

Pre-Charge Engagement

Matt Hardcastle

23 June 2021



This webinar has been drafted and
provided by Kingsley Napley LLP

The slides do not constitute legal advice
and should be used for information
purposes only



31 December 2020

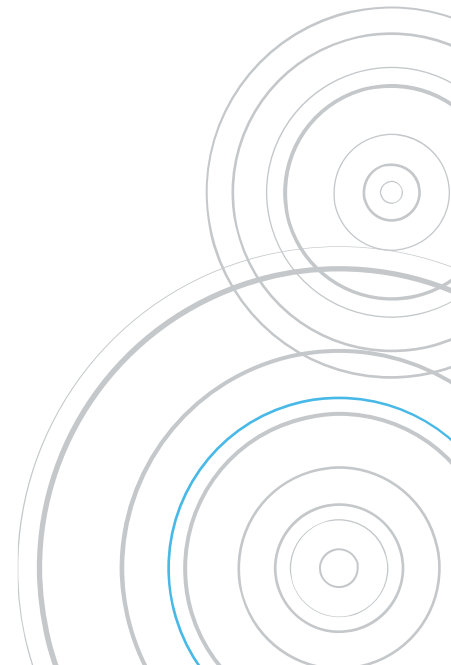
- Revised Attorney General's Guidelines on Disclosure
- The 6th edition of Charging (The Director's Guidance)

27 May 2021

- The introduction of a new APP on the extraction of data from digital devices

07 June 2021

- The coming into force of *The Criminal Legal Aid (Remuneration)(Amendment)(No.2) Regulations 2021*



AG Guidelines on Disclosure

- The framework for Pre-Charge Engagement (“**PCE**”) is found in Annex B
- PCE is a voluntary process and may be terminated at any time [¶3]
- PCE is not exhaustively defined, but may include [¶4]
 - a. Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
 - b. Ascertaining whether the suspect can identify any other lines of inquiry.
 - c. Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
 - d. Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
 - e. Agreeing any key word searches of digital material that the suspect would like carried out.
 - f. Obtaining a suspect’s consent to access medical records.
 - g. The suspect identifying and providing contact details of any potential witnesses.
 - h. Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect’s representatives intend to instruct their own expert, including timescales for this.



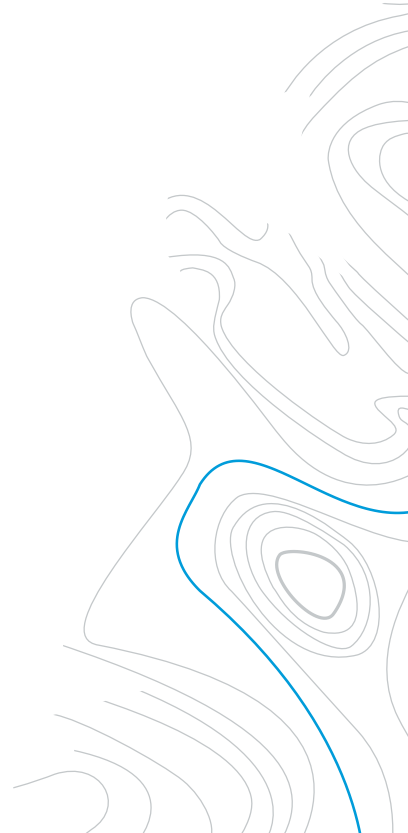
AG Guidelines cont.

- PCE may occur at any point after the first interview under caution and the initiation of criminal proceedings, but an adverse inference under s34 CJPO is not available where a suspect failed to mention a fact when asked about a matter in pre-charge engagement [¶¶1, 7]
- A no comment interview does not preclude the possibility of PCE [¶9]
- PCE is “encouraged” by the Code for Crown Prosecutors and may impact the decision as to charge [¶4; ¶3.4 CCP]
- PCE may be initiated by the investigator; the suspect; the suspect’s representative; or the prosecutor [¶¶11, 13]
- A prosecutor may carry out PCE [¶¶13-14]



AG Guidelines cont.

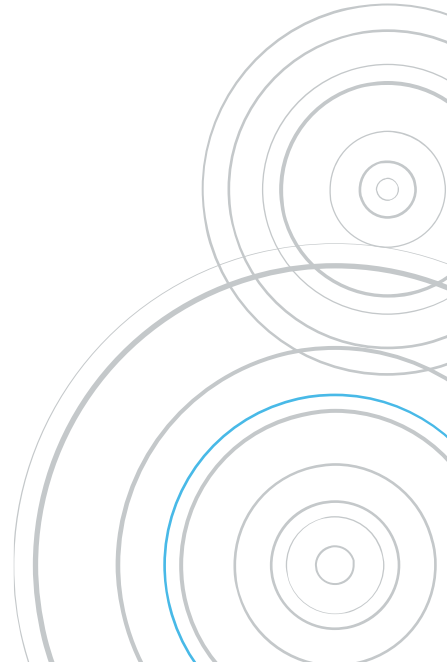
- Investigators are not obliged to follow every line of inquiry suggested by the defence: a line of inquiry must be reasonable in the circumstances of the case [¶15], but any lines of inquiry not pursued must be drawn to the prosecutor's attention along with the rationale for that decision [Annex 4, Charing 6th ed].
- Disclosure of unused material must be considered to ensure that the discussions are fair and the suspect is not misled as to the strength of the prosecution case [¶22; **see also the right to information in Code C 3.4(b); 3ZA**]



AG Guidelines cont.

- A full written record of PCE discussions should be made and should include:
 - Every key action taken as part of the process (including face-to-face [¶19] or informal discussions);
 - All information provided by the suspect's representatives including search terms and witness details; and
 - Any material provided by the suspect's representatives

[¶¶25-30]



AG Guidelines cont.

- PCE may require a more formal mechanism which may be done by the investigator; prosecutor; or suspect's representative sending a letter of invitation to the other party which:
 - Asks whether the other party wishes to enter into PCE in accordance with these guidelines
 - Explains in what was the engagement will assist the investigation. This may include the information sought or sought to be discussed **[¶21]**
- Information or material generated by the process will need to be assessed for evidential and disclosure purposes **[¶30]**



- A new unit of work. The hourly rates are:
 - £51.28 in London; and
 - £47.45 outside London
- Subject to an upper limit of £273.75 [**Schedule 4, Paragraph 3A *Criminal Legal Aid (Remuneration) Regulations 2013***]
- These fees are exclusive of VAT [**s2(2) *Criminal Legal Aid (Remuneration) Regulations 2013***]



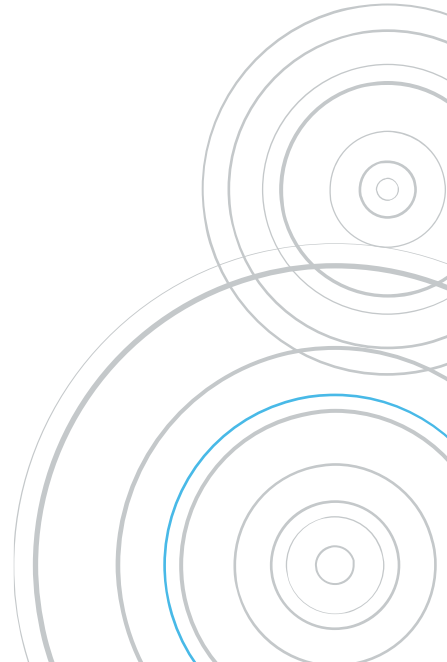
Funding cont.

- PCE is self-granted, subject to the matter passing a the sufficient benefit test **[SCC 2017 ¶9.120]**; there is no financial eligibility test for this unit of work **[SCC 2017 ¶9.116]**
- The sufficient benefit test to claim is satisfied only where there is an agreement (formally or informally) between the client and the prosecutors and/or investigators to undertake pre-charge engagement **[SCC 2017 ¶9.115]**; the information which must be recorded on the file is set out in paragraph **9.120 SCC 2017**
- If costs will exceed the upper limit (£273.75) then an application must be made under paragraphs **5.9 – 5.14 SCC 2017**
- Extensions cannot be granted retrospectively **[¶5.13 SCC 2017]**



Charging 6th Edition

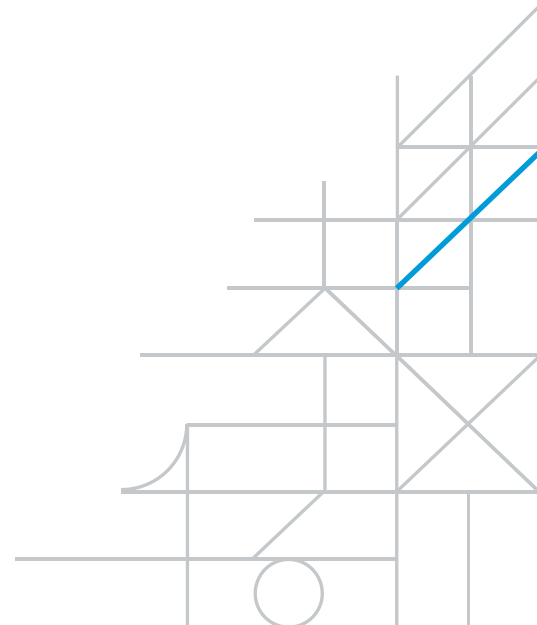
- The police are responsible for ensuring that lines of inquiry, both pursued and outstanding, are revealed to the prosecutor at the time of the referral of the case for early advice or a charging decision **[¶3.1]**
- Prosecutors may advise the police and other investigators about pre-charge procedures and possible reasonable lines of enquiry **[¶7.1]**
- “Where appropriate”, reasonable lines of inquiry already conducted; those which remain outstanding; and those which will not be pursued (along with the rationale for that decision) is information which is required for a charging decision **[Annex 4]**



APP: Extraction of material

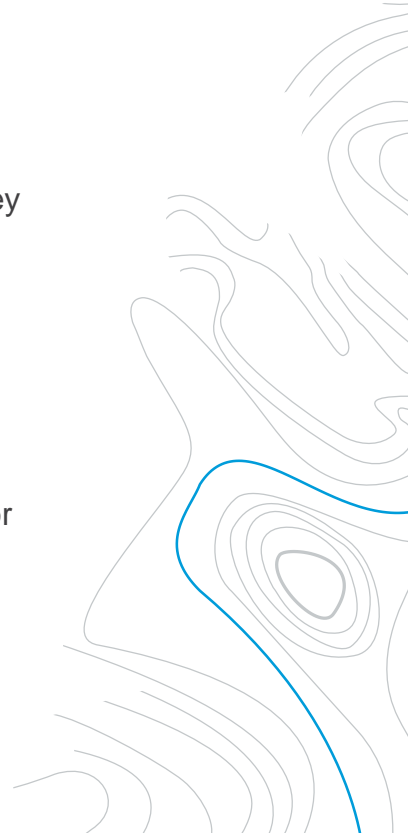
- The APP is based on ten principles:

Principle 1 –	That extracting material must be strictly necessary and avoid unnecessary intrusion.
Principle 2 –	The provision of information to the device user.
Principle 3 –	How to request agreement of the device user.
Principle 4 –	Understanding the device user's right to refuse.
Principle 5 –	Ensuring the material extracted is adequate, relevant and not excessive for the purpose for which it was acquired.
Principle 6 –	Considering the safeguarding implications.
Principle 7 –	The obligations to update the device user and to review and correctly manage material obtained during an investigation.
Principle 8 –	Sharing information.
Principle 9 –	Recording actions.
Principle 10 –	Implementation of the <u>APP</u> .



Glossary

- “Strictly necessary for a law enforcement purpose”: a high-threshold test; investigators need to demonstrate that they have considered other, less privacy-intrusive, means and have found that they do not meet the objective or processing. This criterion cannot be met if the police can achieve the purpose by some other reasonable means.
- “Serious Harm”: not defined, but ‘some help’ can be found in other statutory definitions such as in s93(4) *Police Act 1997* as conduct which: **(a)** involves the use of violence, results in substantial financial gain, or conducted by a large number of persons in pursuit of a common purpose; or **(b)** for a person without previous convictions who has attained the age of 21, the offence(s) could reasonably be expected to carry a sentence of three-years or more

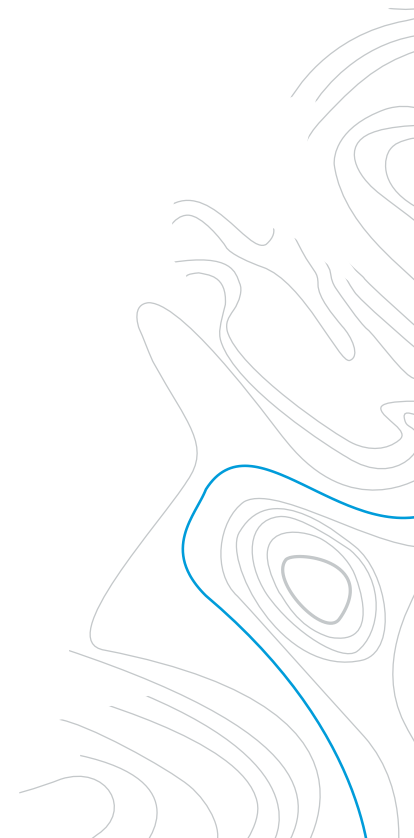


Principle 1: Extraction [pp.36 - 38]

- Material will only be extracted from a personal device if it is proportionate and strictly necessary for an investigation. Only the minimum material that is strictly necessary will be extracted

For Victims and Witnesses

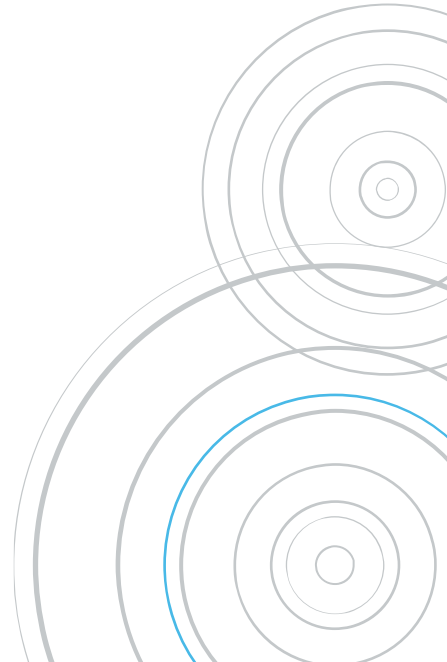
- Mobile phones and digital devices will not be examined as a matter of course and the 'strict necessity' criterion must be satisfied
- Other means may include: viewing limited areas (e.g. an identified sting of messages); taking screenshots without taking possession; extracting material from the device; or whether material may be available on the suspect's device.



Principle 1 (cont.)

Victims and Witnesses (cont.)

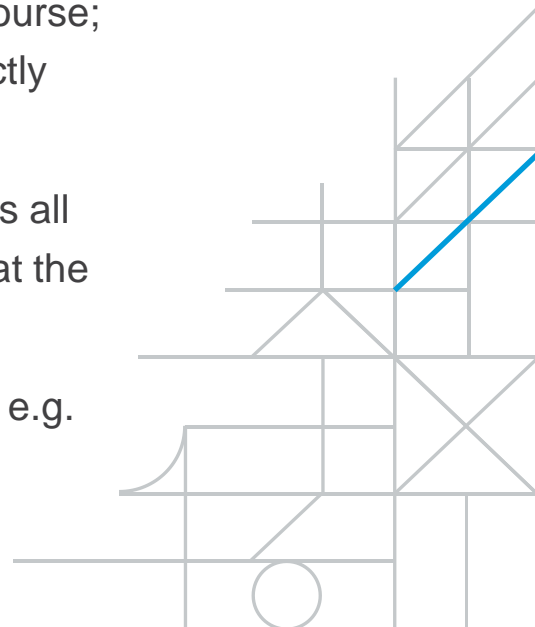
- Where a more extensive examination is required, this will be done with a minimum of inconvenience and intrusion required to recover the relevant material; the least intrusive method available will be used. Intrusion will be minimised by the following: use of defined and focused searches of the device; a search cannot be speculative; the search must support one or more reasonable lines of enquiry; victims, witnesses and suspects may help to identify reasonable lines of enquiry and/or material held on the device. Except where additional serious offences are identified, information irrelevant to the search parameters and line of enquiry will be disregarded



Principle 1 (cont.)

Suspects

- Mobile phones and digital devices will not be examined as a matter of course; they will only be examined where there is reason to believe that it is strictly necessary to acquire material to pursue a reasonable line of enquiry.
- The strict necessity criterion is the same, i.e. it will not be satisfied unless all other less intrusive methods have been explored and it is considered that the purpose cannot be reasonably achieved through less intrusive means.
- The example given is whether it is sufficient to simply view limited areas e.g. message strings



Principle 1 (cont.)

Suspects (cont.)

- Where the police have carried out a search of a device the police should inform the suspect of the method(s) used, including search parameters; the suspect may identify further methods to search the device including suggesting new search parameters, but these must be precise so that a reasonable and proportionate search can be undertaken.
- A search cannot be speculative



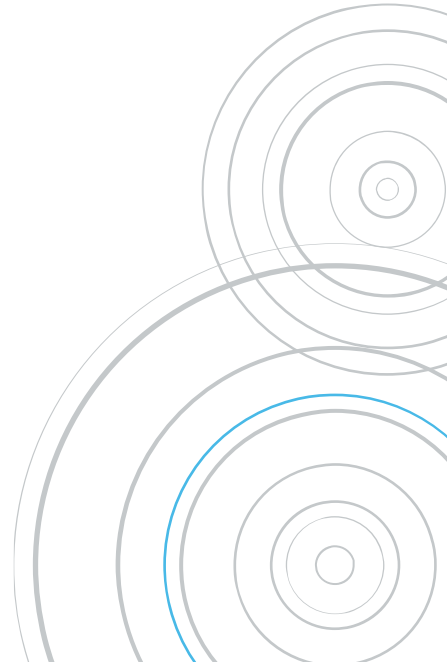
Principle 4: Right to Refuse [pp. 45 – 47]

- Victims, witnesses, and suspects have the right to refuse. If a victim or witness refuses, investigators will need to explain the reasons for the need to obtain material from the device. If the victim / witness continues to refuse permission, investigators should explain that: it may not be possible to pursue the investigation; a witness summons may be issued; any trial resulting from the material may be halted; they must not delete potentially relevant material from their device.
- There may be some circumstances where the investigator may apply for a warrant to seize the device (e.g. an identifiable risk of harm).



Principle 4 (cont.)

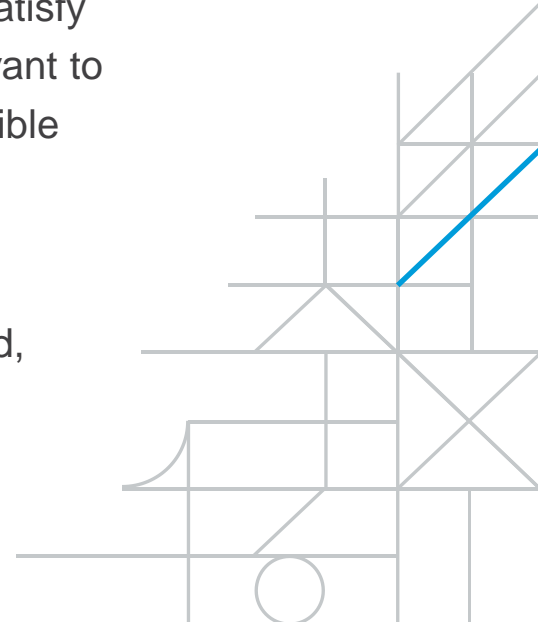
- A victim or witness may withdraw their agreement for the use of material; if this occurs then any relevant material already acquired will be retained as part of the investigation records
- A suspect has the same rights, but the police have additional powers to seize material from suspects such as post arrest powers of search



Principle 5: Adequacy and Relevance [pp. 48 – 51]

Victims, witnesses, and suspects

- Investigators will only extract the minimum amount of data required to satisfy the line of enquiry. Where material has been extracted, but it is not relevant to the investigation, it will not be examined and will be deleted where possible
- Once the material has been extracted, the device will be returned to the owner without undue delay
- Material will fall into one of four categories: (1) used material; (2) unused, relevant, material; (3) unused, non-relevant, material; (4) unused, non-relevant, material which cannot be separated from evidence or unused material.



Principle 5 (cont.)

1. Used material: retained and disclosed under the CPIA 1996
2. Unused, relevant, material: retained and disclosed under the CPIA 1996
3. Unused, non-relevant, material: deleted as soon as reasonably practicable
4. Unused, non-relevant, material that cannot be separated from the evidence or unused relevant material: retained and stored in the same way as evidence or unused (i.e. retained and disclosed under the CPIA 1996)

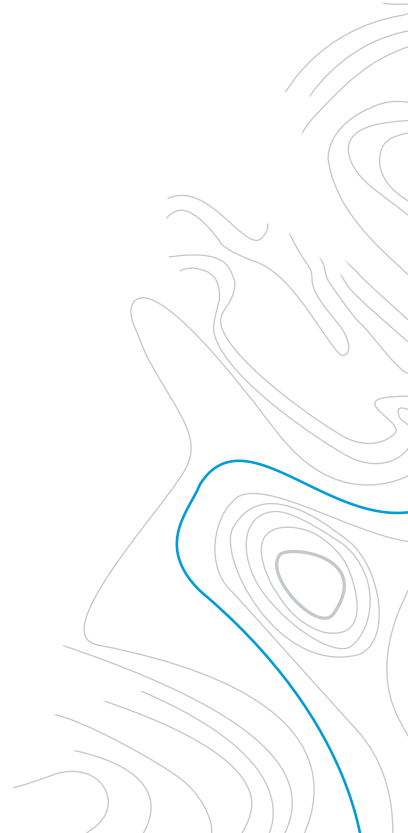


Principle 5 (cont.)

Identification of additional criminality

Victims and witnesses

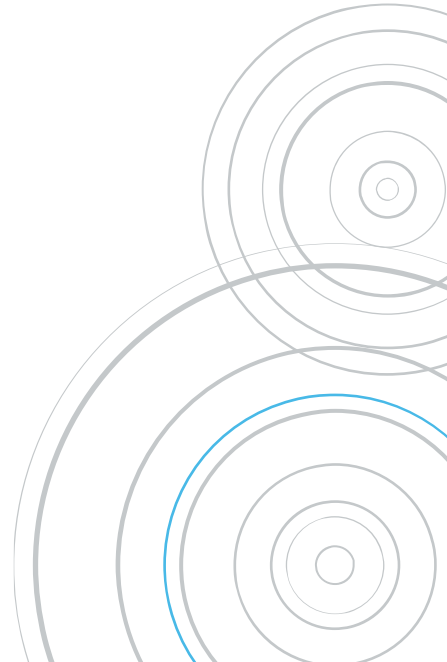
- Before initiating an investigation into such activity, an investigator will consider:
 - The seriousness of the offence being investigated set against the seriousness of the unrelated criminal activity. The example given is that it is unlikely to be proportionate to investigate references to drug use when dealing with the victim of a sexual assault



Principle 5 (cont.)

Identification of additional criminality - Victims and witnesses (cont.)

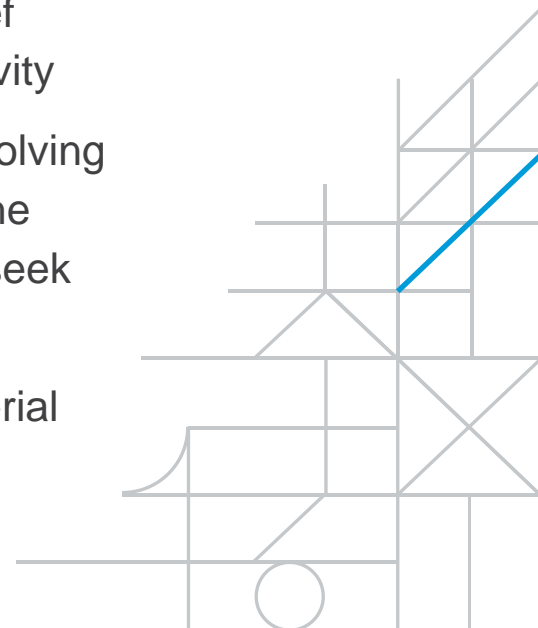
- Whether there is a risk of harm to any other person as a result of the unrelated criminality
- Whether there is a risk that the witness might disengage if they think they will be prosecuted for a minor offence and the impact this may have on the current investigation
- Whether the information about the offence is capable of having a bearing on the initial offence being investigated



Principle 5 (cont.)

Identification of additional criminality - Victims and witnesses (cont.)

- Where the investigation relates to a sexual assault, a detective chief inspector must authorise investigation of the unrelated criminal activity
- Where material is recovered and it indicates additional offences involving serious harm, it may be necessary to investigate those offences. The investigator will: seek advice from a supervisor „in cases of doubt, seek advice from a CPS prosecutor or force solicitor
- Where evidence of a serious offence is identified, the relevant material may be retained and investigated by the police as part of a new investigation, in accordance with this guidance



Contact

Kingsley
Napley

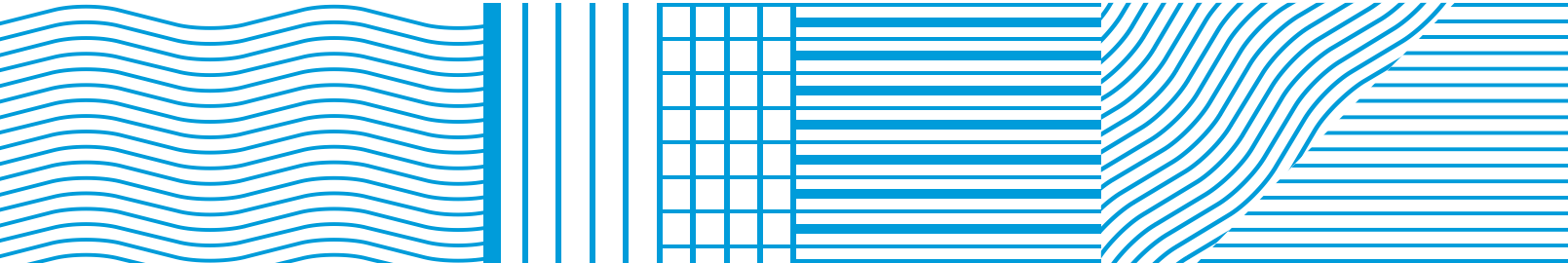


Matthew Hardcastle

SENIOR ASSOCIATE

mhardcastle@kingsleynapley.co.uk

+44 (0)20 3535 1581



This webinar has been drafted and provided by Kingsley
Napley LLP

It should be used for informational purposes only

The information is based on current legislation and should
not be relied on as an exhaustive explanation of the law or
the criminal issues involved without seeking legal advice

