

# **SCOTTISH BIOMETRICS COMMISSIONER ACT 2020**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Schedule 1 – The office of Scottish Biometrics Commissioner***

62. Schedule 1 makes detailed provision concerning the appointment, status, disqualification, terms of office and remuneration, pension and subsequent appointments of the Commissioner. It also provides for the ability to fill the role on a temporary basis, as well as for the appointment of other staff.
63. Paragraph 1 of the schedule provides that the Commissioner is not to be regarded as being a servant or agent of the Crown. In addition, the Commissioner's status is that of a juristic person distinct from the natural person holding the office of Commissioner. The Commissioner's staff are not to be regarded as civil servants. Given that the Commissioner is not a Crown servant or agent, it follows that the Commissioner's property belongs to the Commissioner (as Commissioner) and not to the Crown.
64. Paragraphs 2 and 3 provide for the following: that the Commissioner will be appointed by the Queen on the nomination of the Scottish Parliament; that a Commissioner may serve only one term of office; and that a person is disqualified from being appointed Commissioner if at the time of the appointment or in the year preceding the appointment, the person is or has been a member of the Scottish Parliament, of the European Parliament, of the House of Commons or of the House of Lords. This is to ensure that the Commissioner is free from political influence given that the role will involve scrutinising laws over which these institutions have influence or control. Provision is also made to disqualify employees, office-holders or members of any body listed under section 2(1) of the Act. This is to prevent anyone being appointed as Commissioner who currently is (or has recently been) a member, employee or appointee of the bodies which the Commissioner is to monitor. These disqualification criteria continue to apply during the Commissioner's time in office (see paragraph 5(1)(b) of the schedule).
65. Under paragraph 4, a Commissioner may hold office for a single term of up to eight years, as determined by the SPCB at the time of appointment. This is consistent with the tenure arrangements set out in the Scottish Parliamentary Commissions and Commissioners etc. (Scotland) Act 2010.
66. Paragraph 5 sets out the circumstances under which a Commissioner's appointment may terminate early. A Commissioner may resign, or may become disqualified from holding office under paragraph 3. The Commissioner can also be removed from office where either the SPCB is satisfied that the Commissioner has breached their terms and conditions of appointment and the Parliament resolves to remove the Commissioner as a result, or where the Parliament resolves that it has lost confidence in a Commissioner's willingness, suitability or ability to perform the Commissioner's functions. A resolution in either scenario requires the support of at least two thirds of (normally) the total

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number of members of the Parliament. However, the number of votes required is based on the number of seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

67. Paragraph 6 provides that the validity of any acts of the Commissioner is unaffected by any procedural defects in the Parliament's nomination or by the Commissioner subsequently becoming disqualified from acting as the Commissioner.
68. Paragraph 7 enables the SPCB to set and pay such remuneration, allowances, pension and gratuities to the Commissioner as it determines. It will be for the SPCB to decide whether payments are made and the amounts of any payments. The SPCB must indemnify the Commissioner for liabilities incurred by the Commissioner in the exercise of their functions.
69. Paragraph 8 sets out restrictions on subsequent appointments held by a Commissioner once they have left office. Unless permission is granted by the SPCB, a former Commissioner may not, within the specified period, subsequently be any of the following: be employed or appointed in any capacity by the Scottish Biometrics Commissioner; be a member, an employee or appointee of Police Scotland, the SPA or the PIRC; hold any other office, employment or appointment or engage in any other occupation which that person could not have held or engaged in under paragraph 9(2)(a) when they were the Commissioner. Paragraph 9(2)(a) covers any specific absolute prohibitions on simultaneous appointments which are contained in the Commissioner's terms and conditions. The restrictions under paragraph 8 run from the date of leaving office until the end of the financial year following the one in which the person ceased to be the Commissioner. Therefore, if the Commissioner left office on 1 December 2021, the restriction would subsist until 31 March 2023. The restriction in paragraph 8(1) is in place to avoid a subsequent appointment being seen to compromise the independence of the Commissioner. For example, this could arise if a former Commissioner were to become an office-holder of an authority which they would have been able to investigate when in post as the Commissioner. Accordingly, while the restriction under paragraph 8(1)(b) currently applies to Police Scotland, the SPA and the PIRC, if the persons over which the Commissioner has functions are changed in future under section 2(7) then this will automatically flow through to this provision.
70. Under paragraph 9, the SPCB may determine the terms and conditions of the Commissioner's appointment insofar as not already set out in the Act, including prohibiting the Commissioner from holding any other office, employment or appointment – or requiring that the Commissioner first obtain the approval of the SPCB before holding any other office, employment or appointment. Again, this is to avoid an appointment being seen to compromise the independence of the Commissioner.
71. Paragraph 10 makes provision for the appointment of a temporary Commissioner to hold the office either during a period when the post is vacant or where the Commissioner is unable to perform their functions. During that period, the SPCB may appoint as temporary Commissioner a member of the Commissioner's staff or another person who is not disqualified from holding the post under paragraph 3 of this schedule. However, staff are exempted from the normal disqualification provisions to allow for greater flexibility and in recognition of the short-term nature of the appointment. The SPCB will determine the terms, conditions and duration of the appointment and may relieve the individual from the post at its discretion (by notice in writing), or at the request of the individual.
72. Paragraphs 11 and 12 allow the Commissioner to appoint staff, subject to the consent of the SPCB as to the numbers, and to determine their terms and conditions subject to the approval of the SPCB.
73. Paragraph 13 allows the Commissioner to pay pensions, allowances and gratuities to current or former members of staff, including the establishment of one or more pension

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schemes and the payment of allowances or gratuities by way of compensation for loss of employment. Approval for such arrangements must be obtained from the SPCB.

74. Under paragraph 14, while the Commissioner can delegate any function to any person, ultimately the Commissioner remains responsible for the performance of those delegated functions. Having delegated functions, the Commissioner is still able to decide to perform those functions personally.