Thank you for your letter dated 8 April 2019 which highlights the publication of the Sub-Committee’s report. Your letter asks for a Crown Office and Procurator Fiscal Service (COPFS) view on the suggested approaches offered by stakeholders and the findings set out in the report at paragraphs 143 to 150.

As context it may be helpful if I reiterate some key points that were made by COPFS in the response to ACC Johnson’s letter and the response to your recent letter, both of which explore some of the key issues raised in the report.

Firstly COPFS welcomes any improvement in the capacity to investigate crime in Scotland, particularly in relation to evidence found on digital devices. Alongside this COPFS welcomes any process which enables inquiries to be appropriately targeted and which assists with ensuring the return of digital devices which do not hold evidential material as quickly as possible.

Secondly Police Scotland currently have powers of seizure and examination which apply irrespective of whether the evidence is a digital device or any other item which is being seized and examined. Those powers are governed by legal provisions and legal principles. Where the seizure or examination of an item is conducted outwith the terms of those legal powers then there is a risk that any evidence secured will be found by a Court to be inadmissible. In making an assessment of the admissibility, or potential admissibility, of such evidence Prosecutors and the Judiciary will consider the fairness of the approach taken in the particular circumstances.

There is nothing specific to the Digital Device Triage System which, in principle, prevents it from being used as part of the process to identify information which can then be secured as admissible evidence in a prosecution.

Thirdly evidence recovered from a digital device is of significant importance in a large proportion of the cases which prosecutors encounter on a daily basis, including the most serious offending that we see in our Courts. In some cases, the evidence is critical to the prosecution case. In some cases, it is significant by reason of its exculpatory nature. The manner in which that evidence has been obtained is, and always has been, subject to the scrutiny of the Court and open to challenge by those accused of a crime or their legal representatives.

Turning to the report, I note that the majority of the findings ask specific questions of the Scottish Police Authority and outline the views of the Sub-Committee on the approach taken by Police Scotland on the roll out of the Digital Device Triage System. However, in terms of the suggested approaches and findings in the report I would make the following observations;
As has been suggested in the report, any additional legal framework would require flexibility, the capacity to adapt to circumstances and the ability to ‘keep pace’ with technology. Any proposal to set out additional legal requirements covering seizure and/or examination of digital devices must be framed in terms which do not restrict, prevent or hinder the proper investigation of crime, whilst also, so far as practicable and consistent with that aim, respecting the rights of those whose devices may require to be examined.

As you will know the legislative requirement for a Code of Practice is an approach which has been adopted recently in Scotland in the context of various aspects of criminal investigations. The drafting of any such Code covering this area would need to carefully balance the protection of private data with the requirement to allow law enforcement agencies to properly assess and secure evidence.

The proposal of a requirement for a search warrant in any circumstance where a digital device is being examined “unless it is explicitly and clearly defined by other law”, could delay the analysis of devices or delay the return of devices to their owners, and may have a significant resource impact on the Criminal Justice System. If this approach was adopted it would be important to guard against any risk that evidence may be lost, particularly in urgent circumstances.

To understand the scale of the potential resource impact of additional legal requirements around seizure and examination DCS McLean of Police Scotland advised the Sub-Committee that as many as 15,000 devices are submitted to cybercrime hubs each year for examination. The proportion of those which might require a search warrant under the proposal noted above would, of course, depend on the assessment of whether the position had been explicitly and clearly defined by law, but the additional analysis and process which this would involve would, depending on the approach taken, require additional resource for Police Scotland, COPFS, the Scottish Court and Tribunal Service and the Judiciary.

I hope this information is of assistance to you in your consideration of the next steps to be taken by the Sub-Committee.

David Harvie
Crown Agent