

## **Scottish Criminal Bar Association Response to The Scottish Parliament Justice Sub-Committee on Policing**

1. The Scottish Criminal Bar Association (SCBA) is not satisfied at present that Police Scotland can legally use the new digital device triage systems ('cyber kiosks') in relation to their inquiries into the commission of any alleged offence;
2. The SCBA is of the view that further consideration of this issue is required before these devices are 'rolled out' across Scotland, and that the matter requires consideration by the Scottish Law Commission and possible legislative change;
3. As per Assistant Chief Constable Steve Johnson's letter to Andrew Laing of COPFS dated 15th October 2018, Police Scotland appears to found much of its purported legal authority or its '...understanding of the existing legal framework...' for the use of these devices on the basis of the decisions in *Rollo v HMA* 1996 JC 23 and *JL & EI v HMA* 2014 JC 199

In this connection, the SCBA would observe:-

- (i) that *Rollo* was a decision dealing particularly and discretely with the issue as to whether an electronic notepad or diary fell within the meaning of a 'document' for the purposes of a search specifically carried out in terms of in terms of s. 23(3)(b) of the Misuse of Drugs Act 1971.

It is not readily apparent that the decision in *Rollo* can be read so as to provide the blanket approval of the use of such devices.

Furthermore, in *Rollo*, the search clearly proceeded under the authority of a judicial warrant. It is not clear what assistance the decision provides in relation to searches that are not carried out under the auspices of any warrant;

- (ii) that *JL & EI* was a decision dealing particularly with police powers of search in relation to persons detained under the now repealed provisions of s. 14 of the Criminal Procedure (Scotland) Act 1995. Those powers of detention and subsequent search only applied where the police had reason to suspect that a person had committed an offence punishable by imprisonment.

This would indicate the engagement of a degree of proportionality in that the offence in question had to be sufficiently serious so as to be punishable by imprisonment before the detention and search provisions under s. 14 applied.

Indeed, in *JL & EI*, the crime in question was an assault to injury and permanent disfigurement – in other words, a serious offence indeed punishable by imprisonment.

By contrast, the replacement detention and search provisions introduced by s. 1 of the Criminal Justice (Scotland) Act 2016 can also apply to offences not punishable by imprisonment in terms of s. 1(2) and (3) of the 2016 Act.

It cannot therefore be assumed, as Police Scotland appear to assume, that the decision in *JL & EI* will necessarily apply in relation to different legislative provisions (i.e. s. 1 of the Criminal Justice (Scotland) Act 2016) where the same degree of proportionality as obtained in relation to the provisions under consideration in *JL & EI*

(i.e. the provisions of s. 14 of the Criminal Procedure (Scotland) Act 1995) does not seem to apply.

4. It is a statement of the obvious that the use of these devices would allow police officers to access information that may well be personal and/or sensitive, but irrelevant for the purposes of any police inquiry. In such circumstances, the individual's common law rights to privacy and Art 8(1) ECHR right to a private and family life must be very live considerations. The SCBA is concerned that the correspondence and evidence provided thus far by Police Scotland does not appear to address to any meaningful degree this issue;

5. Similarly, the SCBA notes that the correspondence and evidence provided thus far by Police Scotland does not appear to address to any meaningful degree the issue as to how Scots law's general prohibition on searches amounting to 'fishing exercises' by the police (cf, e.g. HMA v Turnbull 1951 JC 96) interacts with the proposed use of these devices.

6. The SCBA notes with interest the very careful or precise use of words by Assistant Chief Constable Steve Johnson in his letter of 18th February 2019 to the Convener of the Justice Sub-Committee On Policing, viz. :-

'We do not believe the position described by Crown (sic) necessarily contradicts our understanding of the legal basis.'

From this, the SCBA can only infer that Crown Office has not provided an unqualified endorsement of Police Scotland's own assessment of the current legality of the use of this new technology.

7. Returning to the SCBA's view (previously expressed at paragraph 2 above) that further consideration of this issue is required before these devices are 'rolled out' across Scotland, the SCBA would remind the Sub-Committee of the evidence of Ms Clare Connelly, Advocate, to the Sub-Committee on 15th November 2018 in which she suggested that legislative change may well be required to address this issue and that the issue may well be one that would merit consideration by the Scottish Law Commission in this regard..

As Ms Connelly stated at that time:-

'I do not think that it is possible or reasonable to expect the existing common law case law to be developed in court process for an issue as important as this...'

'...fully researched considerations of all possible manifestations of future technological developments by a body such as the Law Commission would at least allow the possibility that the legislation could have some longevity, rather than – as Mr. McArthur says – be out of date by the time it is on the statute book.'

'They (i.e. the cyber kiosks) should not be rolled out in December. That is premature. More than a response from Crown Office is required. The law has to be re-assessed and perhaps re-drafted to meet the challenges of the use of not only cyber kiosks but technology in the modern world.'

The SCBA endorses the views expressed by Ms Connelly at that time.