

Consultation Response

Retention of Biometric Data
Provided for under s18 to 19C
of the Criminal Procedure
(Scotland) 1995 Act

August 2024

Response to Consultation

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Privacy Law sub-committee welcome the opportunity to consider and provide comments on the consultation on the Retention of Biometric Data Provided under s18 to 19C of the Criminal Procedure (Scotland) 1995 Act (**1995 Act**).

General Remarks

We welcome the Scottish Government and Scottish Biometric Commission's review of the report and recommendations made by the Independent Advisory Group on the use of biometric data (**Report**) of those arrested by Police Scotland (PS). We consider the Report as being insightful and clearly well-researched regarding retention practices, DNA, and imagery data concerning such individuals.

We are of the view that there is no easy solution to the rightful concerns, particularly regarding ethics, and retention of those processed by PS. We note that the Report makes some interesting distinctions between other jurisdictions and the lack of a data retention "gold standard" of best practice that can be utilised to guide policy and the law in this area in Scotland.



The analysis contained in the Report is thorough and clearly considers the legal and ethical challenges of biometric processing, particularly in terms of how to apply appropriate retention practices. We commend that there has been progressive changes in recent years in relation to this area, with a willingness to explore the adoption of enhanced retention practices going forward.

In relation to the specific retention practices of convicted individuals and the necessity for more evidence-based research, we are in general agreement with the Report. However, we do have concerns surrounding the methodology that will be utilised to support such a case, as the Report frequently highlights a lack of easily applicable comparisons. We therefore consider that further research and analysis of existing practices in this area in other jurisdictions (as mentioned later in the Report) may be beneficial in assisting and enhancing this review.

In consideration of the above, we believe it would be prudent to consider the potential scope and methodology that will be employed in any future research. There will likely always be a dilemma between the need to retain, and the necessity to delete, data relating to convicted individuals. This is primarily due to concerns about recidivism. Therefore, any study investigating the retention of biometric data of convicted individuals should consider relevant empirical research on this topic, given the limitations it may present as well as the ongoing public interests and concerns.

In conclusion, we consider the Report as providing a compelling explanation of maintaining the status quo with regards to current legislation applicable to those arrested in Scotland. It is clear there is interest in developing systems that are reflective of lawful and ethical practices in biometric data retention of these individuals. While there are always advantages to looking elsewhere for guidance on this important issue, we consider that Scotland may be in a unique position to set the “gold standard” given that such evidence-based research is being undertaken.



However, in the event that any legislative amendments are proposed as a result of PS's review of its data retention policies, or should new policies be proposed by PS themselves as a result of their own internal review, we would suggest that further consultation is undertaken with a view to providing clear guidance on these changes. We believe that this will promote better understanding as to the requirement to ensure that the retention of biometric data is lawful, ethical, effective and proportionate.

If it would be helpful to discuss any of these points in more detail or if we can be of any further assistance, we would be pleased to do so.

For further information, please contact:

Richard Male
Policy Team
Law Society of Scotland
DD: 0131 476 8113
richardmale@lawscot.org.uk