

Response by the Independent Reviewer of Terrorism Legislation

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***Summary***

1. This document responds to a government consultation on abolishing the separate office of the Biometrics Commissioner<sup>1</sup> by transferring his functions to the Information Commissioner’s Office<sup>2</sup>.
2. According to the consultation document, doing so “...should bring benefits to data controllers and the public with a single route for advice, guidance and redress”<sup>3</sup>.
3. In summary, transferring the functions of the Biometrics Commissioner to the Information Commissioner’s Office would put at risk safeguards applicable to Schedule 7 Terrorism Act 2000<sup>4</sup>, and is unlikely to achieve the objective of providing a single route for advice, guidance and redress.

***Relevance to Terrorism Legislation***

4. I considered the role of the Biometrics Commissioner in my annual report, the Terrorism Acts in 2018, in the context of the strong, sometimes contentious, but important no-suspicion powers exercised by counter-terrorism police at ports and the border between Northern Ireland and the Republic of Ireland. This is the power under Schedule 7 Terrorism Act 2000 to examine any person in order to determine whether he appears to be a terrorist.
5. As part of this process, fingerprints and DNA profiles may be taken by the examining officer<sup>5</sup>. For an individual with no previous convictions, these may then be retained for an initial period of 6 months<sup>6</sup>.

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<sup>1</sup> In 2021 Professor Fraser Sampson was appointed to undertake the roles of both the Biometrics Commissioner and Surveillance Camera Commissioner, hence the reference in the consultation document to “Biometrics and Surveillance Camera Commissioner”. However, the Biometrics Commissioner remains a distinct statutory role.

<sup>2</sup> ‘Data: A new direction’, Department for Digital, Culture Media and Sport(10 September 2021), at section 5.8.

<sup>3</sup> At para 410.

<sup>4</sup> The Biometrics Commissioner also has a role in relation to biometrics taken following arrest under section 41 Terrorism Act 2000, but in this response I focus on biometrics taken under Schedule 7.

<sup>5</sup> Paragraph 10 Schedule 8 Terrorism Act 2000.

<sup>6</sup> Paragraph 20C(4) Schedule 8 Terrorism Act 2000.

6. After the initial period has expired these biometrics must be destroyed unless a chief officer of police makes a National Security Determination in favour of their retention. A National Security Determination enables the biometrics to be retained for a further period, recently increased from 2 to 5 years<sup>7</sup>, subject to renewal.
7. The role of the Biometrics Commissioner, under Part 1 Protection of Freedoms Act 2012, is to review every National Security Determination (NSD) that is made or renewed<sup>8</sup>. According to the most recent published Biometrics Commissioner annual report, a total of 497 NSDs were made in 2018 and 398 NSDs were made in 2019<sup>9</sup>, a significant proportion of which related to biometrics taken under Schedule 7<sup>10</sup>.
8. Although the oversight role of the Biometrics Commissioner postdates the enactment of Schedule 7, it now forms one of the safeguards applicable to this unique no-suspicion power. Any dilution of the quasi-judicial role of the Biometrics Commissioner would result in a loss of protection.
9. In both my previous annual reports I cited the former Biometrics Commissioner, Professor Paul Wiles, on account of his expertise and forward-sightedness when considering new biometrics.

### ***Response to Consultation***

10. It is clear from the consultation that there is no intention to abolish this oversight function.
11. Firstly, since there is no intention to abolish the oversight function, it is important to ensure that the function can continue to be performed effectively if it is transferred.
12. Secondly, the function of the Biometrics Commissioner is quasi-judicial. It must be performed independently of government or the police, by a person who is seen to be independent of government or the police.
13. Thirdly, it requires personal consideration of every NSD that is made or renewed, with a requirement to order destruction of any material retained if its retention is not justified<sup>11</sup>. The function is that of the individual Commissioner appointed by the Secretary of State and is non-delegable.
14. Fourthly, the function of the Biometrics Commissioner is relevant to the effective investigation of terrorism. The power to obtain biometrics under Schedule 7 is highly prized and relevant, for example, to investigating battlefield evidence as shown by the 2018 conviction of the Taleban bombmaker, Khalid Ali<sup>12</sup>.

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<sup>7</sup> Paragraph 20E Schedule 8 Terrorism Act 2000, as amended by paragraph 10 Schedule 2 to Counter-Terrorism and Border Security Act 2019.

<sup>8</sup> Section 20(2). The Biometrics Commissioner is also required to review the uses to which material retained pursuant to a NSD is being put.

<sup>9</sup> Biometrics Commissioner Annual Report 2019, at para 257.

<sup>10</sup> Ibid, at para 223.

<sup>11</sup> Section 20(4).

<sup>12</sup> See further, Terrorism Acts in 2018 at 6.127.

15. It follows that if the function of the Biometrics Commissioner is to be transferred to the Information Commissioner:
- The Information Commissioner will need to personally review each NSD and make careful determinations, any one of which can have a significant impact on terrorism investigations.
  - The Information Commissioner will not be able to delegate this function to one of his staff.
16. According to the consultation, the government proposes that the Secretary of State will be able to prepare a statement of strategic priorities to which the Information Commissioner must have regard when discharging his functions<sup>13</sup>. This would not be consistent with a quasi-judicial role: the consultation recognises the possibility of conflict between a duty to have regard to strategic priorities set by the Secretary of State and other statutory objectives, functions and tasks<sup>14</sup>.
17. It would not be a solution for the Secretary of State to confer the function of the Biometrics Commissioner on one of the Information Commissioner's staff:
- Deputy commissioners, other officers or staff are appointed by the Information Commissioner who determines their remuneration and other conditions of service<sup>15</sup>.
  - Any function of the Information Commissioner may be carried out, if so authorised, by any member of the Information Commissioner's staff.
  - It follows that if a member of the Information Commissioner's staff were appointed to carry out the functions of the Biometrics Commissioner, they would not have the necessary independence to carry out a quasi-judicial role.
18. It is therefore difficult to see how the function of the Biometrics Commissioner could in practice be transferred to the Information Commissioner's Office without loss of function.
19. More generally, biometrics are not simply another species of personal data. Unless the Information Commissioner has the capacity to develop the expertise of Biometrics Commissioners such as Professor Paul Wiles, it is not apparent how the Information Commission can provide, in the words of the consultation, "a single route for guidance, advice and redress". Because of the multiple functions of the Information Commissioner, any expertise that was developed would inevitably be split off from the quasi-judicial role.
20. Nor is it clear why transferring functions from the Biometrics Commissioner, an office that has functioned effectively with the confidence of counter-terrorism police, to the Information Commissioner's Office, an office not noted for the clarity of its guidance<sup>16</sup>, would result in an overall simplification of the oversight regime.

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<sup>13</sup> Consultation, para 345.

<sup>14</sup> Ibid, para 346.

<sup>15</sup> Para 5 Schedule 12 Data Protection Act 2018.

<sup>16</sup> As the consultation document coyly notes at para 377, "its core guidance may be very lengthy".

21. Finally, it is even possible that the role of a specialist independent Commissioner with a national security function may need to be expanded, not abolished. This is because of the potential use of new biometrics in connection with national security.

***Conclusion***

22. In answer to Question 5.8.2 (*To what extent do you agree that the functions of the Biometrics Commissioner and the Surveillance Camera Commissioner should be absorbed under a single oversight function exercised by the ICO?*): strongly disagree for the reasons set out above.

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