



03 May 2019

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### **Invitation to a stakeholder meeting on seeking digital evidence from victims of crime**

Dear Colleague,

As you know, there has been extensive public debate over recent days about how investigators and prosecutors manage digital evidence, particularly following allegations of rape or sexual offences. We recognise that there are very real concerns about the potential impact to victims who are asked to share information held on mobile devices, or social media, and would like to work with you as we continue to develop our approach.

Not all the commentary has been accurate, and so it may be helpful to explain in some detail the background to the new police consent form, and clarify some questions over how it will be used. We hope this will offer some reassurance that this is a proportionate response to the challenge of balancing a complainant's right to privacy, and a suspect's rights to a fair investigation.

Police and prosecutors have a duty to pursue all reasonable lines of enquiry in every investigation, and to disclose any material that undermines the case for the prosecution or assists the case for the accused. This is a fundamental principle of our criminal justice system, which ensures that any trial is fair.

With so much more of our lives being lived online, those reasonable lines of enquiry now frequently extend into the devices of complainants and witnesses, as well as suspects - particularly in cases where suspects and complainants know each other.

The National Police Chiefs' Council (NPCC) and the Crown Prosecution Service (CPS) have developed processes to bring consistency to the way investigators search for relevant information on the digital devices of complainants and witnesses. Such searches will not be automatic, but where the investigating officer and prosecutor consider there to be a need to access information on digital devices to investigate a reasonable line of inquiry, they will explain this to the complainants or witnesses. They will be made aware of how their digital devices or records will be examined and how any data will be used, and asked for their informed consent for this to happen.

A new digital processing form and supporting information has been introduced to all forces in England and Wales to support this process. This form aims to help police and prosecutors strike the right balance between respecting complainant and witnesses' rights to privacy and conducting a proportionate investigation as well as meeting our disclosure obligations.

It is clearly wrong that victims should ever feel discouraged from reporting offences or seeking access to support services. We fully recognise that some complainants have had very difficult experiences in the criminal justice system, and we are seeking to address that by bringing clarity and consistency across the country. The consent form is designed to make sure police ask only for



information that is a reasonable line of enquiry in the context of the case. This must not be merely speculative and is not an exercise to find material to undermine the complainant or to investigate them.

We believe such an approach is necessary and proportionate, but we recognise your concerns and take them seriously. We would welcome your involvement as we develop the next phase of guidance.

We would appreciate an opportunity to discuss your concerns and for you to help us to consider any further improvements that could be made – to the form itself or if further guidance could be given to support its implementation. We suggest meeting in June by which time we expect to have the outcome of the Information Commissioner (ICO) investigation into concerns raised about the collection, secure handling and the use of serious sexual crime victims' personal information. The ICO's findings will further inform our approach, and we will be in touch as soon as possible with a suggested date.

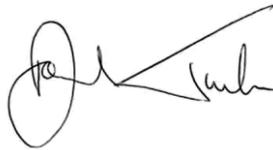
We want to do all we can to make sure that complainants feel confident to report crimes, and to support investigations and prosecutions, and hope we can work together to achieve that.

In the meantime we have set out below some information to assist you.

Yours sincerely,



**T/DCC Jeremy Burton**  
NPCC Lead for Disclosure



**David Tucker**  
College of Policing Lead for  
Crime and Criminal Justice



**Sue Hemming OBE**  
Director of Legal Services, CPS



**Gregor McGill**  
Director of Legal Services, CPS



**Will all those who report a sexual offence or other crime have their digital devices examined?**

No. Mobile telephones or other digital devices should not be examined as a matter of course and this is very clear in our guidance to police and to prosecutors. They should only be examined in investigations where data on the device could form a reasonable line of enquiry.

**Are victims of sexual offences being treated differently?**

No. This approach of seeking consent for digital examination applies to all crimes but will only be used where necessary and proportionate. It will not be used in all sexual offences cases.

It will most likely be used in investigations where the complainant and suspect are known to each other and past communication is a reasonable line of enquiry. Sexual offences often involve complainants and suspects who have a prior relationship with contested claims meaning digital examination is more likely in these investigations than in many other crimes. It will also be used in other cases where digital evidence may be crucial, such as malicious communications, stalking and harassment and violent crime including homicides.

**Why does this focus on the devices of complainants and not suspects?**

When a crime is investigated, police will regularly seize devices of those accused. This is done using police powers and suspects are not required to consent. Coercive police powers are clearly not appropriate for use against complainants and access to their devices should be on the basis of specific, free and informed consent.

**What happens to the information downloaded?**

The investigator identifies material from the phone which is relevant to the investigation.

From that relevant material, only that which is to be used in evidence because it supports the prosecution case or material which undermines the prosecution case or assists the case for the defence (the test for disclosure) will be shared with the defence.

Even once this material has been served or disclosed, there are strict legal safeguards in the trial process that prevent the complainant being cross examined about any previous sexual behaviour other than with the leave of the court. Information that is not relevant will not be used but may be held until the case has concluded.

**Why is more information downloaded than required for reasonable lines of inquiry?**

Currently the forensic tools used by many forces mean that they will extract more data than is required for examination. However, we are clear this does not mean all data should be examined. We are piloting new technology and hope in the future we will be able to only extract the relevant information.

**Will cases be dropped if consent is refused?**

No. Decisions about how best to proceed will be taken on a case by case basis based on the circumstances. Complainants and witnesses are given information to enable them to make an informed decision. If consent is not given, other reasonable lines of enquiry will be considered. However, we must also inform them that without the ability to test a reasonable line of enquiry we may not be able to proceed with the case.



**How was consent previously sought?**

Police forces had different approaches to seeking consent, including seizing devices using police powers. The new national form seeks to bring consistency across England and Wales.

**What safeguards are in place to prevent disproportionate intrusion and to prevent inappropriate information being shared in court?**

Police will only investigate what could form a reasonable line of enquiry. Police and prosecutors have been given clear guidance that they should only seek access to personal data when necessary and proportionate.

Section 41 of the Youth Justice and Criminal Evidence Act 1999 places restrictions on evidence or questions about complainant's sexual history in court. Judges and prosecutors are the gatekeepers to ensuring this is upheld.

