



CROWN OFFICE  
25 CHAMBERS STREET  
EDINBURGH EH1 1LA

Telephone: 0300 020 3000

Dr Brian Plastow  
Scottish Biometrics Commissioner  
Bridgeside House  
99 McDonald Road  
Edinburgh  
EH7 4NL

By Email:

15 December 2021

Dear Dr Plastow,

**CONSULTATION ON SCOTTISH BIOMETRIC COMMISSIONER'S DRAFT CODE OF  
CONDUCT**

Thank you for your letter and the opportunity to respond to the consultation to your draft code of conduct.

Although the code does not directly apply to COPFS, there are aspects of the code which directly relate to the work of COPFS and the proper, rigorous investigation and prosecution of crime in the public interest.

The code provides a strong framework, ensuring that the law is applied and that the rights of those who provide their biometric data are respected, while also ensuring that there is a robust system of investigation and prosecution of crime.



In relation to paragraph 48 of the code, where the samples covered by the code is discussed, it appears ambiguous as to whether this also relates to crime scene samples from which biometric data may be derived. These samples are, of course, not covered by the terms of s18A of the Criminal Procedure (Scotland) Act 1995. It is important that crime scene samples can be retained, particularly in respect of cases which may be retried in terms of the Double Jeopardy (Scotland) Act 2011 that these samples can be retained, as well as cases which may be reported to the Procurator Fiscal where proceedings cannot be commenced at that time but that may be dealt with should the doctrine of mutual corroboration come into play at a later time.

Further to this, in relation to the final principle, “Retention authorised by law”, the section in relation to the acquisition of biometric data from children is not wholly in accordance with the terms of ss58-59 of the Age of Criminal Responsibility (Scotland) Act 2019. Section 58 of the Act provides for circumstances where biometric data may be taken from a child who is under the age of 12 years old which is not stated. Further, the code provides the following:

***Section 59 (1) of the Act covers the taking of samples where the child is 12 years or over, it is unlawful to take any relevant physical data or samples except when authorised to do so specifically under Section 63 – Sheriff’s Order for Forensic Data and Samples or by virtue of Section 69 – taking of data and samples under urgent circumstances or where the child consents.***

Section 59 of the Act only applies where the conduct was alleged to have taken place when the child was under the age of 12 at the time. It is important that investigators are able to exercise the normal powers open to them in relation to the taking of samples from child offenders in other circumstances. It is submitted that this section would benefit from revision to ensure that it is in accordance with the terms of the Age of Criminal Responsibility Act 2019.



I hope that this is helpful. Should further information be required please contact Mhairi Morrison, Assistant Procurator Fiscal who will be happy to assist further.

Yours sincerely

*Dorothy R. Bain.*

**THE RT HON DOROTHY BAIN, QC  
LORD ADVOCATE**