

Justice Sub-Committee on Policing

Police Scotland's proposed use of digital device triage systems (cyber-kiosks)

Supplementary written submission from Police Scotland

Thank you for giving me the opportunity to provide you with an update on Digital Triage Devices. Further to my letter dated 8th November 2018, I am writing to provide the additional information you requested via the Clerks.

Consultation

Consultation continues in the form of established meetings of the Stakeholders Group and External Reference Groups, including extensive consultation and feedback on the supporting document set where these documents have evolved as a result of the views and considerations of participants within these groups to their current form.

- Principles of Use
- Toolkit
- EqHRIA
- DPIA
- Public leaflet

The most recent meetings of both Groups took place on 30th October at which it was agreed that the supporting document sets were at an advanced stage and sufficient to support roll out of associated training of officers. This is a training only roll out, not a deployment of the Kiosks. The training delivery will allow for evaluation and provide assurance as to the suitability of the supporting documents. The document set is designed to provide operational officers and reader with a level of detail which sets out the legal basis on which PSOS rely and the distinctions in powers conferred upon officers when dealing with accused persons and victims/witnesses.

We have sought advice from PSOS Legal Services around our understanding of this legal basis; statutory powers, common law and warrant. The advice provided to us supports that which we have previously articulated but is mindful of the distinction between accused person and victims and witnesses. In respect of victims and witnesses the police will often rely upon individuals volunteering their devices and providing a level of informed consent. We recognise the importance placed upon us to properly explain how the police might handle the individual's information. This guidance will be included within the public information leaflet as well as the supporting document sets, relied upon by our officers.

SRO and Responsibilities

Digital Triage Devices formed part of the Programme of delivery under the Cybercrime Capability Programme with the Senior Responsible Officer (SRO) being ACC Specialist Crime & Intelligence.

Det. Chief Superintendent Gerry McLean as head of Organised Crime and Counter Terrorism Unit (OCCTU) and Det. Superintendent Burnett as lead for the Cybercrime portfolio have previously provided evidence to the Committee. Communication from the committee has been responded to by DSU Burnett once approval has been sought from both DCS McLean and ACC Specialist Crime & Intelligence.

Legal Framework

On the 12 October 2018 the SRO wrote to Crown Office & Procurator Fiscal Service (COPFS) seeking their views around the legal basis on which PSOS relied in examining digital devices. The communication was addressed to the COPFS - Serious Organised Crime Division (SOCD), based at the Scottish Crime Campus Gartcosh. From conversations with staff within SOCD and COPFS representation at the Stakeholder Group it is our understanding that the letter has been passed to Crown Counsel for consideration. We sought an update on this matter on 30 October 2018 at the stakeholder Group where COPFS are represented. We have emphasised the importance of the review and encouraged COPFS to have a position which could be shared with the Committee prior to the evidence session on 15 November 2018. Through discussions at Stakeholder Group COPFS representative has supported the legal basis on which we rely but recognises the nuances of each set of circumstances where police utilise these powers. We are of the view that for officers to be confident on the legal basis they must be mindful of the circumstances in which they use these powers and the status of the individuals concerned. We still await a written position from COPFS – Crown Counsel and without anticipating their position we might reasonably expect them to consider this as an operational matter for policing.

No intimation has been received from Crown Counsel as to when we might receive their written response.

The legal basis on which Police officers in Scotland rely can be summarised as, the power to search and seize including common law power and is also provided within statute or under the authority of a warrant where articles seized by the police are reasonably believed to be connected to a police investigation or incident. These statutory provisions are outlined in Annex A.

Where a lawful power of search exists that power of search enables a police officer to search for an item, seize it, and examine it. That is the position as set out in the case of J.L. & E.I. -v- HMA. In that case the court observed that no speciality is introduced simply because what is found is an electronic device such as the electronic memo-master discussed in HMA v Rollo. HMA v Rollo explored the admissibility of evidence contained in a password protected electronic device. This articulated that the 'means or surface' for recording information did not deprive such stores of information from qualifying as a document which could be subject to examination. The J.L. and E.I. -v- HMA case concerned the examination of an iPhone and, more particularly, information contained within the phone in digital format (namely text messages) and that was deemed to be lawful.

Therefore if a police officer, in the execution of a lawful power of search, seizes a digital device the law appears to allow for the examination of that device for information held within.

The implications in terms of ECHR are apparent however ECHR implications must also be considered with regard to the ECHR protections that digital device examinations provide certain articles of the act. In particular Article 2 and both Articles 5 and 6 where the product of such examination supports the investigation of crime (inculpatory and exculpatory) and the protection of the public from risk whether from themselves or others. Continued consideration must include the balance between ECHR rights as previously outlined in ICO submissions. These are obligations and a duty of Police Scotland officers to protect life, prevent and detect crime and maintain order and we act within the existing legal frameworks as set but the courts to do so.

However, these are not absolute rights. With particular regard to Article 8, interference with a person's rights is permitted if that interference is in accordance with the law and necessary in a democratic society for the prevention of disorder or crime (amongst other things).

Police Scotland Position

Having identified the associated concerns regard kiosk use and digital device examination, consultation has been conducted to ensure these are captured and measures taken to enhance the safeguards in place to protect digital data. As such an audit process is being developed along with the document set outlined which includes bespoke guidance in relation to Kiosk use and a 'Principles of Use' for all digital forensic examination by Police Scotland, which recognises both the legal basis and the status of the individual who owns the device.

We are confident of the legal basis previously described and on which we rely. Our consultation has not identified any existing legal principle which erodes the status quo as regards the examination of digital devices. That having been said we appreciate the concerns of the SHRC and we remain committed to working with them and others to ensure the rights of the public are protected.

We hope this is of assistance and we look forward to providing evidence on the 15 November 2018.

If I can be of any further assistance please do not hesitate to contact me.

Nicola Burnett
Detective Superintendent
Organised Crime and Counter Terrorism
12 November 2018

List of main statutory powers of Stop and Search of the person

Includes but not limited to:

Section 47 Firearms Act 1968 (firearms)

Section 23 Misuse of Drugs Act 1971 (drugs)

Section 60 Civic Government (Scotland) Act 1982 (stolen property)

Section 4 Crossbows Act 1987 (crossbows)

Section 11 Protection of Badgers Act 1992 (evidence of commission of an offence under that Act)

Section 60 Criminal Justice & Public Order Act 1994 (power to stop and search in anticipation of violence)

Section 101 Conservation (Natural Habitat etc.) Regulations 1994 (evidence of commission of an offence under that Act)

Section 4 Wild Mammals Protection Act 1996 (evidence of commission of an offence under that Act)

Section 21 Criminal Law (Consolidation) (Scotland) Act 1995 (control of alcohol at sporting events)

Section 48 Criminal Law (Consolidation) (Scotland) Act 1995 (offensive weapons)

Section 50 Criminal Law (Consolidation) (Scotland) Act 1995 (knives)

Section 7 Protection of Wild Mammals (Scotland) Act 2002 (evidence of commission of an offence under that Act)

Section 11A Fireworks Act 2003 (possession of a firework in contravention of a prohibition imposed by fireworks regulations)

Section 66 Criminal Justice (Scotland) Act 2016 (power to search a person who is to be, or is being taken from one place to another, to ensure not in possession of an item that could cause harm to self or others)

Section 67 Criminal Justice (Scotland) Act 2016 (power to search on entry to relevant premises or events, where consent to the search has been consented to as a condition of entry imposed by the organiser)