



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Naomi Long MLA

Minister for Justice
Minister's Office
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Belfast
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9 December 2021

Re: Extraction of information from electronic devices: Draft Code of Practice, comparison

Dear Minister,

Thank you for providing an updated version of the draft Code of Practice on the extraction of information from electronic devices, received from the Department on 27 October 2021.

As requested, the Northern Ireland Human Rights Commission (the Commission) has considered the updated version of the Code and whether the Code addresses the concerns previously raised.

Whilst we appreciate that the updated draft makes a number of clarifications and stylistic changes, the issues raised in our correspondence of 28 September 2021 remain largely the same.

In particular, the revised draft has not taken the opportunity to make express reference to human rights obligations or to outline a human-rights based approach to decision-making. It remains our view that the Code of Practice should set out exactly how Article 8 of the European Convention on Human Rights (ECHR) is to be taken into account, to provide sufficient safeguards to ensure powers are used lawfully.

I appreciate that Part 2 does note that the sections 36 and 39 powers must be exercised in accordance with the ECHR (referencing Article 8 at paragraph 14) but this should in our view be expanded upon. Practical guidance would be particularly helpful. There is already an example of how to do this. Part 2 states that in addition to ECHR, sections 36 and 39 powers must also comply with the Data Protection Act 2018 ('the DPA'), and the UK General Data Protection Regulation ('the UK GDPR'), both of which appear in more detail at Annex C. This could be done for Article 8, by the inclusion of an annex providing clarity and detailed guidance.

The Commission welcomes the recognition that certain groups are more vulnerable than others, and that investigations may be particularly traumatic for them. We also welcome the commitment (in paragraph 92) "to ensure that their trauma is not further exacerbated as a result of engaging in an investigative process". We welcome the appreciation that devices are relied upon heavily by everyone but more so with vulnerable people. Therefore, as noted, it is especially important that their devices receive priority examination and are returned as soon as possible (paragraph 101). At paragraph 99, however, it is noted that "In the case of a rape victim, ideally this should be within 24 hours of the device being taken." We recognise the intent, but query whether it is appropriate here to distinguish rape victims from victims of other sexual assaults. In our view it should not.

Finally, in its previous advice the Commission had recommended that the proposed Code of Practice should be opened for consultation, in advance of the LCM, to ensure its compliance with human rights standards. The Commission highlighted issues of data extraction and noted its particular relevance to marginalised and vulnerable people including women, children and LGBTQ+ people.¹ The Commission recommended that careful consultation was undertaken with marginalised and vulnerable people and organisations representing them. Consultation is particularly important where there is likely to be a disproportionate negative impact on some groups. Moreover, following such consultation we continue to recommend that the Code of Practice should be produced with those marginalised and vulnerable individuals and their relevant organisations.

I hope these comments are helpful. Should there be anything else we can assist with, please do not hesitate to contact us.

Yours sincerely,

**Alyson Kilpatrick
Chief Commissioner**

¹ See UN General Assembly, 'Right to Privacy: Report of the Special Rapporteur on the Right to Privacy', Fortieth Session, 25th February-22nd March 2019, at paras 48-49.