

## **Justice Sub-Committee on Policing**

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

#### **Written submission from the Scottish Human Rights Commission**

#### **Police Scotland's proposed use of digital device triage systems - human rights assessment in relation to its legality**

Thank you for the opportunity to contribute to the work of the Sub-Committee in this area. As expressed [before](#) to the Sub-Committee the use of mobile phone browsing (MPB) or mobile device examination by Police Scotland raises significant human rights concerns, particularly in relation to Article 8 rights of the European Convention on Human Rights (and potentially under data protection laws too). We understand that Police Scotland is planning to deploy this technique using cyber kiosks later this month and the Sub-Committee has requested our opinion on the legality matter.

The Commission would like to acknowledge that the use of mobile device examination and other similar techniques consisting of checking the telephone records and social media activity of suspects and of some victims (for example missing persons/trafficked persons) could play an important part in the prevention and detection of crime. Protecting the public must involve recovering deleted and encrypted electronic information of those involved in criminal activity, however this measure should be taken in compliance with human rights law and standards. This is both in the interest of Police Scotland and the public in general.

MPB is highly intrusive of the right to privacy, home and correspondence. We consider that there are considerable difficulties when considering the legal basis of this technique. The Commission is of the view that there is a lack of clarity as to the precise legal basis for the use of this technique as well as an absence of sufficient oversight safeguards. MPB appears to be founded on seizure powers (rather than examination powers) arising in many different policing contexts. While the legality is fact dependent, it is reasonably foreseeable that there could be instances where the legal basis for such searches and the use of MPB does not meet the 'quality of the law' requirement in Article 8 of the ECHR. This is likely to be the case where it is deployed outside the context of judicial warrants.

Furthermore, there is a lack of bespoke domestic law governing this issue, which means the legal tests of foreseeability and accessibility test are unlikely to be met in some instances. Serious consideration should also be given to the issue of independent oversight for the use of MPB, which seems unsuitable at the moment.

An adequate legal and policy framework requires both the sufficient precision to enable any individual (if need be with appropriate advice) to regulate his conduct and adequate safeguards to guarantee against the risk of abuse and arbitrary interference. It is crucial that the Sub-Committee (and Parliament) is satisfied that the current framework strikes the right balance between the prevention of crime on the one hand and the right to privacy on the other.

In view of this, we would recommend the Sub-Committee consider a two stage treatment of the issue:

a. The Scottish Parliament should consider the enactment of legislation (i.e. a code of conduct for digital forensics). This would satisfy Article 8 requirements for all possible cases where Police Scotland will be using this technique. In doing so the Scottish Parliament would ensure clarity of the law and the incorporation of adequate and effective guarantees against abuse and arbitrary interference, which are “necessary in a democratic society”. Regulation would also consider the appropriate threshold allowing seizure of the e-device (e.g. “reasonable grounds for suspecting” or other if preferred).

b. There should be a judicial warrant requirement for any search of mobile phone (and digital media), unless it is explicitly and clearly defined by other law. This will provide the required legal precision and necessary oversight under human rights law when a measure is highly intrusive of a fundamental right. As general rule, and subject to the exceptions, Police Scotland will require a judicial warrant to enter and search property. In view of the recognition that MPB is capable of being at least as intrusive of Article 8 rights as searches of homes, the rationale for requiring warrants for searches of premises apply equally to mobile device examination.

As a consequence:

c. Police Scotland should postpone their plans to roll out cyber kiosk until the issue of legal basis is clearly settled and the Sub-Committee decides the next steps.

We are also sending this correspondence to Police Scotland and ICO for their information.

The Commission would welcome the opportunity to discuss this issue further with you if you wish.

Judith Robertson  
Chair, SHRC  
2 November 2018