the case if accountability were to the Scottish Government.
- 6.17. One respondent expressed the view that the Commissioner should be accountable to Scottish Ministers, and a small number stated that they should be accountable to the government. One stated specifically, however, that the Commissioner should not be accountable to individual Scottish Ministers. Another expressed the view that

a close working relationship would need to be established both with Scottish Ministers and the Scottish Parliament.

- 6.18. One respondent suggested that the existing approach to accountability for other Commissioners should be extended to include the Scottish Biometrics Commissioner.
- 6.19. A few respondents commented on specific aspects of the processes for accountability, including that:
- The proposed framework of accountability through the Commissioner’s governance (including disclosure of annual reports, details of “acquisition, retention, use and deletion” of biometric data) will keep them transparent and compliant with the law.
 - Further steps should be taken to ensure “legal” accountability, to ensure that the regulator acts in accordance with the law, to safeguard against abuses of power, and to protect the rights and interests of those affected.
 - The Commissioner should be subject to periodic and regular independent audits (e.g. by an independent judicial authority).
- 6.20. One respondent stated that the results of the audit and an action plan should be published and reported, the Commissioner should action any recommendations made, and any detraction should be reported in an annual report and to the Justice Minister. Another stated that an independent audit would assure the public and Scottish Parliament about: the effectiveness of the role; the accuracy of reports; the efficiency of the system and governance framework; and the cost / benefit balance of the office.
- 6.21. Other suggestions in relation to accountability for the Commissioner included provision of:
- Transparent processes for complaints about the Commissioner.
 - A transparent appeal process.
 - A Board comprising relevant experts (e.g. human rights; data protection; and legal).

Other issues raised

- 6.22. Several respondents, and participants in all of the stakeholder meetings, made further comments which did not relate directly to a specific question (or which were made in addition to their responses to specific questions).
- 6.23. A few written respondents, for example, provided additional details about the nature of their organisation, or the relevance of their role to the issues under consideration.
- 6.24. Several respondents, and participants in two of the meetings, made general comments on the consultation itself. These included welcoming the consultation or the opportunity to contribute, or expressing general support for the changes proposed. A small number of respondents made reference to issues raised by another contributor.
- 6.25. One written respondent stated that it would have been helpful for the consultation to have included draft clauses of a Bill, in order that the entire framework could be

considered. Participants in one meeting expressed disappointment that there had not been broader community engagement in the consultation, and that the composition of the Advisory Group had not included community voices.

- 6.26. A small number of respondents, and participants in one of the meetings made reference to continuing a dialogue with the Scottish Government about these issues, and one stated that they may have further comments when a Bill is published. Participants in one of the meetings asked to be involved in the drafting of the final Code; as well as in the description of the role and in the design of the application process for the Commissioner.
- 6.27. Several respondents provided additional information about their overall views of the issues covered in the consultation. These included general comments on the importance of the issues, or overall concerns about the use of biometric data. These issues have already been covered in the report and will not be reiterated here.
- 6.28. A few respondents reiterated suggestions or requirements relating to specific issues discussed previously (e.g. the definition of biometrics; the principles or approach; and the scope of coverage). One made a specific suggestion for a definition.
- 6.29. Participants in one of the meetings queried whether broader forensic issues, such as mandatory capture of shoe prints from footwear (when entering the custody suite) could be included in the Bill, as there were some legislative gaps. It was noted that it was intended that there would be a fuller review of the Criminal Procedure (Scotland) Act 1995 following the appointment of a Commissioner.
- 6.30. One written respondent stated that it is important to ensure consistency with other legislation (an issue raised previously). They noted specifically that the Counter-Terrorism and Border Security Bill is currently proceeding through the UK Parliament and contains reference to the retention of biometric data for counter-terrorism purposes.
- 6.31. It was also suggested that the scope and meaning of biometric data, as well as the standards and good practice, need to be consistent across the UK.
- 6.32. Participants in one of the meetings stated that there is a need for promotion and awareness of the provisions. It was suggested in one meeting that there should be a communications strategy following the passage of the legislation; and in another that there should be a broad national education campaign (with participants in that meeting stressing the importance of educating young people about their rights).

Annex 1: List of 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?

Annex 2: List of Respondents

There were a total of 89 written respondents.

Those who gave consent for their names to be published were:

Aaron Amankwaa and Dr Carole McCartney
Biometrics and Forensics Ethics Group (BFEG), Home Office
Christopher Huggins
Coalition for Racial Equality and Rights (CRER)
Damian Sefton
Dr Diana Miranda
Dr John Welford
GeneWatch UK
Gordon Drummond
Information Commissioner's Office
James Kelly
John
John Gibson
Laura Martin
Law Society of Scotland
Lewis Hardcastle
Nuffield Council on Bioethics
Open Rights Group
Police Investigations and Review Commissioner (PIRC)
Prof Dame Sue Black
Professor Charles Raab
Scottish Children's Reporter Administration
Scottish Police Authority (SPA)
Shetland Islands Council
Simon Love
Stuart McKenzie