Law Commission
Reforming the law

Search Warrants

Consultation Paper 235

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5 June 2018

This publication is available at www.lawcom.gov.uk/project/search-warrants/.

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Right Honourable Lord Justice Bean, Chair, Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: This consultation paper seeks to obtain consultees' views on proposals to reform the law governing search warrants.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: This consultation paper is available on our website at https://www.lawcom.gov.uk/project/search-warrants/.

Duration of the consultation: We invite responses from 5 June 2018 until 5 September 2018.

Comments may be sent:

By email:	search_warrants@lawcommission.gov.uk.
By post:	Criminal Team, 1st Floor, Tower, Post Point 1.54, 52 Queen Anne's Gate, London SW1H 9AG (access via 102 Petty France)
By telephone:	020 3334 0200

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

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Glossary

Access conditions

The statutory conditions necessary for the issue of a search warrant. Depending on the search warrant provision, these may include that there are reasonable grounds for believing that an offence has been committed and that there is relevant material on the premises. The term is used in this sense in Schedule 1 to the Police and Criminal Evidence Act (PACE).

Accessibility conditions

The term we use to describe a particular subset of access conditions that relate to the impracticability of gaining access to the premises or materials without a search warrant.

All premises warrant

A search warrant that allows for the entry and search of all premises associated with a particular person.

Associated powers

The term we use to refer to powers other than search powers that are authorised under a search warrant. For example, a search warrant may have an associated power to use reasonable force, to search persons found on the premises and to seize material.

Code B of PACE

The Police and Criminal Evidence Act 1984 Code of Practice for searches of premises by police officers and the seizure of property found by police officers on persons or premises.

Duty of candour

This describes the duty owed by any person making an application for a search warrant to provide full and frank disclosure to the court of all relevant information including that which might militate against the granting of the search warrant.

Entry warrant

A warrant issued by a judge that authorises entry onto premises.

Ex parte

A hearing in which an interested party is absent and, in the context of search warrant hearings, unnotified. In the search warrants context, the occupier of the premises will be absent and unnotified when an investigator makes an application for a search warrant, as the presence of the occupier would frustrate the purpose of the search warrant.

Excluded material

Material that is partially exempted from searches under a search warrant. Excluded material is defined in section 11 of the Police and Criminal Evidence Act 1984. It broadly covers material in the following categories, which is held in confidence: medical records acquired or

created in the course of an occupation; human tissue; or confidential journalistic material. It can be searched for under the second set of access conditions under Schedule 1 to PACE.

Exempted material

The term we use for material which is legally privileged, excluded material or special procedure material. It is similar to the definition of “excepted material” in paragraph 4 of Schedule 5 to the Terrorism Act 2000. All three of these categories have varying degrees of restriction in relation to search and seizure.

Imaging

Imaging a device involves capturing and storing a copy of the data on a device for later inspection away from the premises.

Independent lawyer

The term we use to refer to a lawyer who is not connected to the case, whose role is to advise the investigator on what may and may not be seized. This person is referred to in practice as ‘independent counsel’.

Information

The technical name for the document sworn in support of the application for a search warrant. The Criminal Procedure Rules provide application forms that constitute the information.

Inspection warrant

A warrant issued by a judge that authorises entry onto, and the inspection of, premises.

Inter partes

A hearing in which all interested parties are present.

Issuing authority

The term we use to describe the person or court empowered to grant the search warrant application and issue a search warrant.

Judicial review

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. Judicial review is a mechanism for challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

Legally privileged material

Material that is absolutely exempted from searches under a search warrant. It is defined in section 10 of the Police and Criminal Evidence Act 1984 and broadly covers communications made in connection with the giving of legal advice or in contemplation, and for the purpose, of legal proceedings between: a professional legal adviser and his or her client; and a professional legal adviser and any third party representing his or her client.

Live connection

A connection to the cloud account or remote server from a device, enabling material to be viewed without the need for searching, decryption or passwords.

Metadata

A set of data that describes and gives information about other data. An example is communications data, which is data on the who, where, when and how of a communication but not its content. Communications data is defined in section 21(4) of the Regulation of Investigatory Powers Act 2000.

Multiple entry warrant

A search warrant that allows for the entry of premises on more than one occasion, either up to a stated maximum number of times or an unlimited number.

Occupier

The term we use for a person in possession or control of the premises to be searched under a search warrant.

Premises

The place to be entered and searched under a warrant. Premises is defined in section 23 of the Police and Criminal Evidence Act 1984. Other statutes may provide distinct definitions of premises.

Production order

A court order compelling a party to produce a particular category of material as specified under the order.

Public interest immunity

A determination made by an issuing authority that the public interest demands that some of the material relied upon to satisfy the issuing authority to issue a search warrant should not be disclosed.

Quashing order

A quashing order nullifies a decision which has been made by a public body. Where a search warrant is quashed on judicial review, it will be invalidated.

Search warrant

A warrant issued by a judge that authorises entry onto, and the search of, premises.

Seize and sift

Powers of seizure under Part 2 of the Criminal Justice and Police Act 2001, which provides the power to sift indeterminable or inseparable material off the premises.

Sensitive material

Any information relied on in support of the application for a warrant which the applicant identifies as confidential, in the belief that there would be a real risk of serious prejudice to an important public interest were it to be disclosed. Subsequently, the court will determine whether it is against the public interest to disclose it.

Special procedure

The procedure under Schedule 1 to PACE and some other similar statutes by which an investigator can apply for a production order or search warrant in respect of confidential business records and non-confidential journalistic material and (in very limited circumstances) medical and counselling records and confidential journalistic material.

Special procedure material

Material that is partially exempted from searches under a search warrant. It can be searched for under the first set of access conditions under Schedule 1 to PACE. Special procedure material defined in section 14 of the Police and Criminal Evidence Act 1984. It broadly covers material other than excluded material, which was acquired or created in the course of an occupation and which is held in confidence, and also non-confidential journalistic material.

Specific premises warrant

A search warrant that allows for the entry and search only of premises specified in the warrant; these may be either one or more sets of premises.

Chapter 1: Introduction

PURPOSE OF THIS PROJECT

1.1 In this project we review the law and practice governing search warrants. We examine the procedure when applying for, issuing, carrying out a search under warrant and challenging a search warrant. We also examine the treatment of sensitive, exempted and electronic material. Finally, we consider the extent to which search warrant provisions can be consolidated.

1.2 We undertook this project at the request of the Home Office, starting in January 2017. This request followed from comments made by senior members of the judiciary suggesting that the law governing search warrants is unnecessarily complex, liable to give rise to challenges and in need of reform. This is evidenced by the number of cases in recent years in which search warrants have been challenged and quashed on judicial review: in the reported cases alone, there have been some 50 judicial reviews concerning search warrants since 2010. Search warrants are among the most intrusive powers that investigators can exercise. The cost of a defective search warrant can be significant, with entire investigations collapsing and potentially millions incurred by public bodies on legal fees and damages.

1.3 Our purpose is to consider ways in which the law of search warrants can be simplified, clarified and rationalised. This is in order to reduce the number of errors and challenges and to assist both those applying for search warrants and those against whom search warrants are sought in understanding and using the system.

1.4 The terms of reference of the project, as agreed in a memorandum of understanding between the Law Commission and the Home Office signed on 11 January 2017, are as follows:

> The law reform objectives of the review encompass elements of rationalisation and streamlining of the current law, as well as identifying and addressing pressing problems.
>
> The focus of this review is on making search warrants legislation more transparent and accessible, thus reducing the scope for errors, which in turn can lead to substantive injustice and wasted costs.
>
> The review will include consideration of reform by legislative change, as well as non-statutory guidance, Criminal Procedure Rules and other initiatives.

1.5 This document sets out our provisional proposals for reform.[1] A full list of our consultation questions and provisional proposals can be found in Chapter 12 of this consultation paper. We invite responses to these consultation questions. The deadline

[1] The consultation paper is available online at https://www.lawcom.gov.uk/project/search-warrants/.

for responses is 5 September 2018. Details on how to respond to the consultation can be found on page iii.

SCOPE OF THIS PROJECT

1.6 We have identified 176 search warrant provisions, which are listed in Appendix 1. This list does not include warrants to enter premises ("entry warrants") and warrants to enter and inspect premises ("inspection warrants"). Ancillary statutory powers are contained in the Police and Criminal Evidence Act 1984 ("PACE") and Part 2 of the Criminal Justice and Police Act 2001 ("CJPA").

1.7 Beyond the primary legislation, there are supplementary provisions in Code B of PACE, the Home Office Powers of Entry Code of Practice and the Criminal Procedure Rules 2015 (as amended).

1.8 This consultation paper focuses on those problems that have been identified during our pre-consultation analysis as the most pressing problems. During this open public consultation, we invite consultees' comments on these, and any other issues within the terms of reference, surrounding the law of search warrants.

1.9 This project does not concern powers of stop and search or police powers more generally.

METHODOLOGY

1.10 In preparing this consultation paper, we have conducted an extensive literature review and made efforts to engage with stakeholders by organising meetings and roundtable discussions. We have discussed the law with academics, lawyers, judges, court organisations, law enforcement agencies, government departments and special interest groups. This iterative discussion process has been invaluable in helping to understand how the current law operates, its deficiencies and potential avenues for reform. In addition to examining the law of England and Wales, we have examined the law in other jurisdictions and have liaised, in particular, with the New Zealand Law Commission.

1.11 It is important to make clear from the outset that the proposals contained in this consultation paper are only provisional. We do not make any recommendations for law reform at this stage. It is during this open public consultation that we invite all views on our provisional proposals. All comments provided during the consultation period will be taken into account when forming our final recommendations. Our recommendations will be published in a subsequent report.

CURRENT LAW

What is a search warrant

1.12 A search warrant is a written authorisation issued by a court, tribunal or other body ("issuing authority") to a police officer or other investigator, allowing that person to enter one or more sets of premises specified in the warrant and search for persons or materials on those premises. Most search warrants contain associated powers, authorising the investigator to take away materials found during the search and to use reasonable force where necessary.

1.13 As noted above, we have identified 176 search warrant provisions. Roughly speaking, search warrant powers may be divided into the following categories:

(1) powers primarily concerned with obtaining evidence of criminal offences;

(2) powers for the purpose of wider specialised investigations, in fields such as financial services and copyright; and

(3) powers enabling entry for the purpose of removing people or animals in danger or distress, taking away dangerous or unlawfully possessed materials or otherwise preventing or remedying a dangerous situation.

1.14 Under section 8 of PACE, the most commonly used search warrant provision, a justice of the peace may issue a search warrant on the information of a police constable if satisfied that there are reasonable grounds for believing that:

(1) an indictable offence has been committed;

(2) there are materials on the premises which are likely to be of substantial value to the investigation of the offence and likely to be relevant evidence; and

(3) one of a number of accessibility conditions is satisfied, showing that it would not be practicable to gain entry to the premises or access to the materials without a search warrant.

Other search warrant powers have broadly similar conditions of issue.

Obtaining a search warrant

1.15 Search warrants under PACE and some other powers are normally applied for and executed by the police. Some investigators, such as designated National Crime Agency officers, have some or all of the same powers as the police. Other investigators, such as HMRC officers, have had the power to apply for a search warrant under PACE extended to them. There are also search warrant provisions providing for warrants to be applied for or executed by officials other than the police, such as specialised financial or other investigators.

1.16 The person applying for a warrant has a duty to provide all the necessary information to satisfy the court that the statutory conditions are met. In particular, he or she must be in a position to satisfy the court that the material sought is not exempt from search for any reason,[2] and that there are no other reasons why a warrant ought not to be issued. The information on which the application is based is normally set out in an application form, though the applicant may give additional details in the course of the oral hearing of the application.

1.17 The occupier of the premises or other person against whom the warrant is issued has the right to know this information and may apply to the court for it to be provided.[3] There are, however, cases where the applicant believes that some of the information is too

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2 See para 1.20 below.

3 Criminal Procedure Rules, r 5.7(6).

sensitive to disclose, for example if it was obtained by covert surveillance or supplied by an informant. In these cases, the sensitive information is generally supplied to the court in a separate document.[4] If the occupier applies to the court for full disclosure of the information, the court must then form its own view on whether the public interest requires the information marked as sensitive to be kept confidential.[5] This procedure has recently been discussed by the Supreme Court.[6]

1.18 Section 8 of PACE provides that a warrant is issued by a "justice of the peace". This includes both lay magistrates and District Judges (Magistrates' Courts). In addition, both High Court judges and Circuit judges have the powers of a justice of the peace in criminal matters, and may therefore issue search warrants under PACE. Some search powers under other statutes are similar, while others confine the power to issue search warrants to a Circuit judge, a High Court judge or a specialist tribunal.

1.19 Section 15 of PACE contains provisions about the way in which a warrant is applied for and issued: in particular, the information which must be provided to the court and the information which must be stated on the warrant. Section 16 of PACE contains provisions about the way in which search under the warrant is to be carried out, for example the time within which the search must take place and the information to be provided to the occupier. Both these sections apply to all search warrants issued to police constables and people to whom the provisions have been extended:[7] they are not confined to warrants under PACE itself. Section 15(1) provides that any search that does not comply with the requirements of these two sections is unlawful.

Material subject to a search under warrant

1.20 Some kinds of materials may not be searched for under section 8 of PACE or most other powers. These are:

(1) materials subject to legal privilege, meaning communications between a lawyer and a client, or between a lawyer and a third party when they concern litigation;

(2) excluded material, meaning medical and counselling records and confidential journalistic material; and

(3) special procedure material, meaning confidential business records and non-confidential journalistic material.

1.21 We refer to these three categories of material collectively as "exempted material". There is a procedure under Schedule 1 to PACE, in which a Circuit judge or a District Judge (Magistrates' Courts) can allow access to special procedure material, and in a very few cases to excluded material. Normally the judge makes a "production order", meaning that the person against whom the order is made must produce the specified material

4 Criminal Procedure Rules, r 47.26(4).

5 Criminal Procedure Rules, r 15.3(3)(b).

6 *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1, [2018] 2 WLR 357 at [27].

7 Including National Crime Agency officers, accredited financial investigators, SFO officers, officers of Revenue and Customs, immigration officers and designated customs officials. See SI 2015 No 1783, sch 1; SI 2015 No 759 (as modified by SI 2017 No 1222), art 2; and SI 2013 No 1542, schs 1 and 2.

within a given period. If a production order is made and disobeyed, or it is not practicable to make one for various reasons, a warrant can be issued instead.[8]

1.22 Special considerations arise in the case of material stored in electronic form, either on or off the premises being searched:

(1) a search warrant can authorise the search for, and seizure of, an electronic device with information stored on it; but if there is reason to believe any of this may be subject to legal privilege or otherwise exempt from search, the warrant must specifically exclude the exempted material; and

(2) there is no power to search for remotely held material, such as material kept on the cloud or a remote server.[9]

Associated powers

1.23 There are numerous other powers that are relevant to whether and how premises can be searched. For example:

(1) there are statutory powers to search the premises of a person who is arrested;[10] there is also a common law power to this effect;

(2) where a police officer is lawfully on any premises, whether under a search warrant or not, he or she may seize any materials which there are reasonable grounds for believing to be evidence of an offence (not necessarily the offence being investigated), if there are also reasonable grounds for believing that it is necessary to seize them in order to prevent the evidence being concealed, lost, altered or destroyed;[11]

(3) there is power to require a person on the premises to produce in visible and legible form any information accessible from the premises, if:

(a) there are reasonable grounds for believing that it is evidence relevant to an offence and might otherwise be concealed, lost, tampered with or destroyed;[12] or

(b) it would be liable to seizure under the terms of the warrant or certain other statutory powers if it were on the premises in tangible form.[13]

however, both these powers are only available to police or people with similar powers, and only apply to material that is in plain view at the time of the search.

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8 Some of the specialised investigation regimes concerning fields such as copyright and financial services also include a procedure for making production orders in preference to issuing a search warrant.

9 This enables electronic files to be edited and shared whilst potentially hosted in another jurisdiction. Accessibility of material will rely on a connection from a device, which could be suddenly terminated.

10 PACE, ss 18 and 32.

11 PACE, s 19.

12 PACE, s 19(4).

13 PACE, s 20.

They do not allow the investigator to search a device or to require passwords or access details;

(4) in some cases, it is not practicable to determine there and then at the site of the search whether material found on the premises is of a kind which can lawfully be seized or not. There is a procedure known as "seize and sift" which applies in such cases to allow for the material to be taken away as a whole to be sorted at a later date.[14] Where some of the material may be subject to legal privilege, this may involve instructing independent lawyers to oversee the search or the sorting;

(5) there are statutory powers of investigation[15] allowing the interception of communications, the obtaining and retention of communications data, interference with equipment ("bugging") and the use of information from covert human intelligence sources ("CHIS"). The results of these investigations may be used to set the direction for other and less covert kinds of investigation, and in establishing the grounds for issuing a search warrant. As these results are sensitive and confidential by nature, it is not always practicable to use them as evidence in criminal proceedings, and in the case of interception data there is a statutory prohibition on using it.[16]

Challenging a search warrant

1.24 The issue of a warrant can be challenged by judicial review: if the challenge is successful the High Court can quash the warrant and order that any materials taken must be returned. If a search is held to be unlawful for any reason the occupier can bring a civil action for trespass to land or to goods. In addition, there is a procedure for applying to the Crown Court for the materials taken to be returned. This procedure is used if, for example, the materials were taken under the "seize and sift" procedures and turn out on inspection to be material which there was no power to seize.[17] Conversely, the investigator can apply to retain the material if there would be grounds for immediately issuing a new warrant if the materials were returned.[18]

PROBLEMS WITH THE LAW

Complexity

1.25 The sheer number of provisions regulating search warrants, coupled with their complexity, leads to a confusing legislative landscape. This filters through to all stages of the search warrants procedure: there is a risk when applying for a search warrant that drafting errors will occur, that issuing a search warrant becomes little more than a rubber-stamping exercise and that occupiers are unable to understand the extent of the state's power and their own rights. The combined effect of these issues is that there are frequent challenges and investigations may collapse.

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14 CJPA, ss 50 and 51.

15 Police Act 1997; Regulation of Investigatory Powers Act 2000; Investigatory Powers Act 2016.

16 Regulation of Investigatory Powers Act 2000, s 17; Investigatory Powers Act 2016, s 56.

17 CJPA, s 59.

18 CJPA, s 59(6).

Inconsistency

1.26 There are numerous statutes providing search warrant powers. There are differences across these statutes as to who may apply for a search warrant and carry out a search, under what conditions that application and search must be made. Although some of these differences can be explained by the different nature of investigations, there are inconsistencies and potential gaps in investigative capabilities. There are also inconsistencies in the procedure for obtaining a search warrant, in the applicability of statutory safeguards and the protection afforded to particular categories of material. This creates a risk that individuals have the benefit of fewer protections than they should have.

Outdated

1.27 We live in an age where material can be stored remotely across multiple jurisdictions. A large proportion of the provisions governing search warrants, in particular those contained in PACE, predate the advent of electronic material and fail to deal with emerging digital technology and the forms in which criminal activity now takes place.

Costly

1.28 The procedure to obtain a search warrant does not always operate efficiently. Further, the number of appeals generated by search warrants legislation, and the legal fees incurred, create excessive cost for all parties.

REFORMING THE LAW

1.29 Search warrants serve an important purpose and are vital to criminal investigations. They also raise important constitutional issues concerning the rule of law and the proper balance between the powers of the state and the rights and freedoms of the citizen, in particular the right to privacy and safeguards against state intrusion. The overarching aim of the provisional proposals in our consultation paper has been to balance these important interests. Our provisional proposals aim to:

(1) simplify the law - we want to simplify the law by rendering it more rational and comprehensible at all stages of the search warrant process. Our provisionally proposals seek to reduce the scope for error and make the law more efficient;

(2) make the law fairer - we want to make the law fairer by extending protections, making it easier to challenge defective search warrants and making the law more transparent. Our proposals seek to ensure that human rights are protected and that a search under a warrant is necessary and proportionate;

(3) modernise the law – we want to modernise the law to ensure that it reflects the changing nature of investigations and is equipped to deal with electronic material. Our proposals seek to ensure that investigative agencies can tackle criminal conduct as it is carried out in a digital world, whilst maintaining robust and effective safeguards; and

(4) make the law cost-effective - we want to make the law more cost-efficient by introducing a streamlined way to obtain a search warrant and a new procedure to challenge and correct procedural deficiencies. Our provisional proposals, in

addition to simplifying the law, seek to reduce the high number of expensive judicial reviews.

1.30 We outline our provisional proposals below.

Operation of the statutory safeguards

1.31 In Chapter 3 we consider the operation of the statutory safeguards under sections 15 and 16 of PACE. These safeguards govern the process for obtaining a search warrant and how warrants are executed respectively.

1.32 In 2018 it is no longer appropriate to regard the police as the sole agency applying for and executing search warrants. Increasingly frequently, investigations are undertaken by other agencies, or by the police and other agencies in cooperation. Accordingly, many types of search warrant may be applied for by agencies other than the police. Also, many warrants, regardless of who applies for them, may be executed by the police, by other agencies or by the two acting together. Accordingly, the agency applying for a warrant and the agency executing it need not be the same.

1.33 We therefore consider that it is anomalous that the protections in sections 15 and 16 of PACE are limited to warrants "issued to" police constables and people to whom the provisions have been extended. In Chapter 3 we provisionally propose that sections 15 and 16 of PACE should apply to all search warrants that relate to a criminal investigation irrespective of who is making the application and who is carrying out the search. The sections should not be confined to investigations carried out by police constables and people to whom the provisions have currently been extended.

1.34 Further rules about the conduct of a search are contained in the code of practice ("Code B"), made under the powers of PACE. There is an ambiguity in PACE and in the terms of Code B as to whether these rules should be followed where the investigation is not carried out by the police. We therefore provisionally propose that they too should apply to all search warrants relating to a criminal investigation.

1.35 We also provisionally propose amending section 15(1) of PACE to clarify what conduct must comply with the search and the effect of non-compliance.

Applying for a search warrant

1.36 In Chapter 4 we consider potential reform to the procedure by which investigators apply for a warrant. As observed recently by the Supreme Court, the statutory search warrants scheme is designed to be operated speedily at an early stage in a police investigation.[19] We consider that the procedure governing the granting of search warrants ought to be reformed in order to improve procedural efficiency and reduce the scope for serious errors. At the same time, we consider that the law ought to be made more comprehensible by clarifying and amending forms, guidance and enshrining common law duties and judicial observations in legislation. Our intention is to promote greater compliance with statutory criteria and the duty of candour.

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[19] *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [15]. Discussed in *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [13].

1.37 A substantial proportion of search warrant types, including warrants under section 8 of PACE, can only be applied for by a constable. An increasing number of agencies now have the power to apply for a search warrant, or authorise an individual to apply on their behalf. We invite consultees' views on whether the power to apply for a search warrant should be extended to agencies currently unable to apply for a search warrant who are charged with the duty of investigating offences.

1.38 We also consider the application forms prescribed by the Criminal Procedure Rules to be prepared by investigators in support of a search warrant application. We invite consultees' views on amending the available types and content of application forms to improve their ease of use and ensure compliance with statutory criteria.

1.39 Chapter 4 also deals with the duty of candour. When applying for a warrant, the applicant must make full and frank disclosure. This includes mentioning any circumstances that might count against the search warrant being issued. This is referred to as the "duty of candour". As a common law duty, the duty of candour derives from a large body of case law but is not to be found on the face of a statute. We provisionally propose that the duty of candour ought to be stated more clearly to ensure that investigators comply with it. We invite consultees' views on both the form in which the duty of candour ought to be enshrined and the content of the duty.

1.40 Section 15 of PACE provides detailed requirements for what a search warrant must contain. We provisionally propose that the Criminal Procedure Rule Committee should prescribe a standard form for search warrants to ensure compliance with section 15 of PACE.

1.41 The rules regarding how an investigator arranges a hearing to make an application for a warrant and how that hearing is conducted are contained in section 15 of PACE, Code B of PACE and the Criminal Procedure Rules. We ask a series of questions about this procedure and invite consultees' views on whether there ought to be more detail in rules of court or PACE guidance on what is required from an applicant at a hearing for a search warrant.

1.42 Not all searches require a warrant. Section 18 of PACE provides that a constable may enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence. Stakeholders have reported concern that there may be a tendency to sidestep the warrant procedure by means of arrests without warrant. We invite consultees' views on the merits of clarifying the relationship between search warrants and the search of premises following arrest under PACE.

Issuing a search warrant

1.43 In Chapter 5 we discuss the procedure for issuing a search warrant. Our focus is on how procedures can be improved, to ensure that the legal requirements are fully respected and the number of challenges can be kept to those strictly necessary. Several stakeholders have reported a tendency for courts to treat applications for search warrants as a rubber-stamping exercise to be got out of the way before the real work of the day starts. We therefore consider ways of improving judicial scrutiny of warrant applications.

1.44 By simplifying the procedure by which a search warrant is issued, we seek to reduce the scope for error and make the law more efficient. We also consider a uniform procedure to screen search warrant applications to ensure they are in a suitable state to be considered by the issuing authority, thereby making the law more cost-efficient and heightening judicial scrutiny. At the same time, we consider that the law ought to be more transparent and propose a requirement to record and publish statistics to monitor the use of search warrants.

1.45 We examine who may issue a search warrant and seek views on whether there should be general guidance or a requirement that, in certain cases, search warrant applications should be made to the Crown Court or District Judges (Magistrates' Courts) rather than to lay magistrates. We also invite consultees' views on whether the power of the justice of the peace to issue a search warrant should be restricted to those who have undergone special training.

1.46 When a search warrant is applied for in the magistrates' court during the normal working day, we ask whether there should be a requirement for a lay magistrate to be assisted by a legal adviser. We also ask whether there ought to be a minimum of two lay magistrates on a bench to consider the application.

1.47 For applications made out of court hours, we consider whether the procedure ought to be more formalised. In particular, we ask whether search warrant applications out of hours should always be made to a legally qualified judge.

1.48 To improve judicial scrutiny, we ask whether there should be a triage arrangement, in which a judge or legal adviser decides whether the application is in a satisfactory state for a judge to decide the application, and if so whether an oral hearing is required. This would involve revised listing arrangements, connected with a requirement to submit applications in electronic form.

1.49 We provisionally propose that there should be a standard procedure for recording additional information provided by the investigator to the court during the hearing. Additionally, we provisionally propose a statutory duty on the issuing authority to provide written reasons for issuing or refusing a search warrant. Finally, we provisionally propose that there ought to be arrangements for keeping statistics on search warrant applications.

Conduct of a search under warrant

1.50 In Chapter 6 we discuss the rules about how a search under a warrant should be carried out. Statutes providing for different types of search warrant differ in several of these areas. We consider that there ought to be greater consistency in the powers available to the investigators under the warrant whilst ensuring that occupiers' rights are respected.

1.51 We examine who may carry out a search under a warrant and ask whether there are investigative agencies whose investigatory or enforcement powers are unnecessarily hindered because they are unable to execute a search warrant. We provisionally propose clarifying in statute who may accompany the person conducting a search under a warrant.

1.52 We discuss how long search warrants should remain valid. We ask whether there should be uniformity in relation to the period for which a search warrant remains valid or whether the period of validity for any particular provisions ought to be altered. We also ask whether the current power to authorise searches on multiple occasions should be extended to all search warrants for the purpose of criminal investigations.

1.53 We consider the time of day at which a search must take place. We provisionally propose that where a search under warrant is to be carried out between the hours of 10pm and 6am, prior judicial authorisation to do so at that time should be required. Further, a search warrant should be required to show on its face the times at which it can be executed.

1.54 We examine the provisions regulating what information should be provided to the occupier during the search. We provisionally propose that PACE should be amended to specify that a copy of the full warrant must be supplied to the occupier, including any schedule appended to it. This would reflect developments in case law. Additionally, we provisionally propose that a person carrying out a search should provide the occupier with an authoritative guide to search powers, written in plain English and available in other languages. We also provisionally propose that a search warrant should be required to state that the person is entitled to the information which the investigator supplied to the court in support of the warrant and explain how to apply for a copy.

1.55 Finally, we discuss whether the occupier should have the right to have a legal representative present at the search. We provisionally propose that Code B ought to be amended to state that, if the occupier asks for a legal adviser to be present during the search, this should be allowed if it can be done without unduly delaying the search. Further, if present, legal representatives should have the right to observe the search and seizure of materials in order to make their own notes.

Challenging a search warrant

1.56 At present, the main way of challenging a search warrant is by judicial review. An application may also be made under section 59 of CJPA for the return or retention of the materials taken. In Chapter 7 we discuss whether the current avenues for challenging search warrants are satisfactory.

1.57 From discussions with stakeholders we are aware that the current means of challenging search warrants, especially when used in combination, are far too complex. The combination of judicial review and section 59 proceedings can result in long delays and disproportionate costs being incurred. The current system enables well-resourced claimants to bring tactical cases to delay the criminal justice process, while making it difficult for others to challenge unlawful behaviour. There is an urgent need to streamline the procedures so that the same court can consider all the issues in the case.

1.58 We provisionally propose the introduction of a new procedure, broadly based on section 59 of CJPA. Our aim is to enable the Crown Court to have a comprehensive power of judicial oversight of search warrants, looking both at whether the warrant was correctly issued and the search properly conducted.

1.59 If satisfied that insufficient information was provided to the issuing court or that there was a breach of section 15 or 16 of PACE, the court should have power to order the

return of the materials taken and, where necessary, to set aside the warrant. This would not involve a finding that the warrant was invalid or unlawful, and the order setting it aside would not have retrospective effect.

1.60 The investigator would be entitled to oppose an application under the new procedure based on a two-limbed test: first, by establishing that, on the facts now known, there would be grounds to justify the issue of a warrant under which the same materials could have been taken. Secondly, by establishing that it is in the interests of justice to allow retention of the material. In deciding whether it would be in the interests of justice, the court would be required to have regard to a non-exhaustive list of factors.

1.61 In addition to the power to set aside the warrant and order the return of seized or produced material, we invite views on what other powers ought to be available under the proposed procedure. In particular, we consider powers to authorise the retention of seized or produced material; give directions as to the examination, retention, separation or return of the whole or any part of the seized property; order the return or destruction of copies; and order a party to pay another party's costs.

1.62 The new procedure would only be available in cases where materials were taken and would not include a power to award compensation. The option of applying for judicial review would remain available. Where there is judicial review of a warrant, the High Court should decide whether to order return of the materials taken, and would have all the powers and duties of the Crown Court under the new procedure. This should avoid duplication of proceedings.

Sensitive information and public interest immunity

1.63 In Chapter 8 we discuss the disclosure of sensitive information by the applicant to the court, and the court's decision on whether it ought to be disclosed to the occupier. This area of law was recently comprehensively reviewed by the Supreme Court. We invite consultees' views on whether the current procedure for dealing with sensitive information and public interest immunity in relation to search warrants can be improved.

Material exempted from search and seizure

1.64 As explained above, under most types of warrant there is no power to search for or seize:

(1) material subject to legal privilege;

(2) excluded material (medical and counselling records and confidential journalistic material); or

(3) special procedure material (confidential business records and non-confidential journalistic material).

However, there is a procedure under Schedule 1 to PACE for obtaining special procedure material and, in a very few instances, excluded material.

1.65 In Chapter 9 of the consultation paper we discuss some difficulties which stakeholders report in dealing with claims of legal privilege. We consider whether the procedure for instructing independent lawyers should be embodied in statute or rules of court, and the

substance of any proposed legislative framework. We also discuss whether the Crown Court should have power to order a person making a claim for legal privilege to provide search terms or other indications for identifying the material likely to be privileged. In cases where a person makes a misleading claim for legal privilege, we ask whether there should be a sanction in costs, including the costs of the sift.

1.66 We also consider that the position in respect of special procedure material and exempted material is illogical. The availability of these categories of material depends on when the statute was enacted (before or after PACE) and whether the investigation is being carried out by the police or people with similar powers.[20] We consider these to be arbitrary and unprincipled distinctions.

1.67 In relation to excluded material, we provisionally propose that there should be a consistent rule for both categories of excluded material that does not depend on the date of the enactment or the type of investigator. We provisionally propose that medical and counselling records and confidential journalistic material should be exempted from search and seizure in all cases, except possibly in proceedings for medical malpractice or cases where the patient consents. This means that the provisions under Schedule 1 to PACE that allow the search for excluded material can be abolished.

1.68 In relation to special procedure material, we invite consultees' views on whether there ought to be revised definitions of special procedure material which would clarify the status of business invoices for customers and material that may be held with the intention of furthering a criminal purpose. We also invite views on whether the exemption of confidential business records from search warrant powers ought to apply in all investigations for the purpose of obtaining evidence relevant to a suspected criminal offence, whether or not they are carried out by the police.

1.69 We also consider whether greater protection can be given to journalistic material when a search of premises is conducted otherwise than under a warrant.

Electronic material

1.70 Over the last few decades business records and other types of information have increasingly been kept in electronic form rather than on paper. Privacy International has recently highlighted that more information is now likely to be contained on a person's electronic devices than in their home.[21] In more recent times, it has become common for material to be stored on a remote server or a cloud account. Electronic material raises particular problems for those executing search warrants. Professor Richard Stone, a leading expert on search powers, notes that offences from child pornography to fraud are likely to depend on evidence derived from computers, or web-based files, which raises particular challenges given the intangible nature of the evidence and cloud based storage.[22]

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20 PACE, s 9.

21 Privacy International, *Digital stop and search* (March 2018). Available at https://privacyinternational.org/sites/default/files/2018-03/Digital%20Stop%20and%20Search%20Report.pdf (last visited 29 May 2018).

22 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 1.74.

1.71 In Chapter 10 of the consultation paper, we examine section 8 of PACE; Part 2 of CJPA and sections 19(4) and 20(1) of PACE, which together provide a number of routes for obtaining electronic material. We begin the chapter by briefly setting out the various forms of electronic material that may be the subject of a search warrant and how they may be categorised. Secondly, we then discuss the advantages and disadvantages that flow from the two different ways in which search warrants may be drafted: specifying the electronic device or the information on the device.

1.72 Thirdly, we discuss several shortcomings of the CJPA regime: the inapplicability of the seizure powers where devices are specified on the face of the warrant; the limited reach of the statutory safeguards in CJPA; and the inability of CJPA to deal with complex investigations involving electronic material due to potential statutory ambiguity.

1.73 Fourthly, we discuss a number of interpretive challenges surrounding the ancillary powers of seizure in sections 19(4) and 20(1) of PACE: the fact that these are powers of seizure rather than search; the lack of clarity surrounding the consequences of non-compliance; and the lack of clarity surrounding the meaning of the word "accessible".

1.74 Fifthly, we discuss specific issues raised by the search for, and seizure of, material accessible from the premises but held abroad: the concept of jurisdiction in international law; the circumstances in which the Cybercrime Convention may be relevant to remote search and seizure of information; and recent state practice concerning extraterritorial enforcement powers.

1.75 Reform in this area could take many forms and, given the potential implications, will require rigorous scrutiny. Our overarching principle is that any statutory framework must, reflecting the reality and complexities of the digital age, facilitate the investigation of crime and safeguard the important public interest in protecting individual rights. We invite views on the form in which reform ought to take place.

1.76 Recognising in particular concerns about the right to privacy, we provisionally propose that additional steps are required for investigators and issuing authorities to consider the necessity and proportionality of the seizure of electronic devices. Additionally, we provisionally propose that, in principle, the procedures and safeguards in the CJPA 2001 ought to apply whenever electronic devices are seized pursuant to a search warrant.

Consolidating search warrant legislation

1.77 Lord Justice Gross, in *Gittins*, referred to the legal framework of PACE and CJPA governing search warrants as an "unfortunate jumble of legislative provisions".[23] This was in reference to just two regimes. In the course of this project we have identified 176 search warrant provisions, contained in a wide variety of legislation. Each power has its own grounds for issuing a warrant, its own conditions under which the search warrant can be executed and, in addition to search, may authorise associated powers (for example seizure).

[23] *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219 at [36(1)] per Gross LJ.

1.78 The multiplicity of provisions puts a significant burden on issuing authorities and investigative agencies who deal with a wide range of warrants. Magistrates and judges must understand specific statutory provisions, and may only issue the warrant if they are satisfied that each ground set out in the statute has been met. Agencies must also ensure that they apply for a search warrant under the appropriate legislative scheme and abide strictly by the statutory criteria and common law duties.

1.79 In Chapter 11 we ask a series of consultation questions about the advantages and disadvantages of consolidating search warrant powers, either in general or within particular groups. We also consider whether some details of the different powers could be harmonised without consolidation.

NEXT STEPS

1.80 The provisional proposals and consultation questions are listed in Chapter 12.

1.81 The open public consultation will run until 5 September 2018. All comments provided during the consultation period will be taken into account when forming our final recommendations. Our aim is to publish final recommendations in a report later this year.

ACKNOWLEDGMENTS

1.82 The following members of the criminal law team have worked on this consultation paper: Alex Davidson (research assistant) and Simon Tabbush (team lawyer).

1.83 We have held a number of meetings with individuals and organisations while we have been preparing this paper, and we are extremely grateful to them all for giving us their time and expertise so generously.

1.84 We would like to extend our thanks to James Mullen, who has acted as an academic consultant on the project; Alex Bailin QC; Anand Doobay; Andrew Bird; Anthony Edwards; David McCluskey; Her Honour Judge Deborah Taylor; Dijen Basu QC; Professor Ed Lloyd-Cape; Professor Ian Walden; Jessica Parker; Jonathan Hall QC; Jonathan Solly; Maia Cohen-Lask; His Honour Judge Martin Edmunds QC; Professor Michael Zander QC; Micheál Ó Floinn; Millie Graham Wood; Associate Professor Neil Parpworth; Paul Cypher; Professor Peter Hungerford-Welch; Professor Richard Stone; Rupert Bowers QC; Samantha Riggs; Sarah Clarke QC; and Simon McKay.

Chapter 2: Overview of the law of search warrants

INTRODUCTION

2.1 This chapter provides a brief overview of the law governing search warrants for those unfamiliar with this field. We discuss the following areas:

(1) search warrants within the broader context of powers of entry;

(2) the variety of different search warrant powers by reference to their purpose(s);

(3) the statutory conditions that must be met before a search warrant can be issued;

(4) the statutory safeguards in PACE, sections 15 (governing the warrant) and 16 (governing the way a search is conducted), which in Chapter 3 we propose extending and clarifying;

(5) the procedure for applying for a search warrant, which we examine in Chapter 4;

(6) the procedure for issuing a search warrant, which we examine in Chapter 5;

(7) the conduct of the search under warrant, which we examine in Chapter 6;

(8) the ways in which a search warrant can be challenged, which we examine in Chapter 7;

(9) material exempted from search and seizure, which we examine in Chapter 9;

(10) the search for electronic material, which we examine in Chapter 10; and

(11) the human rights implications of search warrants. As we shall see, search warrants engage the right to respect for private life in Article 8 of the European Convention on Human Rights. Any interference must therefore be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society.

Relevant extracts from the Police and Criminal Evidence Act 1984 and the Criminal Justice and Police Act 2001 can be found in Appendix 2.

SEARCH WARRANTS WITHIN THE BROADER SPECTRUM OF POWERS OF ENTRY

2.2 Search warrants form only part of the inventory of powers of entry available to law enforcement agencies:

(1) according to reports laid before Parliament on 27 November 2014 under section 42 of the Protection of Freedoms Act 2012, government departments were responsible for 1,237 powers of entry;

(2) the general scope of powers of entry varies: some only consist of powers of entry, while others include powers of inspection, search or seizure;

(3) some powers of entry require prior authorisation by a judicial authority or a minister. Others can be exercised as soon as the necessary conditions are met, without prior authorisation; and

(4) many powers of entry are unconnected with criminal law. Their purposes include ensuring the safety of premises or assessing rateable values.

2.3 The scope of this project concerns powers of entry that include powers of search and require judicial authorisation. Authorisation given in this context is referred to as a search warrant. The precise terms of reference for the project are set out at paragraph 1.6 above.

2.4 Not all searches require a warrant. The police have various powers to search premises without a warrant, which may be carried out using reasonable force.[24] In these instances, there is no judicial authorisation for the use of the powers.

(1) Section 17 of PACE provides that a police officer may enter and search any premises for the purpose of arresting a person for an indictable offence and other specified offences. Section 17 also provides for entry and search of premises for the purpose of recapturing any person unlawfully at large and saving life or limb or preventing serious damage to property. Whilst section 17 does not expressly state that a constable may seize and retain material, the power of seizure under section 19 of PACE will apply once he or she is lawfully on the premises.

(2) Section 18 of PACE applies where a person is under arrest for an indictable offence.[25] It permits a police officer to enter and search any premises occupied or controlled by the arrested person. The officer must have reasonable grounds for suspecting that there is evidence on the premises relating to the offence for which the arrest occurred, or evidence relating a similar offence. Evidence found on the premises may then be seized under section 18(2).

(3) There is a related but more limited power under section 32 of PACE. This provides police with the power to enter and search any premises where the person was located when arrested (or immediately before being arrested) for an indictable offence.[26] This power is confined to searching for evidence of the commission of the offence for which that person was arrested. It also only applies at or around the time the arrest is made, in contrast with section 18, which applies throughout the time the suspect is detained.[27]

(4) In addition, a police officer arresting a suspect in the suspect's home has a common law power to search the premises and seize any items found there which are reasonably believed to be material evidence.[28] This power would not

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24 PACE, s 117.

25 "Indictable offence" means any offence which can be tried by a jury in the Crown Court, whether or not it may also be tried in a magistrates' court.

26 PACE, s 32(2)(b); *R (Rottman) v Metropolitan Police Commissioner* [2002] UKHL 20, [2002] 2 AC 692.

27 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2015) para 4.77; *M Zander on PACE* (7th ed 2015) para 3 to 39.

28 *Ghani v Jones* [1970] 1 QB 693.

normally be used when powers under sections 18 and 32 are available, but is used in other circumstances, such as when a suspect is arrested under an extradition warrant.[29]

2.5 In circumstances other than those listed above, the forcible entry and search of premises can only be justified by the specific prior authorisation of a court, magistrate or other authority acting under a statutory power. Search warrants are the most commonly used means of giving such authorisation.[30]

DIFFERENT TYPES OF SEARCH WARRANTS

2.6 In the course of this project we have identified 176 different legislative provisions across 138 separate statutes authorising the issue of a search warrant, listed in Appendix 1. The various powers to issue search warrants are designed to serve different purposes, from which it is possible to identify three broad themes:

(1) in many cases, the purpose of the warrant is to empower an investigator to search for evidence of a crime;

(2) in some cases, the search under warrant forms part of a larger or more specialised investigation, which is not necessarily confined to investigations undertaken for the purposes of a possible future prosecution; and

(3) in other cases, the purpose of the warrant is to authorise a search for dangerous materials or persons or animals in distress or danger or otherwise to remedy a dangerous or undesirable situation.

Warrants to search for evidence of a criminal offence

2.7 The clearest example of a warrant to search for evidence of a criminal offence is section 8 of PACE, which empowers a constable to search for evidence relevant to an indictable offence.[31] Other common types of warrant are those to search for stolen property under section 26 of the Theft Act 1968, controlled drugs under section 23(3) of the Misuse of Drugs Act 1971 and firearms under section 46 of the Firearms Act 1968.

Warrants for specialist investigations

2.8 Search warrants for specialist investigations are common in the fields of competition law, financial services and company law. The conditions to be satisfied before a search warrant can be issued in such cases may, as in criminal investigations, require reasons for believing, or in some instances suspecting, that criminal conduct has occurred. Unlike search warrants under PACE, however, the investigation need not be primarily targeted towards a prosecution. Rather, prosecution is one among a range of possible responses, including compliance notices, civil penalties and limiting or suspending the right to trade.

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29 *R (Rottman) v Metropolitan Police Commissioner* [2002] UKHL 20, [2002] 2 AC 692.

30 In a few cases the Secretary of State may issue a "written order" which has the same effect.

31 A search warrant under section 8 of PACE can be issued in respect of some summary offences: see Poisons Act 1972, s 9A.

2.9 In these investigations, the investigator is often seeking information not from the suspect but from a third party who has dealings with the suspect. This could be, for example, a bank, a firm of accountants, or the suspect's employer, all of whom may be expected to cooperate with the investigation if legally required to do so. For this reason, the statutory scheme often provides for information to be sought in the first instance through an order requiring a person to produce specified information or documents. A range of different descriptions including "production orders" and "information requirements" are used: for brevity we shall use "production order" as the general term for all of them. A warrant will only be issued if a production order has been made and disobeyed, or if it is not practicable to proceed by way of production order for some reason.

Warrants to remedy a dangerous or unlawful situation

2.10 A third category of search warrants exists primarily to remedy a dangerous or undesirable situation, though that situation may result from criminal activity. Examples include warrants for removing dangerous substances,[32] rescuing people or animals in danger or distress,[33] or confiscating proceeds of crime or articles used in criminal activity.[34] In some cases, a warrant may exist for more than one of these purposes; for example, to search for dangerous substances, both in order to remove or neutralise them and in order to use them as evidence of an offence.[35]

2.11 In this category, it may not be necessary to show reasonable grounds to believe or suspect that an offence has been committed. In some cases, a statute may allow a warrant where there is reason to suspect that the offence in question *is about to be committed on* the premises,[36] or in some cases anywhere at all.[37]

STATUTORY CONDITIONS FOR ISSUING A SEARCH WARRANT

2.12 The statutory conditions for issuing a search warrant ("the access conditions") are strict. They generally concern three topics, although the exact details differ from one statutory provision to another. Typically, the statutory conditions for a search warrant are that:

(1) there are reasonable grounds for believing, or, for some types of warrant, reasonable grounds for suspecting, that an offence has been committed, or that a situation exists which requires investigation or remedial action;

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32 Anti-terrorism, Crime and Security Act 2001, s 66; Chemical Weapons Act 1996, s 5(2); Cluster Munitions (Prohibitions) Act 2010, s 12(2); Firearms Act 1968, s 46; Landmines Act 1998, s 18.

33 Animal Welfare Act 2006, s 19(4); Dogs (Protection of Livestock) Act 1953, s 2A; Mental Health Act 1963, s 135.

34 Criminal Damage Act 1971, s 6; Customs and Excise Management Act 1979, s 161A; Forgery and Counterfeiting Act 1981, ss 7 and 24; Knives Act 1997, s 5; Misuse of Drugs Act 1971, s 23(3); Obscene Publications Act 1959, s 3; Protection of Children Act 1978, s 4; Public Order Act 1986, ss 24 and 29H; Salmon and Freshwater Fisheries Act 1975, s 33(2); Serious Crime Act 2015, s 52 and sch 2; Terrorism Act 2006, s 28; Theft Act 1968, s 26.

35 Landmines Act 1998, s 18; Offences Against the Person Act 1861, s 65.

36 Chemical Weapons Act 1996, s 29; Copyright Act 1956, s 21A; Copyright (Computer Software) Amendment Act 1985, s 118C; Copyright, Designs and Patents Act 1988, ss 109, 200 and 297B; Trade Marks Act 1994, s 92A.

37 Biological Weapons Act 1974, s 4; Official Secrets Act 1911, s 9.

(2) there are grounds for believing, or in some cases suspecting, that materials of a particular type are on the premises; and

(3) a warrant is needed because it is impracticable to gain access to the premises or materials by other means, or because the materials might be destroyed, removed, concealed or altered if advance notice were given of the investigator's intention. We refer to conditions of this kind as "accessibility conditions".

2.13 Section 8 of PACE requires the person applying for the warrant to show that there are reasonable grounds for believing that an indictable offence has been committed; that material is on the premises which is likely to be of substantial value and relevant evidence; and that the access conditions in section 8(3) are met.[38]

2.14 Some statutes, including section 8 of PACE, require "reasonable grounds for believing". Others, such as section 23(3) of the Misuse of Drugs Act 1971, require "reasonable grounds for suspecting". In either case, the question is an objective one, namely whether those grounds exist. The judge must nonetheless personally be satisfied that there is before them sufficient material on which it is proper to grant the warrant.[39] The Divisional Court has made clear that "reasonable grounds" does not require that any criminal fact has in fact been committed.[40] Additionally, the alleged offence need not have been committed by the occupier.[41]

2.15 There are also differences concerning the fact or proposition to be believed or suspected. In section 8 of PACE, there must be reasonable grounds for believing that an indictable offence has been committed. In other statutes, the requirement is that a specific offence, as named, has been committed. In others, the concern may be that a statutory scheme has not been complied with, or simply that intervention is needed in order to carry out particular functions. The common factor is simply that there is a need for investigation.

The accessibility conditions

2.16 The third group of conditions concerns the need for the warrant, or reasons why the information could not be obtained without one. Again, the precise list of possible reasons differs from one type of warrant to another.

(1) One important difference is that in some cases, the condition is that there are reasonable grounds to believe, or in some instances suspect, that one of these reasons exists. In other cases, the issuing authority (the magistrate, judge or court to which the application is made) must be satisfied that one of these reasons exists in fact.

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38 See Appendix 2.

39 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634 at [83]; *R (Hart) v Crown Court at Blackfriars* [2017] EWHC 3091 (Admin), [2018] Lloyd's Rep FC 98 at [18].

40 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [84].

41 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [53].

(2) Another point concerns warrants connected with specialised investigations in which production orders can be made. In these cases, it is a sufficient condition for issuing a warrant that a production order has been made and disobeyed. A warrant can also be issued if there was good reason for not applying for a production order: for example, if there was reason to fear that the materials would be destroyed if it were known that the investigator wanted access to them.[42]

2.17 Some statutory powers do not contain conditions specifically referring to the difficulty of access to premises or materials. For some powers involving the presence of dangerous or illegally held materials, it is sufficient that there are reasonable grounds for believing that the materials are on the premises.

2.18 An example is section 26(1) of the Theft Act 1968. This allows a police officer to obtain a warrant if there is reasonable cause to believe that a person has stolen goods in their custody or possession or on their premises.

OPERATION OF THE STATUTORY SAFEGUARDS

2.19 All search warrants issued to constables, including other persons with the power and duties of constables and those to whom the legislative provisions have been extended, must comply with sections 15 and 16 of PACE.[43] This obligation applies irrespective of whether the search warrant is obtained under section 8 of PACE or a different legislative provision, and whether the legislative provision came into force before or after PACE. Section 15 of PACE, titled "search warrants – safeguards", specifies the requirements applicable to the process of obtaining a search warrant. Section 16 of PACE, titled "execution of warrants", governs how searches under warrant must be carried out.

2.20 These safeguards aid in ensuring that the interference with the right to respect for private life under Article 8 of the ECHR is in accordance with law and proportionate to the purposes of the search. Further rules to the same effect are provided Code B of PACE.

2.21 In this paper we consult on both extending these safeguards to a wider range of types of investigation[44] and amending their content.[45] We describe the content of these safeguards below. The text of the provisions can be found in Appendix 2.

Section 15 of PACE

2.22 Section 15 of PACE covers three principal areas. Section 15(1) sets out the circumstances when the protections apply and the effect of any failure to comply. Section 15(2) to (4) governs the application process. Section 15(5) to (8) governs the terms and content of the search warrant itself.

Section 15(1) of PACE: the application and effect of the safeguards

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42 See para 2.9 above.

43 PACE, s 15(1).

44 See Chapter 3.

45 See Chapter 4, 5 and 6.

2.23 Section 15(1) of PACE provides:

> This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

2.24 The subsection has two components. First, it sets out to which people and warrants the safeguards apply. Secondly, the subsection sets out the extent to which compliance with the safeguards in sections 15 and 16 is required and the consequences for non-compliance.

Section 15(2) to (4): the application procedure

2.25 Section 15(2) and (2A) require that when making an application, the officer must:

(1) state the ground on which the application is made[46] and the enactment under which the warrant is to be issued.

(2) if the application is for entry on more than one occasion, state the ground for such a warrant and the number of entries desired;[47]

(3) if the application relates to one or more sets of premises, specify each set of premises to be searched.[48] Alternatively, some statutory provisions permit the applicant to apply for an "all premises" warrant, but in this case the applicant must specify as many premises as is reasonably practicable to specify; the person in occupation or control of those premises; why it is necessary to search more premises than can be specified; and why it is not reasonably practicable to specify all the premises;[49] and

(4) identify, so far as is practicable, the articles or persons to be sought.[50]

2.26 Under section 15(3), an application for such a warrant shall be made *ex parte*[51] and supported by an information[52] in writing.

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46 PACE, s 15 (2)(a)(i); Code B of PACE, para 3.6(d): This includes an indication of how the evidence relates to the investigation when the purpose of the proposed search is to find evidence of an alleged offence.

47 PACE, s 15(2)(a)(iii).

48 Notwithstanding the definition of "premises" in section 23 of PACE, where a constable knows that premises consist of dwellings in separate occupation, the application must specify the premises which it is desired to enter and search: *R v South Western Magistrates' Court ex parte Cofie* [1997] 1 WLR 885.

49 PACE, s 15(2)(b).

50 PACE, s 15(2)(c).

51 See the glossary. "Ex parte" means that the investigator applies without notifying the occupier, and that the occupier is not given the opportunity to be present or heard.

52 See the glossary. The "information" is the technical name for the document sworn in support of the application. The Criminal Procedure Rules provide application forms which, when filled in, constitute the information. Available at https://www.justice.gov.uk/courts/procedure-rules/criminal/forms-2015#Anchor11 (last visited 29 May 2018).

2.27 Under section 15(4), the constable shall answer on oath[53] any question that the justice of the peace or judge hearing the application asks him.

Section 15(5) to 15(8): the scope and content of the search warrant itself

2.28 Under section 15(6)(a) the warrant must specify:

(1) the name of the applicant;

(2) the date on which it is issued;

(3) the enactment under which it is issued; and

(4) each set of premises to be searched. Alternatively, an "all premises" warrant must specify the person in occupation or control of a set of premises, and authorise a search of those premises and all others of which that person is in possession or control.

2.29 Under section 15(6)(b), the warrant must identify, so far as is practicable, the articles or persons sought.[54]

2.30 Under section 15(5A) a warrant which authorises multiple entries must specify whether the number of entries authorised is unlimited or limited to a specified maximum.

2.31 Under section 15(7), two copies must be made of a specific premises warrant which provides for a single entry. In the case of a warrant that authorises multiple entries or an all premises warrant, there must be as many copies as are reasonably required to cover the proposed visits.[55] The copies shall be certified as copies.[56]

Section 16 of PACE

2.32 The conduct of a search is governed by section 16 of PACE, as supplemented by Code B of PACE and relevant case law.

2.33 As we describe below, section 16 covers two main areas. Section 16(1) to 16(8) contains general provisions relating to the conduct of the search. Section 16(9) to 16(12) specifies requirements following the search in respect of record keeping. This distinction has implications for the interpretation of section 15(1), as we discuss at paragraph 3.68 below.

The conduct of the search

2.34 Section 16 states that the warrant:

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53 Or affirmation: Oaths Act 1978, s 5.

54 PACE, s 15(6)(b).

55 PACE, s 15(7). These duties can be delegated to the court staff. See *R v Chief Constable of Lancashire ex parte Parker and Magrath* [1993] 2 All ER 56, 61.

56 PACE, s 15(8).

(1) may be executed "by any constable";[57]

(2) may authorise persons to accompany the constable.[58] If so, the authorised person has the same powers as the constable in respect of search and seizure,[59] but may only exercise those powers under the constable's supervision;[60]

(3) must be executed within three months from its date of issue;[61]

(4) must be executed at "a reasonable hour" unless it appears to the constable executing it "that the purpose of a search may be frustrated on an entry at a reasonable hour";[62]

(5) must be produced to the occupier, along with a copy of the warrant supplied and, if the constable is not in uniform, documentary evidence that the searcher is a constable.[63] If the occupier is not present at the time of the search, this procedure must be carried out where a person is in charge of the premises.[64] If there is no person in charge, a copy of the warrant must be left in a prominent place;[65]

(6) may be executed only "to the extent required for the purpose for which the warrant was issued";[66] and

(7) where the warrant does not specify the premises, or where premises are entered for a second or subsequent time, the search must be authorised by "a police officer of at least the rank of inspector".[67]

Following the search

2.35 Section 16(9) to (12) sets out requirements following the search. The constable must endorse the warrant to state:

(1) whether the articles or persons sought were found;[68] and

(2) whether any articles were seized, other than those which were sought.[69]

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57 PACE, s 16(1).

58 PACE, s 16(2).

59 PACE, s 16(2A).

60 PACE, s 16(2B).

61 PACE, s 16(3).

62 PACE, s 16(4).

63 PACE, s 16(5).

64 PACE, s 16(6).

65 PACE, s 16(7).

66 PACE, s 16(8).

67 PACE, s 16(3A) and (3B).

68 PACE, s 9(a).

69 PACE, s 9(b).

2.36 The warrant is then returned to the appropriate person[70] at the court which issued the warrant. It must be retained for 12 months, to allow the occupier to inspect it.

APPLYING FOR A SEARCH WARRANT

2.37 Most warrants, including those issued under section 8 of PACE, are applied for and executed by the police. Certain other categories of officials have the powers and duties of a police constable, either generally or in relation to particular types of investigation, and so are able to apply for and execute a search warrant.[71] However, some warrants are applied for or executed by a specialist investigator rather than the police. Occasionally, there is a choice: the warrant can be applied for either by a police officer or by an official of the relevant body.[72]

2.38 The courts have also held that there is a "duty of candour" in the application for a search warrant: that is, that the applicant must make complete disclosure of the circumstances, including any facts that might be reasons for not issuing a warrant.[73] This can create problems when the application is made following covert surveillance or other similar procedures.[74] The officer making the application for a warrant may not be aware of this background, as such information is often restricted to a narrow group of investigators.

2.39 In the case of warrants under section 8 of PACE and a few other types of warrant, there are application forms prescribed in the Criminal Procedure Rules setting out all the legal requirements and providing a space for the applicant to explain how that requirement is satisfied.[75] So far as possible, all the facts which the applicant relies upon should be set out in this form. However, additional facts may be provided either in supporting documents or orally when the application is heard. It is a matter for the issuing authority to decide whether it is satisfied simply on the applicant's sworn statement or whether it needs to see documentary evidence.

ISSUING A SEARCH WARRANT

2.40 Most types of warrant, including warrants under section 8 of PACE, can be issued by a magistrate (either a lay magistrate or a District Judge (Magistrates' Courts)). Where a statute provides for warrants to be issued by a magistrate, more senior judges can do so as well, as both Circuit judges and High Court judges have the powers of a justice of

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70 PACE, s 10A. If the warrant was issued by a justice of the peace, the appropriate person is the designated officer for the local justice area in which the justice was acting when he or she issued the warrant. If the warrant was issued by a judge, the appropriate officer of the court from which he or she issued it.

71 See para 3.10 below.

72 For example, Animal Welfare Act 2006, ss 19(4) and 23(1), which refer to either an inspector (as appointed by the appropriate national authority or a local authority under the Animal Welfare Act 2006, s 51) or a police constable.

73 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634; *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219; *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [25]; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

74 See Chapter 8 on sensitive material.

75 Criminal Procedure Rules, Part 47: the forms are available at https://www.justice.gov.uk/courts/procedure-rules/criminal/forms (last visited 29 May 2018).

the peace in these matters. In some cases, the warrant cannot be issued by a magistrate and must be issued by a Circuit judge, a High Court judge or a specialist tribunal.

2.41 The authority issuing the warrant must be "satisfied" that the statutory conditions are met. It follows that the applicant must provide sufficient information to allow the court to be so satisfied. In cases where the application is made by a constable or a person with similar rights and duties, detailed rules are set out in section 15 of PACE. These govern both the information provided to the court and the matters to be specified in a warrant.

2.42 The person whose premises are to be searched ("the occupier") is not informed of the application and generally only learns of it when the warrant is executed, that is, when the investigator uses it to gain entrance. Certain basic information must then be provided to the occupier.[76] In general, the occupier may request to see the information used in support of the application, except in cases where the information is too sensitive and disclosing it would endanger informants or frustrate the purposes of the investigation.[77]

CONDUCT OF A SEARCH UNDER WARRANT

2.43 Warrants under section 8 of PACE may be drafted in such a way as to authorise either a single visit or a series of visits,[78] and may specify either a single set of premises, several sets or all sets controlled or occupied by a named person ("all premises warrants").[79] Some other powers present a more limited range of options: for example, some do not allow for all premises warrants.[80]

2.44 Most search warrants include a power of seizure. This power extends to the types of material specified in the search warrant, excluding material subject to legal privilege, (in most cases) excluded material and special procedure material.[81] Where a police officer is on premises and has this power of seizure, the power extends to requiring any person present to produce in visible and legible form any relevant material accessible from the premises.[82]

2.45 In addition to this, a police officer lawfully present on any premises, whether under a search warrant or not, may seize any material if he or she has reasonable grounds for believing that the material is evidence relevant to any offence. This power covers all offences, not only the offence being investigated. However, the power only exists if the police officer has reasonable grounds for believing that there would otherwise be a

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76 See para 6.59 below.

77 For the procedure in these cases, see Chapter 8 below and *R (Haralambous) v Crown Court at St Albans* [2016] EWHC 916 (Admin), [2016] 1 WLR 3073; *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357.

78 PACE, s 8(1C) and (1D).

79 PACE, s 8(1A) and (1B).

80 For example, the Cluster Munitions (Prohibitions) Act 2010, s 12(2) allows for entry on only one occasion.

81 We discuss these categories of material at para 2.50 below.

82 PACE, s 20.

danger of the material being lost or disposed of.[83] There is a corresponding power to require production in visible and legible form of material accessible from the premises.[84]

2.46 As mentioned above, there are several safeguards provided by section 16 of PACE. Section 16(9) provides that a note must be made of all material seized.[85]

CHALLENGING A SEARCH WARRANT

2.47 If a search goes beyond the powers conferred by the warrant, for example if the wrong material is seized, the occupier of the premises or the owner of the material may bring a civil claim for the tort of trespass. However, the only way of challenging the warrant itself is by judicial review in the High Court.

2.48 There have been several high-profile challenges in recent years: in many of these cases, the ground of challenge was that the court issuing the warrant was not provided with all the relevant information.[86] Following a successful application for judicial review, the High Court may order any material taken to be returned. There is not normally power to award damages, unless the way the search was conducted amounted to a breach of human rights.

2.49 Independently of this, a judge of the Crown Court has a range of powers under section 59 of the Criminal Justice and Police Act 2001 to decide what is to be done with material taken in the exercise or purported exercise of any of a variety of search powers. The investigator, the occupier of the premises or any person with an interest in the material may apply to the judge, who may order the material to be retained by the investigator or returned to their owner. The judge may also order the material to be retained if, although the original warrant was flawed for whatever reason, a warrant could and would appropriately have been granted on the facts as the judge now knows them to be.

MATERIAL EXEMPTED FROM SEARCH AND SEIZURE

2.50 Some types of material are protected against search and seizure.[87] We refer to this material collectively as "exempted material". We discuss exempted material in detail in Chapter 9. We briefly set out below what these categories of exempted material are and the extent to which they are exempted.

(1) Communications between a person and his or her lawyer concerning legal advice or legal proceedings, and certain communications between the lawyer and a third party, are subject to "legal privilege".[88] A warrant cannot be issued to search for such material, and if such material is found during the search it may not be

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83 PACE, s 19(3).

84 PACE, s 19(4).

85 PACE, s 16(9).

86 See para 7.10 above.

87 PACE, s 8(1)(d). There are similar provisions in several other statutes providing for search powers.

88 Defined in PACE, s 10.

inspected or taken away, subject to the power to seize and sift discussed at paragraph 2.54 below.

(2) Confidential business records and similar materials, including journalistic materials, are known as "special procedure material".[89] Special procedure material is not available to be searched for under section 8 of PACE, but there is a stricter procedure under Schedule 1 to PACE. A Circuit judge or a District Judge (Magistrates' Courts) can make a production order requiring the occupier of the premises to produce those materials; or if this is not practicable the judge can issue a warrant.

(3) Medical records and a few other types of records, such as journalistic material about protected sources, are known as "excluded materials".[90] These are not available to be searched for under section 8 of PACE, nor are they available under Schedule 1 unless they would have been available under a statute enacted before 1984.

2.51 The presence of exempted material has consequences for both the issue and the execution of search warrants. First, a warrant under section 8 and the other pre-existing powers should not be issued where the material searched for consists of, or includes, exempted material. However, the fact that material of this kind is later found on the premises does not mean that the original search warrant should not have been issued. Secondly, if such items are found in the course of the search they may not be seized under the warrant.

2.52 In addition to the special procedure under Schedule 1 to PACE mentioned above, there are exceptions to the protection of exempted material. Some search powers introduced after 1984 contain exemptions for special procedure materials and excluded materials in the same way as PACE. Other powers, particularly those in the financial field, do not, so that these materials are available in the same way as any other materials.[91] A further qualification is that some of these exclusions and procedures only apply when the investigation is conducted by the police.

2.53 In some cases, there may be other powers of seizure, for example under sections 18, 19, 20 and 32 of PACE, which permit the seizure of special procedure material and excluded material.[92]

2.54 In principle, search warrants are not available in respect of material even where it only *includes* legally privileged material, or in some cases special procedure or excluded material. For example, a computer may contain both non-exempted and exempted material. There are however procedures under sections 50 and 51 of the Criminal Justice and Police Act 2001 known as "seize and sift", to the effect that if it is not practicable to sort out the permitted material on the premises, mixed material can be

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89 Defined in PACE, s 14.

90 Defined in PACE, s 11.

91 These specialised search powers have a strong resemblance to the procedure under PACE, sch 1: for example, production orders are generally preferred to warrants in both cases. Requiring the sch 1 procedure to be used would therefore not increase the protection for the occupier.

92 See para 2.4.

taken for sorting elsewhere. This is in addition to the existing practice of instructing independent lawyers to advise on claims for legal privilege.

2.55 Below we have collated a table that explains the differences between section 8 of PACE and Schedule 1 to PACE.

<table>
<tr><th colspan="4">Statutory conditions for obtaining a search warrant/production order for different categories of material</th></tr>
<tr><td>Statute</td><td>Police and Criminal Evidence Act 1984, s 8</td><td>Police and Criminal Evidence Act 1984, Sch 1 (first set of access conditions)</td><td>Police and Criminal Evidence Act 1984, Sch 1 (second set of access conditions)</td></tr>
<tr><td>Who may grant?</td><td>Justice of the Peace</td><td>Circuit judge or District Judge (Magistrates' Courts)</td><td>Circuit judge or District Judge (Magistrates' Courts)</td></tr>
<tr><td rowspan="3">What may be searched for?</td><td>material which is likely to be of substantial value to the investigation of the offence and to be admissible evidence</td><td>material which is likely to be of substantial value to the investigation of the offence and to be admissible evidence</td><td>material which is likely to be of substantial value to the investigation of the offence and to be admissible evidence</td></tr>
<tr><td>other than legally privileged material, excluded material or special procedure material</td><td>which is or includes special procedure but not excluded material or legally privileged material</td><td>which is or includes either special procedure or excluded material, but not legally privileged material</td></tr>
<tr><td>CONDITIONS FOR WARRANT</td><td colspan="2">CONDITIONS FOR PRODUCTION ORDER</td></tr>
<tr><td>Conditions of which the court must be satisfied: offence or proceedings</td><td>1. reasonable grounds for believing that an indictable offence has been committed</td><td>1. reasonable grounds for believing that indictable offence has been committed</td><td>1. reasonable grounds for believing that indictable offence has been committed</td></tr>
<tr><td rowspan="2">Conditions of which the court must be satisfied: materials on premises</td><td>2. reasonable grounds for believing that there is such material on the premises</td><td>2. reasonable grounds for believing that there is such material on premises</td><td>2. reasonable grounds for believing that there is such material on premises</td></tr>
<tr><td></td><td>3. it is in the public interest to produce it or have access to it</td><td></td></tr>
<tr><td rowspan="3">Conditions of which the court must be satisfied: need for warrant in order to access the materials</td><td rowspan="3">3. reasonable grounds for believing that EITHER (a) it is not practicable to communicate with person entitled to grant entry to premises;
OR (b) it is not practicable to communicate with person entitled to give access to evidence;
OR (c) entry will not be granted without warrant;
OR (d) purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.</td><td>4. other methods of obtaining the material have been tried without success, or have not been tried because it appeared that they were bound to fail</td><td>3. were it not for the exclusion of excluded or special procedure material in PACE s 9(2), a warrant could, and would, appropriately have been issued under an Act prior to PACE</td></tr>
<tr><td colspan="2">CONDITIONS FOR WARRANT: as above; also:</td></tr>
<tr><td>5. EITHER (a) it is not practicable to communicate with any person entitled to grant entry to the premises;
OR (b) it is practicable to communicate with person entitled to grant entry to premises but not with person entitled to grant access to materials;
OR (c) material contains information subject to a statutory restriction on disclosure or obligation of secrecy;
OR (d) service of notice of application for production order may seriously prejudice the investigation.</td><td>4. EITHER (a) a production order has been made but has not been complied with;
OR (b) one of conditions 5(a) to (d) from the first set of access conditions is fulfilled.</td></tr>
</table>

ELECTRONIC MATERIAL

2.56 The increasing ubiquity of internet-enabled electronic devices means that much of the material sought by the investigators consists of information which exists in electronic form. It may be saved on the hard drive of a device (PC, laptop or mobile phone) on the premises, or it may be stored off the premises on the cloud or a remote server. In these cases, the normal procedure is to seize the device itself, as that falls within the definition of the material specified in the warrant. Alternatively, the information on the device may be copied or forensically "imaged"[93] onto an external hard drive. In either case, there may be traces of the remotely stored material in the form of document metadata or temporary files on the device, enabling the remotely stored material to be traced. In many cases, there are specific powers to copy information or require a person present to provide explanations of the information and where it is stored.

2.57 These powers must be distinguished from the powers of surveillance and interception provided by the Regulation of Investigatory Powers Act 2000 ("RIPA") and the Investigatory Powers Act 2016 ("IPA").[94] In particular, information obtained by interception may not be used as evidence in legal proceedings if this would reveal the fact that interception has occurred. There are however some interactions between the two sets of powers:

(1) Information obtained by covert means may be used in support of an application for a search warrant, though where the information is sensitive investigators may try to avoid doing so wherever possible. When this happens and the court is satisfied that the public interest requires the information to be treated as confidential, it is not disclosed to the occupier.[95]

(2) If the information seized or copied is encrypted or password protected, Part III of RIPA confers power to give a notice requiring a person to provide the means of decryption.

HUMAN RIGHTS

The European Convention on Human Rights (ECHR)

2.58 The exercise of powers of entry search and seizure may engage several of the rights enshrined in the ECHR, which are incorporated into domestic law by the Human Rights Act 1998. These include the right to respect for private life,[96] the right to peaceful enjoyment of property[97] and the right to a fair trial,[98] all of which are enshrined in the ECHR.[99] The Supreme Court also noted in parenthesis that the police may well be under a duty under Articles 2 and 3 of the ECHR to protect the safety of an informer

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93 Imaging a device involves capturing and storing the data on a device for later inspection away from the premises.

94 IPA, when fully in force, will partially replace RIPA.

95 For more on sensitive information and public interest immunity see Chapter 8.

96 ECHR Article 8.

97 ECHR Protocol 1, Article 1.

98 ECHR Article 6.

99 For discussion see R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 2.02.

when relying on information from that source in applying for or executing a warrant if there is a risk of the identity of the source becoming known.[100]

2.59 We discuss Article 8 in detail below, given that it is the right most likely to be engaged in the context of search warrants. Article 8 of the ECHR provides that:

(1) Everyone has the right to respect for their private and family life, their home and their correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.60 Professor Merris Amos describes the nature of Article 8 as "in essence, the right to live one's personal life without unjustified interference and to have the right to personal integrity".[101] There is a positive obligation on the state to provide protection from interference with Article 8 rights, as well as refraining from interference.[102]

Is the Article engaged?

2.61 The first question which must be determined when considering a possible infringement of Article 8 is whether the Article has been engaged. The European Court of Human Rights ("ECtHR") has found that powers of entry, search and seizure may potentially create interference with all guarantees arising under Article 8(1), apart from the right to respect for family life.[103]

2.62 The right to respect for private life will be engaged, among other cases, when a search of an individual's person is undertaken as part of a search of premises.[104] The Court has held that the right to respect for a person's home extends to their place of work. Therefore, Article 8 will be engaged when entry, search and seizure occurs in either private or business premises.[105] The Court justified the extension on the basis that a narrow interpretation of the term fails to take into account the interchangeability of private and professional activity on premises and may attenuate the object and purpose of Article 8: to protect the individual against arbitrary interference by public authorities.[106] Similarly, the search for and seizure of documents is covered by the term "correspondence", regardless of whether the material is personal in nature.[107] Seizure in the sense of copying data may also fall under the notion of both "private life" and

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100 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [27].

101 M Amos, *Human Rights Law* (2nd ed 2014) p 409.

102 *X and Y v Netherlands* (1986) 8 EHRR 235 (App No 8978/80).

103 *Funke v France* (1993) 16 EHRR 297 (App No 10828/84); *Wainwright v United Kingdom* (2006) 42 EHRR 45 (App No 12350/04).

104 *Wainwright v United Kingdom* (2006) 42 EHRR 45 (App No 12350/04).

105 *Niemietz v Germany* (1992) 16 EHRR 97 (App No 13710/88) at [30].

106 *Niemietz v Germany* (1992) 16 EHRR 97 (App No 13710/88) at [30] to [31]. See also R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 2.33.

107 *Niemietz v Germany* (1992) 16 EHRR 97 (App No 13710/88) at [32].

"correspondence", and the subsequent storage by the authorities of such data may amount to interference for the purpose of Article 8.[108]

2.63 Article 8, however, is not absolute. An interference with the rights protected will comply with the ECHR if all of the following criteria are satisfied. These criteria are set out in Article 8(2) of the ECHR:

(1) the interference was in accordance with the law;

(2) the interference sought to pursue one of the legitimate aims listed in Article 8(2); and

(3) the interference was necessary in a democratic society.

Is the interference in accordance with the law?

2.64 The first requirement, that the interference was in accordance with the law, requires examination of both the basis and quality of the contested measure. The ECtHR has explained the requirement in the following terms:

> The expression "in accordance with the law", within the meaning of Article 8(2), requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, those consequences need not be foreseeable with absolute certainty, since such certainty might give rise to excessive rigidity, and the law must be able to keep pace with changing circumstances.[109]

2.65 Therefore, determining whether the interference is in accordance with law requires examination of the following:

(1) whether the search warrant has a basis in national law; and

(2) whether the law is of a sufficient quality insofar as:

(a) the law is accessible to the persons concerned; and

(b) the law is formulated with sufficient precision to enable the persons concerned, with appropriate advice, to foresee to a reasonable degree the consequences of that law.

2.66 When considering whether a search power is in accordance with the law, the ECtHR has observed that "a failure to observe the legal requirements [of a search power] may lead to a finding that the interference with the applicant's rights was not 'in accordance

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[108] *MN v San Marino* (2016) 62 EHRR 19 (App no 28005/12) at [55].

[109] *McLeod v United Kingdom* (1998) 27 EHRR 493 (App no 24755/94) at [41]. See also *Kopp v Switzerland* (1999) 27 EHRR 91 (App no 23224/94) at [70] to [71].

with the law' within the meaning of Article 8".[110] The term "law" is to be understood in its substantive sense, not a formal one, and is not limited to statutory law.[111] Further, statutory law is to be read in the way it has been interpreted by the competent courts.[112] Therefore, where a search warrant is defective on the grounds that it has failed to observe legal requirements laid down in PACE as supplemented by Code B of PACE, it may be held to have breached Article 8 on the grounds that it was not in accordance with the law. Issues of practical compliance with relevant legislation will also be relevant in considering the third requirement: whether the interference was necessary in a democratic society.[113]

2.67 Turning next to the quality of the law in question, this involves examining both the accessibility of the law and the foreseeability of its consequences, such that individuals are able to act in accordance with the law.[114] In *Sallinen v Finland*, the foreseeability requirement was not met in relation to powers of search and seizure where the relationship between various provisions of domestic law was unclear and had given rise to different views on the extent of the protection afforded to legally privileged material.[115] Therefore, the powers of search and seizure exercised in this case were not in accordance with the law.

2.68 In *McLeod v United Kingdom*, the ECtHR held that that the common law power of the police to enter private premises without a warrant to deal with or prevent a breach of the peace, as preserved by section 17(6) of PACE, was defined with sufficient precision for the foreseeability criterion to be satisfied.[116] For this reason, Professor Helen Fenwick writes that search powers under PACE will probably meet this requirement.[117] We agree with this conclusion.

Does the interference pursue a legitimate aim?

2.69 Regarding the second requirement, that the interference must pursue a legitimate aim, the Strasbourg Court has long held that search and seizure may pursue the legitimate aim of the prevention of disorder or crime or protecting national security.[118] Whilst some commentators have seen the term "prevention" rather than "detection" or "investigation" as problematic,[119] Professor Richard Stone points out that there do not seem to have

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110 *Mancevschi v Moldova* (2008) (App no 33066/04) at [43].

111 *Société Colas Est and Others v France* at [43]. In *Wieser v Austria* (at [54]), notwithstanding that the Austrian Code of Criminal Procedure did not contain specific provisions for the search and seizure of electronic data, the domestic courts' case law had established that the provisions apply to the search and seizure of electronic data and the search and seizure of electronic data was therefore in accordance with the law.

112 *KS and MS v Germany* (2016) (App no 33696/11) at [35].

113 *Mancevschi v Moldova* (2008) (App no 33066/04) at [43].

114 *Kopp v Switzerland* (1999) 27 EHRR 91 (App no 23224/94) at [62] to [63].

115 *Sallinen v Finland* (2007) 44 EHRR 18 (App no 50882/99) at [90] to [94].

116 *McLeod v United Kingdom* (1998) 27 EHRR 493 (App no 24755/94) at [38] to [45].

117 *H Fenwick on Civil Liberties and Human Rights* (5th ed 2017) p 872.

118 *Modestou v Greece* (2017) (App no 51693/13) at [42].

119 JES Fawcett, *The Application of the European Convention on Human Rights* (2nd ed 1987).

been any problems in practice with this.[120] Professor David Feldman has also taken the view that the detection of crime contributes to the prevention of disorder or crime and therefore this criterion will not cause problems in practice.[121]

2.70 The "prevention of disorder or crime" is conceivably wide enough to cover a dual-purpose warrant, such as section 39(4) of the Psychoactive Substances Act 2016, which provides a power of search for the purpose of finding relevant evidence in relation to an indictable offence and the power to seize and dispose of any psychoactive substance whether or not it is relevant evidence. Search warrants that fall outside this criminal sphere will be likely to remain justified in the interests of public safety, the protection of health or morals, or for the protection of the rights and freedoms of others.

Is the interference necessary in a democratic society?

2.71 When determining whether the interference is "necessary in a democratic society", the Strasbourg Court will take into account the principle that a certain margin of appreciation is left to the Contracting States.[122] However, the exceptions provided for in Article 8(2) are to be interpreted narrowly, and the need for them in a given case must be convincingly established.[123]

2.72 In determining whether the interference was "necessary in a democratic society", the ECtHR has repeatedly observed that:

> As regards searches of premises and seizures in particular, the Court has consistently held that the Contracting States may consider it necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons put forward to justify such measures were relevant and sufficient, and whether the aforementioned proportionality principle has been adhered to. As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the specific circumstances of each case in order to determine whether, in the particular case, the interference in question was proportionate to the aim pursued. The criteria the Court has taken into consideration in determining this latter issue are, inter alia: the severity of the offence in connection with which the search and seizure were effected; the manner and circumstances in which the order was issued, in particular whether any further evidence was available at that time; the content and scope of the order, having particular regard to the nature of the premises searched and the safeguards implemented in order to confine the impact of the measure to reasonable bounds; and the extent of possible repercussions on the reputation of the person affected by the search.[124]

2.73 Other cases in which this passage has been cited have also specified "the presence of independent observers during the search in order to ensure that materials subject to

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120 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 2.42.

121 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed 2002) p 539.

122 *Camenzind v Switzerland* (1999) 28 EHRR 458 (App no 21353/93) at [44].

123 *Buck v Germany* (2006) 42 EHRR 21 (App no 41604/98) at [44].

124 *KS and MS v Germany* (2016) App no 33696/11 at [44]. See also *Buck v Germany* (2006) 42 EHRR 21 (App no 41604/98) at [45]; *Smirnov v Russia* (2007) 51 EHRR 496 (App no 71362/01) at [44].

professional secrecy were not removed" and "whether the search was undertaken pursuant to a warrant issued by a judge and based on reasonable suspicion" as criteria which the Court has taken into consideration in determining whether the interference in question was proportionate to the aim pursued.[125]

2.74 This passage indicates that in determining whether a search warrant was necessary in a democratic society a court will be required to examine two distinct questions:

(1) whether reasons put forward to justify the issue of the warrant were relevant and sufficient; and

(2) whether the proportionality principle has been adhered to insofar as:

(a) the relevant legislation and practice afford individuals adequate and effective safeguards against abuse; and

(b) the measures taken in the specific case were proportionate to the legitimate aim pursued.

2.75 The first question of whether the reasons adduced to justify the search and seizure are "relevant" and "sufficient" will involve examining the terms in which the search warrant has been drafted and the reasons provided by domestic authorities to justify recourse to search and seizure.[126]

2.76 The second question determining whether a search pursuant to a warrant is proportionate involves examining whether legislation and practice afford individuals adequate and effective safeguards against abuse in addition to whether the particular measures taken in each case were proportionate for the aim of preventing crime etc.[127] Therefore, the question of proportionality involves a holistic examination of the facts of each case. As the then Lord Chief Justice, Lord Woolf explained: "In considering compliance with article 8 and article 6 the facts of the particular case will in the end always be decisive".[128] As Professor Richard Stone notes, challenges might be based, for example, on the timing of the use of the power, the number of people involved in the entry, and the amount of force used and:

> In particular, the question should be asked as to whether it would have been possible to achieve the objective for which the powers was used by less intrusive means. Powers of compulsory entry and search should be used as a last resort, and only where other methods have failed or are, for good reason, thought likely to be ineffective. Many of the statutory powers discussed do contain provisions along these

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125 *Cacuci And Sc Virra And Cont Pad Srl v Romania* [2017] ECHR 53 (App no 27153/07) at [91].

126 *Smirnov v Russia* (2007) 51 EHRR 496 (App no 71362/01) at [47]; *Modestou v Greece* (2017) (App no 51693/13) at [52] to [53].

127 See also *Vinci Construction and GTM Génie Civil et Services v France* (2015) (App nos 63629/10 and 60567/10) at [66].

128 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [23] per Lord Woolf CJ.

lines – for example, requiring the process of seeking information by means of a 'production order' rather than a search warrant where possible.[129]

2.77 Commenting on the interplay between PACE and the ECHR, Professor Helen Fenwick writes:

> The PACE search and seizure provisions are clearly intended to make lawful actions that would otherwise amount to trespass to property and to goods only in very specific circumstances and only where a certain procedure has been followed. Invasion of a person's home has traditionally been viewed as an infringement of liberty that should be allowed only under tightly controlled conditions and in the exercise of a specific legal power. Article 8 ECHR under the HRA affords specific expression to these values … The PACE provisions suggest some determination to strike a reasonable balance between the perceived need to confer on the police a general power to search property and the need to protect the privacy of the citizen. It is less clear that this is true of the Terrorism Act 2000 and Criminal Justice and Police Act 2001 provisions.[130]

2.78 Professor Richard Stone has similarly noted:

> Most powers under English law, which are based on the authority of a warrant, and take account of special considerations such as legal or other professional privilege, will likely meet the standards of Art. 8 … As far as powers to seize property are concerned, these will generally be justified by Art. 1 of the First Protocol to the ECHR.[131]

The Human Rights Act 1998

2.79 The rights enshrined in the ECHR are given effect in domestic law by virtue of the Human Rights Act 1998 (HRA). The purpose of the HRA, as stated in the government White Paper,[132] is to enable people to enforce their Convention rights against the state in domestic courts and to influence the development of case law and the scrutiny of new legislation and policies.[133] In this sense, the HRA addresses each of the three branches of government: the judiciary, who are to apply and enforce ECHR rights; the executive, who are to be liable for any breach of ECHR rights; and the legislature, in the sense that any laws that are passed must be accompanied by a statement of compatibility and may nevertheless later be declared incompatible.[134] As Lady Hale explained:

> [The HRA] is to protect [ordinary people] inter alia against arbitrary interceptions of their mail, email and telephone conversations, *searches of their homes* and persons, arrest, prolonged imprisonment without charge or trial, enforced separation from their

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129 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 2.43.

130 *H Fenwick on Civil Liberties and Human Rights* (5th ed 2017) p 871.

131 R Costigan and R Stone, *Civil Liberties and Human Rights* (2017) p 272.

132 Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782) at [1.18] to [1.19].

133 For discussion see M Amos, *Human Rights Law* (2nd ed 2014) pp 3 to 28.

134 *Wilson v First County Trust* [2003] UKHL 40; [2003] 3 WLR 568.

children and families, trials in secret before military tribunals, inhuman and degrading treatment in hospital and care homes[135] (emphasis added).

2.80 Broadly speaking, the HRA requires domestic courts to take into account ECtHR case-law so far as it is relevant to proceedings and give further effect to the Convention rights in primary and secondary legislation, so far as possible.[136]

2.81 In the context of search warrants, the courts have indicated the heightened scrutiny to be applied following the advent of the Human Rights Act 1998. In *Keegan v Chief Constable of Merseyside*, Lord Justice Ward suggested that the coming into force of the Human Rights Act 1998 may be said to have elevated the right to respect for one's home.[137] In a similar vein, the then Lord Chief Justice, Lord Woolf, in *R (Cronin) v Sheffield Magistrates' Court*, noted that comments made by the Divisional Court, holding that the absence of a note or expressed reasons during a hearing need not invalidate a search warrant, had to be considered in the context of it being a judgment which predated the Human Rights Act 1998.[138]

2.82 The HRA has three significant effects on the law of search warrants:

(1) Under section 7 of the HRA, a person who is the victim of a public authority acting in a way which is incompatible with a Convention right has standing to bring proceedings against the authority or rely on rights concerned in any legal proceedings. The majority of authorities exercising powers in relation to search warrants will fall under the definition of "public authority" for the purpose of the HRA.[139] Therefore, domestic courts will be the likely forum to consider whether an interference has occurred, notwithstanding subsequent applications lodged with the ECtHR.

(2) As most of the law regulating search warrants is contained in statute, section 3 of the HRA will apply. This imposes an obligation on a court to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights, so far as it is possible to do so. It is noteworthy that Code B of PACE constitutes secondary legislation and therefore must also be considered and interpreted in light of the HRA. Lord Steyn has described the operation of section 3 in the following terms:

> The interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings … In accordance with the

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135 *Friend v Lord Advocate* [2007] UKHL 53; [2008] HRLR 11 at [38].

136 For an overview of the provisions of PACE and related statutes concerning search warrants, in the context of human rights law, see B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (3rd ed 2012) pp 286 to 294.

137 *Keegan v Chief Constable of Merseyside* [2003] EWCA Civ 936; [2003] 1 WLR 2187 at [35] per Ward LJ.

138 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [24] per Lord Woolf CJ.

139 For discussion see R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) paras 2.06 to 2.09. It is arguable that independent lawyers, by acting on behalf of the court, should be treated as acting as a public authority, and therefore has a responsibility to ensure compatibility with Convention rights.

will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.[140]

(3) If a court, as specified under section 4(5) of the HRA, finds that it is unable to interpret a statute in a way that is compatible with Convention rights, then it may issue a "declaration of incompatibility" under section 4(2) of the HRA.[141]

(4) The ECHR is a living instrument, so the rights it contains are capable of growth and expansion.[142] Put another way, the rights contained in the ECHR are the floor, not the ceiling, of rights-based protection. Domestic courts may therefore develop rights in the future. Further, by giving effect to the ECHR, the HRA creates new domestic rights which are conceptually distinct from Convention rights.[143]

2.83 Many of the provisions of PACE, such as sections 15 and 16 and the provision for Codes, are designed to secure conformity with the ECHR.[144] Nevertheless, a judge or magistrate considering an application for a warrant or production order must take account of fundamental rights such as the right to privacy, the right to freedom of expression and the protection against self-incrimination, whether or not these are explicitly referred to in statute. In particular, these questions will inform the judge's appreciation of whether the public interest test is met, in an application under Schedule 1 to PACE for the production of special procedure material.[145]

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140 *R v A* [2001] UKHL 25 at [44]; [2001] 3 All ER 1, 17.

141 See M Amos, *Human Rights Law* (2014) p 132 and following.

142 *Brown v Stott* [2003] 1 AC 681, 703 per Lord Bingham.

143 *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807 at [68].

144 B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (3rd ed 2012) p 292 and following.

145 *R v Central Criminal Court ex parte Bright* [2001] 1 WLR 662. See B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (3rd ed 2012) pp 290 to 1.

Chapter 3: Operation of the statutory safeguards

INTRODUCTION

3.1 Important statutory safeguards are set out in sections 15 and 16 of the Police and Criminal Evidence Act 1984 ("PACE"). Section 15 of PACE, titled "search warrants—safeguards", governs the process for obtaining a warrant. Section 16 of PACE, titled "execution of warrants", governs how search warrants are executed.[146] Section 15(1) sets out when the safeguards apply. These sections incorporate the recommendations of the Philips Commission and are supplemented by a code of practice, Code B of PACE.[147] The text of these provisions can be found in Appendix 2.

3.2 Sections 15 and 16 of PACE help ensure compliance with the European Convention of Human Rights ("ECHR") requirement that any search under warrant is a proportionate interference within Article 8 of the ECHR.[148] When considering whether Article 8 has been complied with, the European Court of Human Rights ("ECtHR") has examined whether domestic legislation provides sufficient procedural safeguards capable of protecting the applicant against any abuse or arbitrariness, in addition to whether the search warrant specifies the objects of the search with sufficient precision.[149] This has included consideration of whether: independent observers were present;[150] the occupier was informed why the search is necessary;[151] and journalistic material was protected.[152]

3.3 We analyse several of the provisions in sections 15 and 16 in the next three chapters, which concern the application process (Chapter 4), the issue of a search warrant (Chapter 5) and the way in which the search under warrant is conducted (Chapter 6). In this chapter we focus on section 15(1) of PACE, which sets out when the safeguards in sections 15 and 16 apply and the consequence of non-compliance. In particular we discuss:

(1) to which people and warrants the safeguards apply; and

(2) the extent to which compliance with these safeguards is required.

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146 We discuss the content of sections 15 and 16 in Chapter 2.

147 See Royal Commission on Criminal Procedure, Report Cmnd 8092 (1981) para 3.46 to 3.47. It was a result of the Commission's recommendations that PACE was enacted.

148 *Kent Pharmaceuticals v Director of the Serious Fraud Office* [2002] EWHC 3023 (QB) at [30] per Lord Woolf CJ. For discussion see R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) paras 4.16 to 4.19.

149 *Niemietz v Germany* (1992) 16 EHRR 97 (App No 13710/88) at [37]; *Ernst and Others v Belgium* (2003) 39 EHRR 35 (App no 33400/96) at [116]; *Roemen and Schmit v Luxembourg* (2003) (App no 51772/99) at [70]; *Smirnov v Russia* (2007) 51 EHRR 496 (App no 71362/01) at [47]; *Robathin v Austria* (2012) (App No 30457/06) at [44]; *Posevini v Bulgaria* (2017) (App No 63638/14) at [72].

150 *Niemietz v Germany* (1992) 16 EHRR 97 (App No 13710/88) at [37].

151 *Ernst and Others v Belgium* (2003) 39 EHRR 35 (App no 33400/96) at [116]; *Tamosius v United Kingdom* (2002) 35 EHRR 323, 329.

152 *Roemen and Schmit v Luxembourg* (2003) (App No 51772/99) at [71].

3.4 The first problem we have identified is that, by virtue of section 15(1), sections 15 and 16 only apply to warrants "issued to constables". In 1984, the majority of criminal investigations were carried out by the police. Since the advent of PACE, there has been what Denis Clark refers to as an "exponential growth" in investigative powers and in the range of organisations that may exercise them.[153] Professor Ed Lloyd-Cape raised concern over the now limited reach of the statutory safeguards to other investigators.

3.5 We consider that it is no longer appropriate to confine these important safeguards only to search warrants issued to constables. We provisionally propose below that the application of sections 15 and 16 should be extended to all search warrants relating to a criminal investigation. We also discuss how the concept of a "search warrant relating to a criminal investigation" should be defined to determine the extent of the application of the safeguards.

3.6 There are three further aspects of section 15(1) of PACE that lack clarity:

(1) what elements of the search are rendered unlawful as a result of non-compliance with section 15(1);

(2) what conduct must comply with section 15 and 16; and

(3) what breaches of sections 15 and 16 of PACE make the entry, search unlawful.

We provisionally propose amending section 15(1) of PACE to clarify the operation of provision in relation to the above aspects and invite consultees' views on the consequences of non-compliance.

EXTENDING SECTIONS 15 AND 16 OF PACE

Current law

3.7 The application of both sections 15 and 16 of PACE is set out in section 15(1) of PACE, which provides:

> This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

3.8 In other words, for the safeguards to apply, the warrant must be "issued to" a constable and must be "to enter and search premises". If these criteria are met, the safeguards apply to search warrants of any type, irrespective of whether the power under which it was issued was enacted before PACE, in PACE itself or subsequently.

3.9 Below we consider:

(1) who is treated as a "constable" for these purposes;

(2) who a warrant is "issued to"; and

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153 D Clark, *Bevan & Lidstone's The Investigation of Crime* (3rd ed 2004) p 1.

(3) which warrants are "to enter and search premises".

We consider that the answers to these questions are complex and not as certain as they should be.

Who is treated as a "constable"?

3.10 In England and Wales, a "constable" is a person holding the office of constable, not a member of a police force holding the rank of constable.[154] In this context, the term "constable" refers to a police officer of any rank. It covers not only territorial police officers but also officers in special police forces. These are the Ministry of Defence Police;[155] British Transport Police;[156] Civil Nuclear Police;[157] and special constables.[158] Certain other categories of officials have some or all of the powers and duties of a police constable. These are authorised civilian investigating officers;[159] and designated National Crime Agency Officers.[160]

3.11 In some cases, sections 15 and 16 of PACE have been extended specifically by statute to other investigators who can apply for search warrants under PACE. These are Welsh Revenue Authority officers;[161] an officer of Revenue and Customs;[162] immigration officers and designated customs officials;[163] officers of the department for Business, Energy and Industrial Strategy;[164] and labour abuse prevention officers.[165] In addition, sections 15 and 16 of PACE have been extended to "appropriate officers" applying for a warrant under section 352 of the Proceeds of Crime Act 2002.[166]

3.12 In other cases, specific statutory provisions for search warrants expressly state that the provision is subject to sections 15 and 16 of PACE, even if the investigation officer is

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154 *R v Manchester Stipendiary Magistrate ex parte Granada Television Ltd* [2001] 1 AC 300, 311 per Lord Hope of Craighead.

155 Ministry of Defence Police Act 1987, s 2.

156 Railways and Transport Safety Act 2003, s 31(1).

157 Energy Act 2004, s 52.

158 Police Act 1996, s 30(2).

159 Police Reform Act 2002, s 38 (as amended by the Policing and Crime Act 2017, s 38).

160 Crime and Courts Act 2013, s 10.

161 Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 (SI 2018 No 400), sch 1, para 1.

162 Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015 (SI 2015 No 1783), sch 1.

163 Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013 (SI 2013 No 1542), schs 1 and 2.

164 Police and Criminal Evidence Act 1984 (Department of Trade and Industry Investigations) Order 2002 (SI 2002 No 2326), art 3.

165 Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017 (SI 2017 No 520), reg 3.

166 Proceeds of Crime Act 2002 (Application of Police and Criminal Evidence Act 1984) Order 2015 (SI 2015 No 759) (as modified by SI 2017 No 1222), art 2. Appropriate officer is defined under Proceeds of Crime Act 2002, s 378(1) as a National Crime Agency officer, an accredited financial investigator, an SFO officer, an officer of Revenue and Customs and an immigration officer.

not a constable. For example, the search warrant power under Schedule 2 to the Food and Environment Protection Act 1985 states:

> In relation to England and Wales, sections 15 and 16 of the Police and Criminal Evidence Act 1984 … shall have effect in relation to warrants for officers under this paragraph as they have effect in relation to warrants for constables. [167]

3.13 Similarly, sections 15 and 16 of PACE have been specifically extended to search and seizure warrants sought for the purposes of a confiscation investigation, a money laundering investigation, a detained cash investigation, a detained property investigation and a frozen funds investigation.[168]

3.14 Finally, in some cases sections 15 and 16 do not apply, but the warrant provision is subject to similar safeguards. For example, warrants under section 28B of the Immigration Act 1971 are issued to immigration officers rather than constables; therefore, the safeguards under PACE do not apply directly. However, these warrants are subject to nearly identical safeguards under sections 28J and 28K of the Immigration Act 1971.

3.15 Warrants that are not subject to section 15(1) of PACE are still subject to common law protections, however, these requirements are far less extensive.[169]

3.16 Although these cases are relatively clear cut, the issue of who is treated as a constable under section 15(1) can lead to uncertainties. For example, some officials are given the powers of a constable, but not the duties. For example, section 8 of the Prison Act 1952 states that:

> Every prison officer while acting as such shall have all the powers, authority, protection and privileges of a constable.

It is therefore possible that a warrant issued to a prison officer would be subject to sections 15 and 16, but the point is far from clear.

3.17 In short, in principle those sections apply only to warrants issued to constables, but there are several piecemeal extensions to other types of officer or other types of warrant. The rules in this area are complex and leave gaps in protection.

Complexity

3.18 It is not always immediately apparent who is and is not treated as a constable. This is illustrated by considering the status of members of the Serious Fraud Office. First, there is no statutory provision conferring upon members of the Serious Fraud Office the powers and privileges of a constable. Secondly, sections 15 and 16 of PACE have not been extended specifically by statute. Thirdly, comparable safeguards are not provided

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167 See also Food and Environment Protection Act 1985, sch 2, para 7(4). Another example is the Animal Welfare Act 2006, sch 2, para 1(1).

168 Proceeds of Crime Act 2002 (Application of Police and Criminal Evidence Act 1984) Order 2015 (SI 2015 No 759) (as modified by SI 2017 No 1222), art 2.

169 *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952. See R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 1.48.

under the Criminal Justice Act 1987. Ostensibly therefore, members of the Serious Fraud Office are not subject to sections 15 and 16 of PACE when applying for, and executing a search warrant, under section 2(4) of the Criminal Justice Act 1987.

3.19 An example of the complexity of determining who is treated as a constable is illustrated by the recent case of *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners*.[170] The Divisional Court observed in passing that an officer of HMRC is not a "constable" for the purpose of section 16 of the Crime (International Co-operation) Act 2003 and therefore cannot apply for a search warrant under that provision.[171] In fact, an extending order has been made under section 27 of the Crime (International Co-operation) Act 2003 and therefore an officer of HMRC can apply for a search warrant under section 16.[172] Although the point was not central to the reasoning of the court, this demonstrates that the law in this area is not always easy to discern.

Gaps in protection

3.20 An example where the statutory protections did not apply arose in *Hargreaves v Brecknock and Radnorshire Magistrates' Court*.[173] One ground of the claimants' case was that the search was unlawful because they had not been supplied with copies of the warrant, contrary to section 16(5)(c) of PACE. The Divisional Court held that PACE did not apply in these circumstances.[174]

3.21 In that case, the warrants were issued under regulation 22 of the Consumer Protection from Unfair Trading Regulations 2008. This power has now been replaced by a consolidated power in the Consumer Rights Act 2015. The new power applies to a wide range of consumer protection enforcers, including the Competition and Markets Authority, the Financial Conduct Authority and the Office of Communications.[175] The power is subject to *some* safeguards. For example, the investigator may only enter the premises at a reasonable time and must produce the warrant for inspection to an occupier of the premises.[176] However, these safeguards are less extensive than those under PACE.

Other issues

3.22 Section 15(1) of PACE provides that searches carried out by the police that do not comply with those sections are unlawful, potentially giving rise to an action for trespass. In doubtful cases, as described above, investigators may decide to follow the rules in sections 15 and 16 for reasons of caution, but it remains uncertain whether failure to do

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170 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115.

171 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [63].

172 Crime (International Co-operation) Act 2003 (Exercise of Functions) Order SI 2013 No 2733, Art 9.

173 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399.

174 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [39].

175 Consumer Rights Act 2015, sch 5, para 32.

176 Consumer Rights Act 2015, sch 5, para 33(1) and (4).

so will make the search unlawful. Our provisional proposal, below, to extend the sections to all criminal investigations is not simply a matter of clarifying that investigators ought to behave in a certain way. The most important effect is to extend the rule that failure to behave in that way will make the search unlawful.

3.23 In addition, given the increasing tendency to provide powers of search to be exercised by specialist investigators other than the police, the existing system is not future proof. Each time a new search power is introduced, it is necessary to determine whether the person applying for the warrant or conducting the search should be given the powers and duties of police constables, and whether sections 15 and 16 should apply to these warrants. A broad definition of the warrants to which those sections apply, as contained in our provisional proposal, would avoid this need for constant updating.

Who is a warrant "issued to"?

3.24 A further complication is that the safeguards only apply where a warrant is "issued to" a constable. The accepted interpretation of section 15(1) of PACE is that the warrant is "issued to" the person applying for it.[177]

3.25 In the case of section 8 of PACE there is no problem: the information is given by a constable, and the warrant authorises any constable, not necessarily the applicant, to carry out the search. However, under many other provisions the category of person applying for the warrant and the category of person carrying out the search need not be the same.

3.26 A further complication is that many search warrant provisions allow for the application to be made by different categories of officials. In other words, the application may be made by either a non-police official or a police officer. Similarly, in other cases the statute may allow a choice of person who is to execute the warrant, between a police constable and a civilian inspector or official. For example, section 194 of the Banking Act 2009 provides that, on the application of a Bank of England appointed "inspector", either an appointed inspector or constable may inspect the operation of a recognised payment system.

3.27 Some anomalous situations can arise. For example, section 15(1) does not include a case where the warrant is applied for by a person other than a police officer even if the search is carried out by a police officer. In the case of the Banking Act 2009, this difficulty is somewhat mitigated by the fact that, under section 194(7) of that Act, section 15(5) to 15(8) and 16 apply to warrants under that section. There is, however, no equivalent of section 15(1), stating that a search that does not comply with those provisions is unlawful.

3.28 As against this, the Divisional Court in *Hargreaves* appeared to suggest that there was scope for argument that the safeguards should apply where a non-police officer is accompanied by a police officer during the search.[178] On a strict construction of section

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177 *R v Manchester Stipendiary Magistrate ex parte Granada Television Ltd* [2001] 1 AC 300, 309 to 310.

178 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399, discussed at para 3.33 below.

15(1) of PACE, however, the safeguards would not apply as the search warrant was not issued to a constable.

3.29 In addition, section 15(1) also controls in what circumstances section 16 applies. However, section 16 is concerned with the conduct of the search rather than the process of applying for the warrant. If there is to be any distinction depending on the involvement of police, it would make more sense for section 16 to apply whenever the search is carried out by a police constable, regardless of who applies for the warrant. It is therefore anomalous that the conditions for sections 15 and 16 are the same.

The warrant must authorise entry and search

3.30 Section 15(1) of PACE states that the statutory protections apply to warrants "to enter and search" premises. Many warrants authorise the entry and inspection of premises, rather than search. We refer to these as inspection warrants.[179] Other warrants authorise only entry of premises. We refer to these as entry warrants.[180] Powers of inspection or search may or may not be engaged once an investigator is lawfully on premises, but if so these powers emanate from a particular officeholder's position rather than the warrant. Ostensibly, sections 15 and 16 of PACE do not appear to apply to inspection warrants or entry warrants.

3.31 However, the distinction between inspection warrants and search warrants is far from clear cut. This is illustrated by *R (Helidon Vuciterni) v Brent Magistrates' Court*, which also concerned the now replaced Consumer Protection from Unfair Trading Regulations 2008.[181] The Regulations provided a power to enter, inspect, seize and detain goods, but did not expressly provide a power to search.[182] The traders challenged the execution of the warrants on the ground that they were treated as search warrants although all that was permitted was inspection. Lord Justice Davis held that the powers to enter and inspect "plainly carry with them a power to search, as a matter of sensible construction".[183]

3.32 Lord Justice Davis observed that it was difficult to see how an enforcement officer could effectively exercise a power to inspect if "having lawfully obtained entry, [he was]

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179 Theatres Act 1968, s 15; Local Government (Miscellaneous Provisions) Act 1982, ch 3, para 25; Food Safety Act 1990, s 32(2); Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018 (SI 2018 No 321), reg 14(3); Public Regulated Service (Galileo) Regulations 2018 (SI 2018 No 230), reg 22 (not yet in force).

180 Gambling Act 2005, s 306; Local Government (Miscellaneous Provisions) Act 1982, s 12; Alternative Fuels Infrastructure Regulations 2017 (SI 2017 No 897), reg 10(1); Nuclear Security (Secretary of State Security Directions) Regulations 2018 (SI 2018 No 408), sch 1, para 2. Another example of a search power which emanates from an officer's position rather than a warrant can be found in Proceeds of Crime Act 2002, s 47D.

181 *R (Helidon Vuciterni) v Brent Magistrates' Court* [2012] EWHC 2140 (Admin), (2012) 176 JP 705. As mentioned above, this is now replaced by powers under the Consumer Rights Act 2015, but the same reasoning would apply to these powers.

182 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008 No 1277), reg 21 (now repealed).

183 *R (Helidon Vuciterni) v Brent Magistrates' Court* [2012] EWHC 2140 (Admin), (2012) 176 JP 705.

confined to standing in the hallway and looking around by way of 'inspection' for what he can (or cannot) see".[184] He continued:

> The powers conferred necessarily connote a power to, for example, search a desk or cabinet to see if there are relevant documents which may be required to be copied, if a breach has reasonably been suspected; they connote that an enforcement officer may, for example, go into back rooms and store rooms to see if there are goods that should be seized or detained, if there is reason or cause to believe (not just suspect) a breach; and likewise may search for containers or vending machines.[185]

Lord Justice Davis did not state whether there was also power to break down doors or force containers open.

3.33 This interpretation was followed in *Hargreaves* where the warrant under regulation 22 read "I authorise the person who is identified … to search for …", despite no power of search being provided for by the regulations.[186] It was held that the powers conferred by this type of warrant extended to a power of search.

3.34 Even on this broad interpretation, however, many of these inspection warrants are significantly different from the typical search warrant, in which the primary purpose is to search for and seize materials of a kind specified in the warrant, and the conditions of issue include the existence of reasonable grounds for believing that those materials are on the premises. They are more akin to search warrants for the prevention or remedying of an unlawful or dangerous situation.

3.35 Similar considerations may apply to warrants which are not described as either search warrants or inspection warrants but simply as powers of entry. Under section 306(2) of the Gambling Act 2005, a justice of the peace may issue a warrant authorising a constable or enforcement officer to enter premises if the justice is satisfied that there are reasonable grounds for suspecting that an offence under the Act has been committed on the premises or that evidence of that offence may be found there. Once the constable or enforcement officer is there, section 317 confers power to inspect any part of the premises and any machine or other thing on the premises and to remove and retain anything which he or she reasonably believes to constitute or contain evidence of an offence under the Act. Again, this is a search warrant in all but name.

3.36 Confusion may also arise from legislative headings. Paragraph 10 of Schedule 1 to the Motorcycles (Type-Approval) Regulations 2018,[187] although headed "powers of search, etc.", only provides a power of inspection, rather than search.[188]

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184 *R (Helidon Vuciterni) v Brent Magistrates' Court* [2012] EWHC 2140 (Admin), (2012) 176 JP 705 at [48].

185 *R (Helidon Vuciterni) v Brent Magistrates' Court* [2012] EWHC 2140 (Admin), (2012) 176 JP 705.

186 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [34].

187 (SI 2018 No 235) (in force 20 May 2018). See also Agricultural and Forestry Vehicles (Type-Approval) Regulations 2018 (SI 2018 No 236), sch 1, para 10(5) (in force 20 May 2018).

188 See D Greenberg, *Craies on Legislation* (11th ed 2017) para 26.1.8 to 26.1.11.

3.37 In short, warrants that are not issued to constables or certain other categories of persons, or which do not authorise a search, are not covered by the protections in section 15 and 16 of PACE. This leaves a potential gap in protection.

Code B of PACE

3.38 Section 15 and 16 of PACE are supplemented by guidance in Code B of PACE, which restates many of the same rules. Section 67(9) of PACE states that:

> Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of a code.

3.39 There is some ambiguity here. Section 67(9) explicitly refers to persons other than police officers, and extends to all investigations whether or not they take the form of a search. However, the preamble to Code B of PACE reads "Code of practice for *searches* of premises *by police officers* and the seizure of property found *by police officers* on persons or premises": on its own wording, the Code does not extend to non-police searches or warrants other than for searches. Further, several provisions of Code B of PACE could not, on a plain reading, apply to non-police investigators. Other provisions, such as those referring to a particular rank of officer, could reasonably be transposed to non-police investigators. The question is whether, in these instances, the provisions of Code B of PACE are "relevant" or whether the investigator ought still, under section 67(9), to have regard to them by way of analogy.

3.40 The Court of Appeal has held that whether a person is "charged with the duty" of investigating offences is a question of fact in each case.[189] According to the Divisional Court, such a duty "may be any type of legal duty, whether imposed by statute or by the common law or by contract".[190] According to Professor Michael Zander, the phrase "must have regard to" means something very close to "must follow".[191]

3.41 It is unclear, however, which provisions of the code are "relevant" to investigators who are not covered by sections 15 and 16. On one view, the guidance in Code B of PACE about how to comply with sections 15 and 16 is irrelevant to those who are not subject to these sections. On another view, all investigating officers should have regard to the principles in those sections to ensure that their actions are proportionate under the ECHR.

3.42 Stakeholders have told us that the position is uncertain. Particular agencies may follow Code B of PACE as a matter of policy, but it is unclear whether there is a legal duty to do so. It is also unclear, on either interpretation, what the consequences would be of failure to follow Code B of PACE.

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189 *R v Seelig and Spens* (1992) 94 Cr App R 17.

190 *Joy v Federation Against Copyright Theft Ltd Independent* (unreported); [1993] 8 Criminal Law Review 588.

191 *M Zander on PACE* (7th ed 2015) para 6-09. "Have regard to" in this context appears to mean something different from a duty to have regard to certain factors, as in Criminal Justice Act 2003, s 114(2) on hearsay evidence, which may mean little more than "take account of". The overall effect may be similar to that of the Coroners and Justice Act 2009, s 125, where a sentencing judge must follow sentencing guidelines unless satisfied that to do so would be contrary to the interests of justice.

3.43 In addition to the uncertainty over the application of Code B of PACE to non-police investigators, it is unclear whether Code B of PACE applies to the inspection, rather than search, of premises. Professor Richard Stone and Associate Professor Ruth Costigan suggest that it does not.[192] However, on another reading of PACE, it might do.[193]

3.44 Where Code B of PACE does not apply, the Home Office Powers of Entry Code of Practice applies, which is similar in scope and content to Code B of PACE.[194]

Conclusion on the problems with the current law

3.45 The requirement that the warrant must be issued to a constable is not based on a clear reason of principle. We have identified the following problems with the current application of the statutory safeguards under sections 15 and 16 of PACE:

(1) the "issued to" test is unsatisfactory:

(a) where a search warrant is issued to a non-police investigator, but the search is carried out by a constable, the safeguards will not necessarily apply; and

(b) the test fails to distinguish the type of investigation being undertaken and instead focuses on to which person the search warrant has been issued.

(2) the requirement that the search warrant is issued specifically to a constable leaves gaps in protection:

(a) in the case of non-constables, the safeguards have been extended to some officeholders but not others; and

(b) although comparable safeguards for other officeholders are found in specific statutes, this is far from universal and the extent to which the safeguards apply varies.

(3) there is uncertainty about whether the protections apply to entry and inspection warrants which include or give rise to an implied power to search; and

(4) in situations where sections 15 and 16 of PACE do not apply, it is unclear how far the investigator must have regard to Code B of PACE.

The combined effect of these problems are complexity and uncertainty in the search warrants regime. Further, this increases the risk of human rights violations by agencies.

3.46 For these reasons, we consider that section 15(1), concerning the ambit of sections 15 and 16, should be reformed to provide a more coherent scheme of protection.

Reform

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192 R Costigan and R Stone, *Textbook on Civil Liberties and Human Rights* (11th ed 2017) p 246.

193 See Code B of PACE, para 2.5.

194 Produced pursuant to the Protection of Freedoms Act, s 47.

When the statutory safeguards ought to apply

3.47 We consider in policy terms that stricter safeguards should apply to those investigations which may result in the person investigated being prosecuted. In 1984, when most investigations into criminal offences were carried out by police, the rule that the safeguards apply to warrants issued to the police was a reasonable way of reflecting this policy. Under today's conditions, when the police are one among a number of agencies investigating different sorts of crime, the test of "issued to a constable" is no longer a suitable proxy. There should be a broader test for deciding which investigations may result in prosecution.

3.48 For these reasons, as well as the technical problems and ambiguities identified above, we take the view that the statutory safeguards under PACE (including Code B of PACE) should apply to all search warrants that relate to a criminal investigation.

3.49 As a matter of policy, having the statutory safeguards in sections 15 and 16 (and Code B of PACE) apply to search warrants relating to a criminal investigation is intended to achieve several aims, namely to:

(1) isolate, from the current range of situations, those search warrants the execution of which may put the occupier or another person in danger of being prosecuted;

(2) clarify for investigators and occupiers exactly when the safeguards apply and prevent arbitrary distinctions based on both the category of officeholder to whom the warrant is issued and whether the statutory provision contains an explicit power of search;

(3) achieve greater parity between sections 15 and 16 of PACE and Code B of PACE, which applies where a person is charged with the duty of investigating offences; and

(4) extend the instances in which the safeguards currently apply and thereby grant a more uniform scheme of protection for occupiers and reduce the risk of unwitting breaches of Article 8 of the ECHR.

3.50 Below we consider how a search warrant that relates to a criminal investigation ought to be defined.[195] If sections 15 and 16 of PACE are to be extended, they will need some amendment, if only to remove inappropriate references to "constables".

Defining search warrants that relate to a criminal investigation

3.51 We do not consider that the test of whether a search warrant relates to a criminal investigation should depend on the statute under which the search warrant is sought. Many statutory provisions can be used to find evidence in support of either a civil or

[195] Definitions of a 'criminal investigation' are contained in the Criminal Procedure and Investigations Act 1996 Code of Practice, para 2.1 and Proceeds of Crime Act 2002, s 154(1). Neither of these definitions can be transposed for present purposes.

criminal investigation.[196] This test would therefore fail to distinguish between criminal and non-criminal investigations.

3.52 Further, we do not consider that the test of whether a search warrant relates to a criminal investigation should depend on the hypothetical question of whether evidence may be found relating to the commission of a criminal offence. An incidental consequence of a search under warrant may be that the material found relates to the commission of a criminal offence, however, it is not necessarily the dominant purpose for which the search warrant is obtained.[197]

3.53 Nor do we consider that the test of whether a search warrant relates to a criminal investigation should depend on the intention of the investigator. Applications for search warrants may be actuated by a plurality of purposes,[198] the dominant purpose of which may not be easily discerned.

3.54 In our provisional view, the test for whether a search warrant relates to a criminal investigation should be an objective test based on the facts or beliefs relied upon in the application. We consider that a search warrant would relate to a criminal investigation where these facts or beliefs (if true) demonstrate some form of criminal activity, whether or not it is intended to base a prosecution on them. The grounds of this kind in existing powers to issue search warrants are where there are reasonable grounds for believing, or in some cases suspecting, that:

(1) a criminal offence has been, is being or is about to be committed;[199] or

(2) there is to be found on the premises:

(a) evidence of the commission of a criminal offence;[200]

(b) material which it is a criminal offence to possess;[201]

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196 For example, a search warrant may be issued under the Data Protection Act 2018, sch 15, para 1(1) where there are reasonable grounds for suspecting either a contravention of the data protection principles or the commission of an offence under the Act.

197 *R v Southwark Crown Court ex parte Bowles* [1998] AC 641, 651 per Lord Hutton. See HWR Wade and CF Forsyth, *Administrative Law* (11th ed 2014) p 352.

198 *R v Southwark Crown Court ex parte Bowles* [1998] AC 641.

199 For example, Animal Welfare Act 2006, s 22(4): reasonable grounds for believing that an offence under section 8(1) or (2) of the Animal Welfare Act 2006 (fighting) has been committed in relation to any animal and an animal in relation to which the offence has been committed is on the premises; Data Protection Act 2018, sch 15, para 1(1): reasonable grounds for suspecting that an offence under this Act has been or is being committed.

200 For example, Chemical Weapons Act 1996, s 29: reasonable grounds for suspecting evidence of the commission of an offence is to be found on the premises; Video Recordings Act 1984 (repealed and revived by Video Recordings Act 2010), s 17: evidence that an offence under the Act has been or is being committed on the premises. Wildlife and Countryside Act 1981, s 19(3): evidence of an offence under the Act may be found on premises.

201 For example, Cluster Munitions (Prohibitions) Act 2010, s 12(2): reasonable cause to believe munition is on the premises which is prohibited and there is no defence for having such munition; Protection of Children Act 1978, s 4: reasonable ground for suspecting there is an indecent photograph etc on the premises;

(c) material obtained by means of a criminal offence or representing the proceeds of crime;[202]

(d) material which has been, is being, or is about to be used in connection with a criminal offence;[203] or

(e) material connected to an ongoing criminal investigation.[204]

A definition of a search warrant that relates to a criminal investigation should be framed in such a way as to include these instances.

3.55 If a definition on these lines is adopted, we consider that any definition should be self-contained and exhaustive to prevent the risk of uncertainty. It will therefore be necessary to review all the non-police powers to issue warrants to which sections 15 and 16 currently apply. This is in order to determine whether the provisions fall within the definition of a criminal investigation to ensure that the safeguards continue to apply.

3.56 We do not consider that, by adopting this definition, the instances in which the safeguards currently apply ought to be narrowed. For example, as noted at paragraph 3.13 above, sections 15 and 16 of PACE have been specifically extended to search warrants sought for the purposes of a confiscation investigation, a money laundering investigation, a detained cash investigation, a detained property investigation or a frozen funds investigation.[205] Case law suggests that such investigations are not, strictly speaking, criminal investigations.[206] Investigations such as these ought to nonetheless be included within the definition of a search warrant relating to a criminal investigation to ensure that the safeguards continue to apply.

Consultation Question 1

We provisionally propose that the statutory safeguards in sections 15 and 16 of the Police and Criminal Evidence Act 1984 should apply to all search warrants that relate to a criminal investigation. Do consultees agree?

Salmon and Freshwater Fisheries Act 1975, s 33(2): probable cause to suspect illegal nets or instruments are on premises.

202 For example, Control of Trade in Endangered Species (Enforcement) Regulations 1997 (SI 1997 No 1372), reg 9(1); Theft Act 1968, s 26.

203 For example, Criminal Damage Act 1971, s 6: reasonable cause to believe that any person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse) to destroy or damage property belonging to another; or to destroy or damage any property in a way likely to endanger the life of another.

204 For example, Terrorism Act 2000, sch 5, para 1: reasonable grounds for believing that there is material on premises to which the application relates which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation; Customs and Excise Management Act 1979, s 161A(1): satisfied that there are reasonable grounds to suspect anything liable to forfeiture is kept or concealed in any building or place.

205 Proceeds of Crime Act 2002 (Application of Police and Criminal Evidence Act 1984) Order 2015 (SI 2015 No 759) (as modified by SI 2017 No 1222), art 2.

206 *R v Southwark Crown Court ex parte Bowles* [1998] AC 641, 648 per Lord Hutton.

Consultation Question 2

We provisionally propose that anyone who applies for a search warrant that relates to a criminal investigation should be required to follow Code B of the Police and Criminal Evidence Act 1984. Do consultees agree?

Consultation Question 3

We provisionally propose that the definition of a "search warrant that relates to a criminal investigation" should be any search warrant in which the grounds for the application include facts or beliefs which (if true) would show that:

(1) a criminal offence has been, is being or is about to be committed; or

(2) there is to be found on the premises:

(a) evidence of the commission of a criminal offence;

(b) material which it is a criminal offence to possess;

(c) material obtained by means of a criminal offence or representing the proceeds of crime;

(d) material which has been, is being or is about to be used in connection with a criminal offence; or

(e) material connected to an ongoing criminal investigation.

Do consultees agree?

Entry and inspection warrants

3.57 The proposals above only concern search warrants that relate to a criminal investigation. They do not extend to entry warrants and inspection warrants, which are not, strictly speaking, within the scope of the project. We consider, however, that there is force in the argument that the statutory protections in sections 15 and 16 of PACE should apply to all warrants that include an implied power to search, even if this power is not explicit on the face of the statute. As we have discussed, an inspection warrant will frequently include a right to "rummage", by, for example, searching a desk for documents or going into back rooms to find goods to be seized.[207] In many cases where an inspection warrant or entry warrant is being executed, there will also be statutory powers to break into rooms and containers and seize articles, even though these powers are not expressly conferred by the warrant. In cases where an entry warrant

[207] See *R (Helidon Vuciterni) v Brent Magistrates' Court* [2012] EWHC 2140 (Admin), (2012) 176 JP 705, discussed at para 3.31 above.

relating to a criminal investigation is obtained for the purpose of searching premises, it may also be considered arbitrary that safeguards do not apply simply because of the legislative drafting of the provision.

3.58 There are two potential problems with extending sections 15 and 16 of PACE to all entry or inspection warrants conferring or giving rise to a power of search that relate to a criminal investigation. First, such a category would be difficult to define. Whether an entry or inspection warrant provision contains an implied power of search beyond the terms of statute is fact specific and cannot necessarily be anchored to statutory criteria in the same way as search warrant provisions. For example, a warrant to enter and inspect premises can be issued where there are reasonable grounds for suspecting that an obscene performance is taking place, contrary to section 2 of the Theatres Act 1968.[208] Depending on the layout of the premises, and if the performance is concealed, an investigator may need to go beyond mere inspection and search the premises.

3.59 Secondly, not all the protections in sections 15 and 16 are capable of being applied in every case to entry and inspection warrants. For example, under section 15(2)(c) the applicant must identify, so far as is practicable, the articles or persons to be sought. Under section 15(6)(b), this must also be stated in the warrant. In cases where the primary purpose of the warrant is to allow the investigator to ascertain the existence of a 'state of affairs' or to remedy a dangerous situation, rather than to collect evidence or make an arrest, there may not be any such articles or persons, though powers of search or seizure may arise when the investigator is on the premises. Similarly, in these cases section 16(9), requiring the person to make an endorsement on the warrant stating whether the articles were found, and if anything else was seized, will not apply.

3.60 We do not consider that this is an obstacle to extending the protections in sections 15 and 16 to inspection and entry warrants carrying powers of search. The same limitations will apply in the case of several search warrants explicitly so called that are subject to section 15 and 16 of PACE. In particular, those where the primary purpose is to prevent or remedy an unlawful or dangerous situation rather than to collect evidence.[209] We do consider, however, that demarcating those entry and inspection to which sections 15 and 16 ought to apply poses problems. We seek consultees' views on this issue.

Consultation Question 4

We invite consultees' views on whether the statutory safeguards in sections 15 and 16 of the Police and Criminal Evidence Act 1984 should apply to entry or inspection warrants conferring or giving rise to a power of search that relate to a criminal investigation. If so, to which provisions should this apply?

CLARIFYING SECTION 15(1) OF PACE

Current law

[208] Theatres Act 1968, s 15(1).

[209] Animal Welfare Act 2006, s 19(4).

3.61 As stated above, section 15(1) of PACE provides:

> This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

3.62 There are three aspects of section 15(1) of PACE that lack clarity:

(1) what elements of the search are rendered unlawful as a result of non-compliance with section 15(1) of PACE;

(2) what conduct must comply with section 15(1) of PACE; and

(3) what breaches of sections 15 and 16 of PACE make the entry, search unlawful.

The elements of the search rendered unlawful by non-compliance

3.63 Section 15(1) states that failure to comply with the provisions in sections 15 and 16 will render any entry or search unlawful. The Divisional Court, however, expressed the view that non-compliance with section 15(1) also renders seizure unlawful.[210] Therefore, the warrant itself will not be unlawful as a result of non-compliance with section 15 and 16,[211] only the entry, search and seizure.

The conduct that must comply with section 15(1) of PACE

3.64 Section 15(1) of PACE states that "an entry on or search of premises under a warrant is unlawful unless *it* complies with this section and section 16 below". There is an ambiguity in the word "it". Does "it" refer to the warrant, to the entry and search, or to both? Whilst a workable interpretation has been reached by the Divisional Court,[212] we consider that the section should be clarified.

3.65 Section 15(1) of PACE states that "it" must comply with both sections 15 and 16. However, the two sections do not govern the same subject matter:

(1) section 16 of PACE governs the conduct of the search, but makes no provision about warrants. A warrant therefore cannot be said to comply, or not comply, with section 16;

(2) conversely, section 15 of PACE governs the application for and issue of a warrant, but makes no provision about the entry or the search. It is therefore hard to see how the entry and search can comply, or not comply, with section 15; and

(3) if the intention is that both the warrant and the entry and search must comply with the sections, the word "it" seems inappropriate.

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210 *R (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 WLR 948 at [31] per Elias LJ. See also *Lees v Solihull Magistrates' Court* [2013] EWHC 3779 (Admin), [2014] Lloyd's Rep FC 23 at [39].

211 *Lees v Solihull Magistrates' Court* [2013] EWHC 3779 (Admin), [2014] Lloyd's Rep FC 23 at [43].

212 *R v Chief Constable of Lancashire ex parte Parker and another* [1993] QB 577.

3.66 In *R v Longman*, the Court of Appeal said that they suspected the intention was to refer to both the warrant and the search, even if they doubted the wording had achieved that intention.[213] The Divisional Court in *R v Chief Constable of Lancashire, ex parte Parker and another* however considered "it" to refer to both the warrant and the search and that doing so "does no violence to the language of the subsection and gives effect to what seems to us to be its obvious legislative purpose".[214] Professor Richard Stone agrees that:

> The best view is that the whole process – warrant, entry and search – must comply with the requirements of the sections … The point may now be taken to be settled, pending any review by the Court of Appeal or Supreme Court.[215]

3.67 Further support for this interpretation can be found in the Police and Criminal Evidence (Northern Ireland) Order 1989, which provides that the warrant, entry and search must comply with the requirements of the articles.[216]

3.68 More recently, the Divisional Court stated that the requirement for the entry and search to comply with section 16 does not apply to events that apply after the entry and search have been completed.[217] Therefore, where section 15(1) refers to entry and search being unlawful unless "it" complies with sections 15 and 16, this means entry and search.[218] Further, section 15(1) of PACE does not apply to events that occur after the entry and search have been completed; therefore, entry and search does not include post-search activity.[219]

The extent of non-compliance with the safeguards which makes the search unlawful

3.69 The courts have held that the wording of section 15(1) is unequivocal[220] and that the requirements of sections 15 and 16 should be applied stringently.[221] Recently, however, following the quashing of a warrant, the Divisional Court observed:

> This decision should not be seen as encouraging the pursuit of unmeritorious technical challenges to the relevant authorities' use of the relevant powers under PACE (or associated powers). The s. 8 procedure under PACE must be workable. Search and seizure warrants play a crucial role in the criminal justice system, and the requirements of ss. 8, 15 and 16 of PACE must be applied in a manner which takes

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213 *R v Longman* [1988] 1 WLR 619, at 623.

214 *R v Chief Constable of Lancashire ex parte Parker and another* [1993] QB 577, at 584.

215 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 4.19.

216 PACE (NI) Order 1989 (SI 1989 No 1341), Art 17(1).

217 *R (Hicks) v Commissioner of the Metropolis* [2012] EWHC 1947 (Admin), [2012] ACD 102 at [247] per Richards LJ.

218 The Divisional Court was ambiguous on whether the warrant itself must comply with the safeguards.

219 *R (Hicks) v Commissioner of the Metropolis* [2012] EWHC 1947 (Admin), [2012] ACD 102 at [247] per Richards LJ.

220 *R (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 WLR 948 at [31] per Elias LJ.

221 *R v Central Criminal Court ex parte AJD Holdings* [1992] Criminal Law Review 669.

careful account of the practical realities of running large-scale fraud investigations such as this. But the statutory safeguards provide an important constitutional check.[222]

3.70 This pragmatic approach is reflected by the fact that the courts have placed varying degrees of stringency on particular provisions in sections 15 and 16 of PACE. In the next few paragraphs we give some examples.

Breaches of section 15

3.71 Whether non-compliance with section 15(6) will render the warrant unlawful depends on the gravity of the breach. Errors that may render the warrant unlawful include those where a warrant:[223]

(1) does not include a schedule of the premises authorised for search;[224]

(2) fails to specify the relevant statutory power under which it was issued;[225]

(3) does not on its face identify the articles or persons sought (even where a separate document listing the required information is provided);[226]

(4) fails to specify the material sought with sufficient precision;[227]

(5) affords discretion to the executing officer(s) as to its terms;[228] or

(6) has not been certified appropriately as a copy.[229]

3.72 On the other hand, failure to specify whether the warrant was a specific premises warrant or an all premises warrant was not sufficient to render a search unlawful.[230]

3.73 The authorities are not entirely consistent regarding the requirement for the warrant to specify the name of the person who applies for it under section 15(6)(a)(i). In *R (G) v Commissioner of Police of the Metropolis*, Lord Justice Laws held that, where a search warrant referred to a police unit, this "does not in my judgment strictly comply with the statute and as I see the matter, this is a context in which the statute must be complied

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222 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [85].

223 This list is helpfully provided in Piers Von Berg, *Criminal Judicial Review: a Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (2014) para 4-43.

224 *R (Global Cash & Carry Ltd) v Birmingham Magistrates' Court* [2013] EWHC 528 (Admin), [2013] ACD 48. See also *R (Cook) v Serious Organised Crime Agency* [2010] EWHC 2119 (Admin), [2011] 1 WLR 144.

225 *R (G) v Commissioner of Police of the Metropolis* [2011] EWHC 3331 (Admin).

226 *R v Chief Constable of Lancashire Constabulary ex parte Parker* [1993] QB 577. See also *R (Van Der Pijl) v Crown Court at Kingston* [2012] EWHC 3745 (Admin), [2013] 1 WLR 2709.

227 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [70]; *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647.

228 *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157.

229 *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157.

230 *R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091.

with to the letter".[231] In *R (Goode) v Nottingham Crown Court*, by contrast, Lord Justice Pitchford held that, where a warrant omitted the name of the officer who made the application, this was only a technical breach and should not render the warrant unlawful.[232]

Breaches of section 16

3.74 Section 16(5) sets out the information that persons conducting the search must provide to the occupier, including a copy of the warrant. The Divisional Court has held that, notwithstanding the unambiguous terms of section 16(5) of PACE, on the facts of the case where the warrant was produced after the search was completed, the consequence of a breach should not inevitably lead to the grant of what is discretionary relief in judicial review.[233] In reaching this conclusion, the Court referred to Code B of PACE, paragraph 6.8, which provides that, if the occupier is present, copies of the warrant shall 'if practicable' be given to them before the search has begun.

3.75 It has also been held that failure to return the warrant to the court following a search contrary to section 16(10) ought not to invalidate an otherwise lawful search. To invalidate a search because of later events would be an unduly restrictive reading.[234] This reasoning was cited with approval to justify the same conclusion for potential breaches of section 16(9), which requires a constable to endorse the warrant stating whether the articles or persons sought were found.[235]

3.76 This reasoning reflects the fact that, as discussed above, where section 15(1) refers to entry and search being unlawful unless "it" complies with sections 15 and 16, "it" means entry and search only, and not post-search activity. Therefore, non-compliance with section 16(9) to (12) will not render entry, search and seizure unlawful.

Consequence of search or warrant being unlawful

3.77 Where a search or warrant is "unlawful" this could potentially lead to a civil action for trespass to land or goods. In most cases, however, the remedy lies in a judicial review of the decision to issue the warrant. The practical effect of holding a search or warrant to be unlawful is a declaration to that effect, the duty to return the material and, in some cases, pay damages for breach of human rights.[236] Relief in judicial review proceedings is, however, discretionary.[237]

3.78 Quite apart from whether a statutory breach has occurred, permission to apply for judicial review and the grant of relief may be refused under section 31 of the Senior

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231 *R (G) v Commissioner of Police of the Metropolis* [2011] EWHC 3331 (Admin) at [23].

232 *R (Goode) v Nottingham Crown Court* [2013] EWHC 1726 (Admin), [2014] ACD 6 at [45].

233 *R (Glenn & Co (Essex) Ltd) v HMRC* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22 at [77] per Simon J.

234 *R (Hicks) v Commissioner of the Metropolis* [2012] EWHC 1947 (Admin), [2012] ACD 102 at [247] per Richards LJ.

235 *R (Haly) v Chief Constable of West Midlands Police* [2016] EWHC 2932 (Admin) at [17].

236 *R (Glenn & Co (Essex) Ltd) v HMRC* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22 at [75] per Simon J.

237 *R (Hicks) v Commissioner of the Metropolis* [2012] EWHC 1947 (Admin), [2012] ACD 102 at [247] per Richards LJ.

Courts Act 1981 if it appears to be highly likely that the outcome for the applicant would not have been substantially different had the conduct complained of not occurred.

3.79 We discuss these topics in depth in Chapter 7, where we provisionally propose a new remedy for breach of sections 15 or 16 of PACE, consisting of an order for the return of the materials taken and (in the case of a breach of section 15) the setting aside of the warrant.

Reform

3.80 We provisionally consider that the wording of 15(1) is unclear and, on its face, fails to account for the practicalities of criminal investigations.

Clarifying which elements of the search are rendered unlawful following a breach

3.81 Case law suggests the correct interpretation of section 15(1) is that entry, search and seizure will be rendered unlawful where there is non-compliance with the safeguards. Section 15(1), however, only refers to entry and search. It was suggested by one stakeholder that section 15(1) should be clarified to state that, unless the safeguards are complied with, any seizure is also unlawful.

Consultation Question 5

We provisionally propose that section 15(1) of the Police and Criminal Evidence Act 1984 should be amended to clarify that an entry on, search of, or seizure of materials from, any premises under a warrant is unlawful unless it complies with sections 15 and section 16 of the Police and Criminal Evidence Act 1984. Do consultees agree?

Clarifying the conduct that must comply with the safeguards

3.82 The Divisional Court consider that "it", in the context of compliance with the safeguards, refers to both the warrant and the search. We consider that it would be useful to amend section 15(1) to make it clear that the warrant, entry and search must all comply with the safeguards.

Consultation Question 6

We provisionally propose that section 15(1) of the Police and Criminal Evidence Act 1984 should be amended to clarify that entry, search and seizure are unlawful unless the warrant, entry and search comply with sections 15 and section 16 of the Police and Criminal Evidence Act 1984. Do consultees agree?

Clarifying when a breach of section 15(1) will occur

3.83 We are interested in consultees' views on whether every breach of section 15 or 16 of PACE should render the entry, search and seizure unlawful. In particular we would be grateful for views on whether the current case law achieves just outcomes or whether it would be desirable to amend the statute to clarify which breaches do and do not have the effect of making the search unlawful.

3.84 One view is that, rather than specify which breaches would be sufficient to render the search unlawful, either: the provisions of sections 15 and 16 of PACE should spell out more clearly what conduct is required under the particular provision; and/or section 15(1) of PACE should spell out more clearly the discretionary nature of subsequent relief for non-compliance.

Consultation Question 7

We invite consultees' views on whether every breach of section 15 or 16 of the Police and Criminal Evidence Act 1984 ought to have the effect that the search and seizure of material are unlawful. If not, which breaches should and should not have this effect? In particular, we are interested in consultees' views in respect of:

(1) Section 15(6) of the Police and Criminal Evidence Act 1984; and

(2) Section 16(9) to (12) of the Police and Criminal Evidence Act 1984.

We also invite consultees' views on whether it is desirable to confirm the above position in statute.

Chapter 4: Applying for a search warrant

INTRODUCTION

4.1 In this chapter, we consider potential reform to the procedure by which investigators apply for a warrant. We consider possible reform to the following areas:

(1) who may apply for a search warrant;

(2) the "Information" or application form;

(3) the duty of candour;

(4) the draft search warrant;

(5) the hearing; and

(6) search following arrest.

4.2 As observed recently by the Supreme Court, the statutory search warrants scheme is designed to be operated speedily at an early stage in a police investigation.[238] We consider that the procedure governing the granting of search warrants ought to be reformed in order to improve procedural efficiency and reduce the scope for serious errors. At the same time, we consider that the law ought to be made more comprehensible by clarifying and amending forms, guidance and enshrining common law duties and judicial observations in legislation. Our intention is to promote greater compliance with statutory criteria and the duty of candour.

4.3 There is no universally applicable search warrant application procedure. Instead, there is considerable variation in approach, depending on the agency applying and the type of search warrant sought. This has resulted in varying cultural practices. Some differences are institutional, for example, where individual agencies have provided distinct guides to best practice.[239] Other differences are geographical, such as where HMCTS regions and specific courts have piloted search warrant procedure schemes.[240] Whilst many aspects of these individual schemes are to be commended, there are disparities in practice across England and Wales.

4.4 Our starting point of principle is that there ought to be regional and institutional consistency in the process for applying for a search warrant or production order so far as possible. This would reduce the risk of inconsistent levels of scrutiny given to a search warrant application depending on the geographical region in which the warrant

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238 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [15]. Discussed in *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [13].

239 For example, the National Crime Agency issue internal guidance on when to seek the input of their legal team when preparing a search warrant application.

240 For example, to deal with out of hours applications and whether applications may be submitted electronically.

is sought or the particular agency carrying out the investigation. At the same time, the application procedure ought to take account of the nature of different investigative powers and the various operational needs of those agencies applying for a search warrant.

4.5 Clear and consistent application procedures also reduce the scope for error in an area of law that is particularly complex. They also ensure that the process of issuing search warrants, which, it must be emphasised, authorise state intrusion, is conducted in accordance with human rights protections.

4.6 The use of sensitive material when applying for a warrant generates unique issues to which we have devoted a separate chapter (Chapter 8).

WHO MAY APPLY FOR A SEARCH WARRANT

Current law

4.7 A substantial proportion of search warrants, including search warrants under section 8 of PACE, can only be applied for by a constable.[241] As discussed at paragraph 3.10 above, the term "constable" refers to a police officer of any rank. It covers not only territorial police officers but also officers in special police forces. These are the Ministry of Defence Police;[242] British Transport Police;[243] Civil Nuclear Police;[244] and special constables.[245] Service police officers have their own regime under service law.[246] Certain other categories of officials have some or all of the powers and duties of a police constable. These are authorised civilian investigating officers;[247] and designated National Crime Agency Officers.[248]

4.8 In some cases, the power to apply for a search warrant under PACE has been extended specifically by statute to other investigators. These are Welsh Revenue Authority

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241 For example, Anti-terrorism, Crime and Security Act 2001, s 66; Channel Tunnel (Security) Order 1994 (SI 1994 No 570), art 14(5); Control of Trade in Endangered Species (Enforcement) Regulations 1997 (SI 1997 No 1372), reg 9(1); Copyright Act 1956, s 21A; Copyright (Computer Software) Amendment Act 1985, s 3; Copyright, Patents and Designs Act 1988, ss 109, 200 and 297B; Crime (International Co-operation) Act 2003, s 17; Criminal Justice Act 1988, s 142; Customs and Excise Management Act 1979, s 161A(3); Dogs (Protection of Livestock) Act 1953, s 2A; Drug Trafficking Act 1994, s 56; Extradition Act 2003, s 156; International Criminal Court Act 2001, s 37 and sch 5; Knives Act 1997, s 5; Northern Ireland (Location of Victims' Remains) Act 1999, s 6; Protection from Harassment Act 1997, s 2B; Public Order Act 1936, s 2(5); Public Order Act 1986, ss 24 and 29H; Sexual Offences Act 2003, s 96B; Terrorism Act 2000, s 42 and sch 5, para 11; Terrorism Prevention and Investigation Measures Act 2011, sch 5, para 8; Trade Marks Act 1994, s 92A.

242 Ministry of Defence Police Act 1987, s 2.

243 Railways and Transport Safety Act 2003, s 31(1).

244 Energy Act 2004, s 52.

245 Police Act 1996, s 30(2).

246 Armed Forces Act 2006, s 83 and Sch 1, para 12.

247 Police Reform Act 2002, s 38 (as amended by the Policing and Crime Act 2017, s 38).

248 Crime and Courts Act 2013, s 10.

officers;[249] an officer of Revenue and Customs;[250] immigration officers and designated customs officials;[251] officers of the department for Business, Energy and Industrial Strategy;[252] and labour abuse prevention officers.[253]

4.9 Other provisions allow an application to be made by either a police constable or some other specified category of investigator.[254] An increasing number of agencies now have the power to apply for a search warrant, or authorise an individual to apply for a warrant on their behalf. These include the Charity Commission;[255] the Immigration Services Commissioner;[256] the Information Commissioner;[257] an immigration officer;[258] the Bank of England;[259] Secretaries of State;[260] the Serious Fraud Office;[261] the Financial Conduct Authority;[262] the Competition and Markets Authority;[263] the Prudential Regulation

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249 Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 (SI 2018 No 400), sch 1, para 1.

250 Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015 (SI 2015 No 1783), sch 1.

251 Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013 (SI 2013 No 1542), schs 1 and 2.

252 Police and Criminal Evidence Act 1984 (Department of Trade and Industry Investigations) Order 2002 (SI 2002 No 2326), art 3.

253 Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017 (SI 2017 No 520), reg 3.

254 Animal Welfare Act 2006, ss 19(4) and 23(1): an inspector (as appointed by the appropriate national authority or a local authority under the Animal Welfare Act 2006, s 51) or constable; Wireless Telegraphy Act 2006, s 97(1): either a constable or person authorised by OFCOM or the Secretary of State; Iran (United Nations Sanctions) Order 2009 (SI 2009 No 886), sch 2, para 2; Iraq (United Nations Sanctions) Order 2003 (SI 2003 No 1519), sch 3, para 2: a constable or person authorised by the Secretary of State or the Commissioners to act for the purposes of this paragraph either generally or in a particular case.

255 Charities Act 2011, s 48: a member of staff of the Charity Commission.

256 Immigration and Asylum Act 1999, s 92A: the Immigration Services Commissioner (this includes a reference to a member of staff authorised in writing by the Immigration Services Commissioner under the Immigration and Asylum Act 1999, s 92A(7)).

257 Data Protection Act 2018, sch 15, para 1(1).

258 Immigration Act 1971, ss 28FB, 28B and 28D.

259 Banking Act 2009, s 194: an inspector (as appointed by the Bank of England under the Banking Act 2009, ss 83ZC and 83ZD).

260 Compensation Act 2006, s 8 and Compensation (Claims Management Services) Regulations 2006 (SI 2006 No 3322), reg 37: a regulator (as designated by the Secretary of State under the Compensation Act 2006, s 5); Merchant Shipping Act 1995, s 247: a receiver (as appointed by the Secretary of State, with consent of the treasury under the Merchant Shipping Act 1995, s 248); Iran (United Nations Sanctions) Order 2009 (SI 2009 No 886), sch 2, para 2; Iraq (United Nations Sanctions) Order 2003 (SI 2003 No 1519), sch 3, para 2: a constable or person authorised by the Secretary of State or the Commissioners to act for the purposes of this paragraph either generally or in a particular case; Cluster Munitions (Prohibitions) Act 2010, s 12(2): any person acting under the authority of the Secretary of State.

261 Criminal Justice Act 1987, s 2(4).

262 Financial Services and Markets Act 2000, ss 122D and 131FB: by, or on behalf of, the Financial Conduct Authority.

263 Competition Act 1998, ss 28, 28A, 62, 62A, 63 65G and 65H and Enterprise Act 2002, s 194.

Authority;[264] an officer of revenue and customs;[265] approved mental health professionals;[266] the Gas and Electricity Markets authority;[267] the European Securities and Markets Authority;[268] and OFCOM.[269] Some provisions do not directly specify who may apply for a warrant.[270]

4.10 This growth in the number of organisations empowered by statute to apply for a search warrant has developed in a piecemeal fashion, resulting in an incoherent legislative landscape and problems in practice.

4.11 First, we are informed that there are organisations that have investigators and a prosecutorial remit but no power to apply for a warrant. One example is the Department for Work and Pensions. In such instances, they must solicit the help of the police to make an application for a search warrant. Secondly, we are informed that some agencies may obtain search warrants for offences not within their remit.

4.12 This suggests that the search warrants legislation is being used in a way that was not intended when it was enacted: the police are now asked to seek warrants for other agencies even where the police themselves are not conducting the investigation. Such practice is difficult to reconcile with the Divisional Court's observation that the officer applying for the warrant at court and giving information on oath should, save in exceptional circumstances, be an officer directly involved in the investigation, as otherwise the magistrate is unlikely to get the full and coherent picture he or she is entitled to expect.[271] It also adds cost and delay to require a constable to swear the information on oath when an investigator may be more conversant with the investigation and better placed to satisfy the court of the relevant statutory conditions.

Reform

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264 Friendly Societies Act 1992, s 62A: by, or on behalf of, the Financial Conduct Authority or the Prudential Regulation Authority.

265 Customs and Excise Management Act 1979, s 161A(1).

266 Mental Health Act 1983, s 135: an approved mental health professional (as approved by a local social services authority (as defined in s 145(1)) under the Mental Health Act 1983, s 114).

267 Electricity and Gas (Market Integrity and Transparency) (Enforcement etc) Regulations 2013 (SI 2013 No 1389), reg 16: a person authorised by the Gas and Electricity Markets Authority.

268 Credit Rating Agencies Regulations 2010, reg 33(5): an official of, or person authorised by, the European Securities and Markets Authority.

269 Wireless Telegraphy Act 2006, s 97(1): either a constable or person authorised by OFCOM or the Secretary of State.

270 Animals (Scientific Procedures) Act 1986, s 25; Anti-terrorism, Crime and Security Act 2001, s 52; Biological Weapons Act 1974, s 4; Broadcasting Act 1990, s 196; Chemical Weapons Act 1996, ss 5(2) and 29; Children and Young Persons (Harmful Publications) Act 1955, s 3; Communications Act 2003, s 366; Competition Act 1998, s 28A; Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012), reg 115(3); Criminal Damage Act 1971, s 6; Customs and Excise Management Act 1979, s 188C; Dangerous Dogs Act 1991, s 5; Environment Act 1995, sch 18, para 2; Firearms Act 1968, s 46; Forest Law Enforcement, Governance and Trade Regulations 2012 (SI 2012 No 178), reg 6(6); Forgery and Counterfeiting Act 1981, ss 7 and 24.

271 *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157 at [167] per Simon J.

4.13 The problems outlined above invite the question as to which agencies ought to be able to apply for search warrants and we discuss this as a separate issue in Chapter 6.[272]

4.14 There is an argument that the range of agencies able to apply for a search warrant should be broad enough to encompass the growing number of different investigative and prosecuting authorities. There is already a statutory duty on "persons other than police officers who are charged with the duty of investigating offences" to "have regard to" any relevant provisions of Codes made under section 67 of PACE, including Code B of PACE.[273] It may be the case that particular agencies falling within this category ought to be able to apply for a search warrant.

4.15 There are two main justifications for expanding the pool of agencies able to apply for a search warrant. First, it would save time and resources by not requiring the police to apply on an investigator's behalf. Secondly, it would create a more consistent position for investigative agencies and ensure that those who appear before the court are fully conversant with the investigation.

4.16 There may be a logistical disadvantage to expanding the agencies able to apply for a search warrant. The police or other agencies may be unwilling to execute warrants on behalf of agencies where they have had no involvement in the application process. We do not consider that investigative agencies should be able to apply for a search warrant to be executed by another agency without their prior knowledge and approval. In such cases, a declaration could be made on the application form that there is an agreement with the prospective agency planned to conduct the search.

4.17 Another disadvantage would be that widening the pool of agencies able to apply for a warrant increases the pool of individuals empowered to apply for authorised state intrusion into the home or private space of a citizen. However, so long as a magistrate or judge is satisfied that the statutory conditions are met and the statutory safeguards are followed, we do not consider this to be a problem given the number of agencies currently empowered by statute to apply for a warrant. The purpose of the application procedure is to establish whether the necessary statutory grounds exist to justify the grant of a warrant. What is important is that the issuing authority is personally satisfied that there is before them sufficient material on which it is proper to grant the warrant.[274]

4.18 Further, we are not suggesting that that any agencies empowered to apply for a search warrant should automatically be able to conduct the search. The question of who may execute a search warrant raises important issues, which we discuss in Chapter 6.[275] We consider that the pool of agencies empowered to execute a search warrant should not be expanded unless there are compelling reasons for doing so.

4.19 We also consider that any expansion in the pool of agencies empowered to apply for a search warrant ought to be tightly defined. We are mindful of the growing use of search

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272 See para 6.4 above.

273 PACE, s 67(9).

274 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634 at [83]; *R (Hart) v Crown Court at Blackfriars* [2017] EWHC 3091 (Admin), [2018] Lloyd's Rep FC 98 at [18].

275 See para 6.4 above.

warrants for the purpose of private prosecutions.[276] In *R v Zinga*,[277] the Metropolitan Police Service assisted Virgin Media Ltd by obtaining search warrants for the purpose of a private prosecution against an individual for conspiracy to defraud. Restricting any expansion to those who are charged with the duty of investigating offences, would continue to prevent commercial entities and civilians from being able to directly apply for a search warrant.

4.20 Additionally, we consider that, as a matter of principle, it is important to ensure that investigative agencies only make applications for searches within the remit of their investigative responsibilities. Expanding the pool of agencies empowered to apply for a search warrant should not encourage applications for search warrants for offences that are not within their investigatory remit. For this reason, we do not consider that non-police agencies should be able to apply for a search warrant under section 8 of PACE, which is an all-purpose criminal investigation warrant. Where specialised search warrant provisions currently exist in respect of the investigation of criminal offences that fall within an agency's remit, only minor amendment would be required.

4.21 We therefore consider that organisations other than the police who are charged with the duty of investigating criminal offences should be able to apply for search warrants themselves. However, these organisations should only be able to do so where the investigation concerns an offence which they have a duty to investigate.

Consultation Question 8

We invite consultees' views on whether the power to apply for a search warrant should be extended to government agencies currently unable to apply for a search warrant but which are charged with the duty of investigating offences.

If so, we invite consultees' views on:

(1) which agencies ought to be able to apply for a search warrant; and

(2) for which types of investigations the agency ought to be able to apply for a search warrant.

THE "INFORMATION" OR APPLICATION FORM

Current law

4.22 The written information provided to the court in support of an application for a search warrant is known as the "Information". Primary legislation does not prescribe the form the Information must take. The Criminal Procedure Rules only require the applicant to

[276] Prosecution of Offences Act 1985, s 6(1). The right to bring a private prosecution is long established: its history is summarised in the judgments of Lord Wilson and Lord Mance in *R (Gujra) v Crown Prosecution Service* [2012] UKSC 52, [2013] 1 AC 484.

[277] [2014] EWCA Crim 52, [2014] 1 WLR 2228.

apply in writing.[278] As one stakeholder put it: in theory, the Information could be written on the back of a cigarette packet.

4.23 For eight search warrant provisions, including section 8 and Schedule 1 to PACE, the Criminal Procedure Rules have prescribed an application form, which takes the place of the Information, to guide applicants through the relevant criteria.[279]

4.24 The current form for section 8 of PACE was introduced in April 2016.[280] The form sets out boxes where different categories of information must be provided. There are notes at the end of the form that explain the meaning of key terms. The information prompted by the application forms is that which is required by legislation, the Criminal Procedure Rules and the common law duty of candour.

4.25 The Criminal Procedure Rules and the Criminal Practice Direction direct that these forms should be used where possible but provide no sanction for failing to use them. A judge or magistrate may therefore issue a warrant even though the wrong form, or no form, was used in the application, provided that all the required information is supplied.

4.26 One of the eight forms provided is a more generic application form to be used when applying for a search warrant under a provision to which sections 15 and 16 of PACE apply, other than section 8 of PACE.[281] Although a large proportion of search warrant applications will fall under this residual category, it does not cover all forms of warrant. As discussed in Chapter 3, at present sections 15 and 16 of PACE do not in general govern search warrants applied for by officers of agencies who do not have the status of constables. This means that some search warrant provisions may have no form provided and may or may not fall in this residual category.

4.27 In October 2015, Part 47A of the Criminal Practice Direction was introduced, which governs the application for and issue of warrants generally. Paragraph 47A of the Practice Direction requires Part 47 of the Criminal Procedure Rules and its accompanying forms to be followed. However, where there is no form designed for the particular warrant:

> The forms should still be used, as far as is practicable, and adapted as necessary. The applicant should pay particular attention to the specific legislative requirements for the granting of such an application to ensure that the court has all of the necessary

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278 Criminal Procedure Rules, r 47.26(2)(a).

279 PACE, s 8; PACE, sch 1; Criminal Justice Act 1987 s 2; Terrorism Act 2000; sch 5, para 11; Proceeds of Crime Act 2002, s 352; Crime (International Co-operation) Act 2003, s 16; Criminal Justice (European Investigation Order) Regulations 2017, regs 6, 11 and 15 to 19; and any provision to which ss 15 and 16 apply. In the case of production orders (including explanation orders, information orders, account monitoring orders and other similar procedures), there are ten instances in which an application form is prescribed under the Criminal Procedure Rules.

280 Under Criminal Procedure Rules, Part 47: available at https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/forms/iw001-eng.doc (last visited 29 May 2018).

281 https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crimpr-part6-rule6-32app.pdf (last visited 29 May 2018).

information, and, if the court might be unfamiliar with the legislation, should provide a copy of the relevant provisions.[282]

4.28 In *Hargreaves,* the Divisional Court stressed the need for caution in adapting forms designed for other legislation as there is a risk of adapting the form incorrectly.[283] In that case, both the application and the magistrates' decisions on issuing the warrant failed to address each of the statutory grounds, leading "inexorably to the conclusion that these warrants cannot stand".[284]

Reform

The need for an application form

4.29 We consider that application forms are desirable in principle for several reasons. First, as pointed out by the Law Society Criminal Law Committee, imprecision during the application and drafting of a search warrant often leads to a challenge to the lawfulness of entry, search and seizure. Ensuring that applications are properly drafted reduces the risk of expensive litigation and criminal investigations being frustrated. Secondly, the National Crime Agency has informed us that application forms are a useful way to guide applicants and prompt them to provide the necessary information.

4.30 Against this, some argue that set forms can encourage applicants to treat the application as a tick-box exercise instead of giving a full explanation of the background to the application. In our view, the benefits of application forms outweigh any disadvantages.

4.31 Ideally, we consider that there should be a specific application form for each statutory search warrant provision, to ensure that the applicant and issuing authority are guided through the necessary statutory criteria. Specific application forms would include the relevant legislative provisions, ensuring that both the applicant and the issuing authority apply their minds to the specific statutory conditions of the particular statutory search warrant provision.

4.32 The main problem with creating forms for every single search warrant provision is that it would be a significant undertaking, and would potentially overburden the Criminal Procedure Rule Committee and the Rules themselves when complete. It would also lead to numerous application forms. HHJ Edmunds QC, Resident Judge at Isleworth Crown Court, suggested that the number of different application forms should be reduced, not increased.

4.33 We consider that creating forms for every single search warrant provision may nonetheless be cost-effective if it removes the need for even a small number of appeals. Further, there are several reasons why creating forms for every search warrant provision may not prove so large an undertaking as may first appear. First, there is likely to be common ground between statutory provisions. Secondly, any potential codification

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282 Criminal Practice Direction Part 47A.5.

283 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [16].

284 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [32].

of search warrants legislation may lessen this burden by reducing the overall number of different powers for which application forms are needed. We discuss the possibilities for codification separately in Chapter 11. Thirdly, given the scale of the task, it could be completed in tranches, with the assistance of the specialist users or tribunals concerned. For example, within the specialised schemes, it may be possible to encourage relevant agencies to develop their own forms and then submit them to the Rule Committee for consideration.

4.34 Another option would be a halfway house whereby either specific forms for the most common warrants or general forms for all warrants are created. The benefits of this approach would be time saving, specifically given the rarity of some particular search warrant types. Additionally, a general form already exists when applying for a search warrant under a provision to which sections 15 and 16 of PACE apply, and if our provisional proposal to extend the scope of those sections is accepted this form will apply to more types of warrant. Against this, however, it may be said that those provisions which are infrequently used may leave applicants more prone to error owing to unfamiliarity. Further, some of these uncommonly used search warrant provisions may be particularly complex. Prescribing forms for the most common warrants, or generic forms for all warrants, may also increase the risk of inept or inaccurate adaptations of these forms when applying for warrants for which no specific form is prescribed, as in *Hargreaves*.

4.35 In addition to these points, we are interested in consultees' views on whether greater use could be made from filling in application forms online. We consider that, as the use of technology within the criminal justice system becomes more prevalent, an online system could be explored.

Consultation Question 9

We invite consultees' views on whether the lack of prescribed application forms causes problems in practice. If so, for which search warrant provisions?

We also invite consultees' views on whether:

(1) in principle, application forms should be prescribed for all search warrant provisions;

(2) application forms should be prescribed for only the most common types of warrant;

(3) there should be generic application forms not linked to particular types of warrant; or

(4) there should be no prescribed forms, and applicants should simply set out all the relevant information in narrative form.

We also invite consultees' views on whether online application forms ought to be devised that are interactive and guide the applicant through the appropriate questions.

Amending the application forms

4.36 Having discussed in which cases application forms should be created, we move on to consider the content of application forms.

4.37 In several cases, challenges to the lawfulness of search warrants have stemmed from the failure of those making the application to complete the application form properly.[285] In *Fitzgerald v Preston Crown Court*, Lord Justice Gross described the contents of an application form as "an impenetrable, discursive mass lacking a discernible sense of order".[286] The National Crime Agency review of all warrants and orders obtained in ongoing prosecutions identified the most commonly arising issues.[287] In respect of applications, these included:

(1) a failure to state that the subject of the warrant and/or occupier of the premises were of previous good character;

(2) insufficient time estimates;

(3) a lack of consistency of information across warrants and applications;

(4) a failure to detail the reliability and sensitivity of information contained within warrants; and

(5) a failure to explain why statutory grounds were met.[288]

4.38 The problem of the incompleteness of the application form may be attributable to both the form itself and the knowledge of the officers completing the application form.

4.39 During preliminary discussions, some stakeholders argued for redesigning the application forms to reflect more clearly the information which should be included. For example, one stakeholder stated that the application form makes it difficult to distinguish between a warrant for "specific premises" and one for "all premises", leading to problems in practice. Others argued against longer and more complex forms. Instead, they suggested that better guidance should be made available to the police and other bodies responsible for filling in these applications. They did not wish the form to become a tick box exercise, where each question is answered "yes" or "no" without further comment.

4.40 Although we understand the concerns about ever longer and more complex forms, we consider that there may be a case for some changes, which need not necessarily make forms longer or more complex. For example, the form currently asks the applicant to estimate how long the court might take to consider the application. However, the form does not provide a space to record how long the application actually took. Yet the time

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285 For example, *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

286 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [20].

287 National Crime Agency, *Warrant Review Closing Report*.

288 National Crime Agency, *Warrant Review Closing Report*, pp 11 to 13. Similar findings were reached in respect of Proceeds of Crime Act orders (pp 13 to 15).

taken is information which the occupier might reasonably request, as it indicates the level of scrutiny given to the application by the issuing authority.[289]

4.41 We consider that it would be advantageous for the application form to require the issuing authority to specify the time taken to consider the application and the time of the application. This should include the start and finish times of the hearing to allow for analysis of when applications are being slotted into the court listing for the day. Further, it should include any required reading time in advance of the hearing in circumstances where the issuing authority had copies of the information in advance of the hearing. This would promote transparency about whether the issuing authority has considered the application in advance. This should also prompt the issuing authority to consider whether adequate time has been given to scrutinising the application and might also encourage early sight and consideration of the application.

4.42 We welcome views on the suggestion below, as well as inviting consultees to provide their views more generally on how the application forms ought to be amended.

Consultation Question 10

We provisionally propose that all search warrant application forms should be amended to require the issuing authority to record the time taken to consider the application. This should be divided into time for pre-reading and the hearing itself. Do consultees agree?

We invite consultees' views on how else search warrant application forms ought to be amended.

THE DUTY OF CANDOUR

Current law

4.43 When applying for a warrant, the applicant must make full and frank disclosure. This includes mentioning any circumstances that might militate against the search warrant being issued. This is referred to as the "duty of candour". As a common law duty, the duty of candour derives from a large body of case law but is not to be found on the face of a statute.[290] Failure to comply with the duty of candour can lead to a warrant being quashed on judicial review.[291]

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289 *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin), (2014) 178 JP 336; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

290 *R v Lewes Crown Court ex parte Hill* (1991) 93 Cr App R 60, 69 per Bingham LJ; *R (Energy Financing Team) v Bow Street Magistrates' Court* [2006] 1 WLR 1316, 1325 per Kennedy LJ; *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [25]; Adam Craggs, "Golfrate Property Management: applicants for search warrants" (2014) 1237 *Tax Journal* 13.

291 *R (Daly) v the Commissioner of Police of the Metropolis* [2018] EWHC 438 (Admin) at [33] per Sir Brian Leveson P.

4.44 The duty was described recently by the Supreme Court in *R (Haralambous)* as meaning that the information on which the applicant relies must constitute a fair and balanced presentation of the circumstances on the basis of which a warrant is sought.[292]

4.45 In *R (Golfrate Property Management Ltd) v Southwark Crown Court*, the Divisional Court emphasised that police officers applying for search and seizure warrants owed a duty to ensure that judges faced with such applications were presented with a full and clear picture of what lay behind the application.[293]

4.46 In *Re Stanford International Limited*, Lord Justice Hughes, as he then was, observed that:

> In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he was representing the defendant or a third party with the relevant interest, he would be saying to the judge, and, having answered that question, that is precisely what he must tell.[294]

4.47 The duty of candour has also been described as the duty to approach the court with "cards face up on the table".[295] In *R (Chatwani) v National Crime Agency*, the Divisional Court suggested that an even more onerous duty of candour arises where a warrant application it is made to a lay magistrate, who may be less able to consider and question applications with the same experienced and informed rigour as a Circuit judge.[296]

4.48 Search warrant application forms include a box prompting applicants to provide any information that might reasonably be considered capable of undermining any of the grounds of the application. This is followed by a declaration that this has been done and a note for guidance. The guidance note gives the example of whether the premises have been searched before or whether there are unusual features of the investigation or of any potential prosecution.[297]

4.49 It is for the applicant to consider what material should be placed before the court to discharge the duty of candour, and to satisfy the court that the criteria are met. Reported cases indicate that the duty is not always complied with by applicants.

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292 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [34].

293 *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12. See also *R (Austen) v Chief Constable of Wiltshire Police* [2011] EWHC 3385 (Admin) at [26], where Ouseley J emphasised that the duty of full, complete and frank disclosure includes drawing to the judge's attention anything which militates against the issue of a warrant. For further discussion, see Adam Craggs, "Golfrate Property Management: applicants for search warrants" (2014) 1237 *Tax Journal* 13.

294 *Re Stanford International Limited* [2010] EWCA Civ 137, [2010] 3 WLR 941 at [191]; cited by Aikens LJ in *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647. See also *R v Lewes Crown Court ex parte Hill* (1991) 93 Cr App R 60, 69 per Bingham LJ and *R (Energy Financing Team) v Bow Street Magistrates' Court* [2006] 1 WLR 1316, 1325 per Kennedy LJ.

295 *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, 945.

296 *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110 at [105] per Hickinbottom J.

297 See the section 8 of PACE application form available at https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/forms/iw001-eng.doc (last visited 29 May 2018).

4.50 In the civil law context, a similar duty of candour exists in applications for without notice injunctions and permission to apply for judicial review.[298]

4.51 The claimant must make full disclosure of all material matters when seeking a without notice injunction.[299] In the context of freezing injunctions,[300] the claimant must make full and frank disclosure of all matters in his [or her] knowledge which are material for the judge to know.[301]

4.52 A person applying for permission to proceed with,[302] or appeal against,[303] judicial review also owes a duty of candour. All public authorities who are respondents to applications for judicial review owe a duty of candour.[304] The effect of this duty is to require the public authority, when presenting its evidence in response to the application for judicial review, to set out fully and fairly all matters that are relevant to the decision under challenge, or are otherwise relevant to any issue arising in the proceedings.[305]

4.53 The Divisional Court has also distinguished between a failure to make full and frank disclosure and a failure to make proper enquiries: an investigator cannot fail to make full and frank disclosure of that of which they are unaware.[306]

4.54 The duty to make proper enquiries is therefore a separate duty. Where a search warrant is being sought, section 23 of the Criminal Procedure and Investigations Act 1996 also requires an investigator to pursue all reasonable lines of inquiry.[307] Code B of PACE requires an officer to check that the information upon which the application is based is accurate, recent and has not been provided maliciously or irresponsibly.[308] The officer is also required to make reasonable enquiries to establish whether the premises have been searched previously and, if so, how recently.[309] However, Code B of PACE does not require the officer to pass this information on to the court. There is an obligation to

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298 For discussion see *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416. See also para 6.70.

299 *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645; *Brinks MAT Ltd v Elcombe* [1988] 3 All ER 188. See D Bean, I Parry and A Burns, *Injunctions* (12th ed 2015) para 7-04.

300 Freezing injunctions are interim prohibitory injunctions designed to prevent the dissipation of assets prior to the execution of a judgment. For discussion see M Jones, A Dugdale and M Simpson, *Clerk & Lindsell on Torts* (22nd ed 2017) para 29 to 53; J McGhee, *Snell's Equity* (33rd ed 2017) para 18-073; *A Zuckerman on Civil Procedure: Principles of Practice* (3rd ed 2013) para 10.185-200.

301 Civil Procedure Rules, Practice Direction 25A, para 3.3. See *UL v BK* [2013] EWHC 1735 (Fam), [2014] 2 WLR 914 at [50] per Mostyn J.

302 White Book 2018, Vol 1, para 54.6.2.

303 White Book 2018, Vol 1, para 54.6.2.

304 Paul Matthews and Hodge Malek, *Disclosure* (4th ed 2012) para 4.07.

305 *R (Al Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin). See also *R (Bilal Mahmood) v Secretary of State for the Home Department* [2014] UKUT 439 (IAC) at [15] to [26] per McCloskey J.

306 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [53].

307 For discussion see Ed Lloyd-Cape, *Modernising police powers – again?* [2007] 12 Criminal Law Review 934, 945.

308 Code B of PACE, para 3.1.

309 Code B of PACE, para 3.3.

relay these facts to the court, but the duty stems from case law rather than from statute, Code B of PACE or rules of court.

Reform

Enshrining the duty of candour

4.55 Reported cases suggest that the failure to discharge the duty of candour is a frequent ground of challenge. Hugo Keith QC of 3 Raymond Buildings confirmed that the issue arises fairly regularly in practice.

4.56 For these reasons, we provisionally propose that the scope of duty of candour ought to be made more accessible and comprehensible to ensure that investigators comply with the legal duty. The question is in what form the duty ought to be articulated.

4.57 In our discussion with stakeholders on this matter, Professor Peter Hungerford-Welch suggested that the duty of full and frank disclosure could usefully be articulated more clearly in primary legislation. Professor Richard Stone also agreed that the duty of candour ought to be put on a statutory footing.

4.58 Enshrining the duty of candour in statute would demonstrate its importance by creating a statutory duty. Section 15(2) already imposes a number of information requirements, such as to identify, so far as is practicable, the articles or persons to be sought.[310] We consider the duty of candour to be of equal importance to the information requirements currently set out in section 15 of PACE.

4.59 There would be a further advantage in light of our proposed new challenge procedure in Chapter 7. Under the new challenge procedure, our proposed grounds for setting aside a search warrant are that:

(1) the applicant did not provide the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled; or

(2) the provisions of section 15 of PACE were not followed.

The first ground above encompasses the duty of candour. Therefore, the grounds of challenge could be streamlined to a single ground of breaching section 15 of PACE.

4.60 Against this, we note that in other contexts the duty of candour has not been enshrined in primary legislation. More commonly, the duty is articulated in regulations. For example, section 81 of the Care Act 2014 provides that regulations made by the Secretary of State must include provisions imposing a duty of candour on providers of health care and adult social care services registered with the Care Quality Commission.[311]

4.61 Another difficulty is that enshrining the duty of candour in statute would not necessarily make the law more accessible and easier to comply with. Simply requiring "full and frank disclosure" on the face of the statute may not help officers who do not know what it is. However, this is a problem that could arise in any proposal to enshrine or codify the

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310 PACE, s 15(2)(c).

311 See Health and Social Care Act 2008 (Regulated Activities) Regulations SI 2014 No 2936, reg 20.

duty of candour, whether in primary legislation or in any other instrument. Whatever the mechanism for effecting this change, one solution would be to provide an accompanying list, giving examples of the information that ought to be disclosed. In the next section we discuss what types of information could be included in this list.[312]

4.62 Another option would be to enshrine the duty of candour in secondary legislation by amending the Criminal Procedure Rules or Code B of PACE. The courts' powers however to respond to any breach of the Criminal Procedure Rules are in general terms limited to the fixing, postponing, bringing forward, extending, cancelling or adjourning of a hearing;[313] imposing a cost order;[314] or in the last resort staying a case as an abuse of process.[315] Additionally, Section 67 of PACE provides that no criminal or civil liability flows from a failure to observe any provision of a Code of Practice.

4.63 We are interested in consultees' views on the form in which the duty of candour ought to be articulated.

Consultation Question 11

We provisionally propose that the duty of candour ought to be made more accessible and comprehensible to ensure that investigators comply with the legal duty. Do consultees agree?

We invite consultees' views on whether the scope of the duty of candour ought to be enshrined in:

(1) primary legislation;

(2) rules of court; or

(3) Code B of the Police and Criminal Evidence Act 1984.

We also invite consultees' views on whether any amendments ought to include a list of the information which must always, if it exists, be disclosed?

The content of the duty of candour

4.64 Enshrining the general principle in legislation is one thing, detailing the precise content of the duty of candour is another. As discussed at paragraph 4.48 above, search warrant application forms currently prompt the applicant to provide any information that might reasonably be considered capable of undermining any of the grounds of the application. Case law suggests that concerned applicants may throw all the information they have into the application form, which the Divisional Court has made clear is not the answer to compliance with the duty.[316] For this reason, we consider that search warrant

312 Para 4.64 and following, below.

313 Criminal Procedure Rules SI 2015 No 1490 rule 3.5(6).

314 Prosecution of Offences Act 1985, s 19.

315 *R v Crawley* [2014] EWCA Crim 1028, [2014] 2 Cr App R 16.

316 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [20].

application forms ought to include questions to assist with the duty of full and frank disclosure.

4.65 The duty of candour is a general one, which cannot be reduced to a list of tick boxes. However, some issues are especially important. For example, the applicant would need to inform the court if:

(1) previous search warrant applications had been made, and either refused or (if granted) nothing was found;

(2) the suspect or occupier is of previous good character;[317]

(3) there are reasons to think that informants might have acted maliciously;

(4) there are other facts relevant to the grading or assessment of the intelligence; or

(5) there are reasons to suspect the presence of legally privileged materials. This can be especially significant. For example, it has been held that warrants have been issued improperly where the court was not informed that the occupiers were a firm of solicitors[318] or the independent trustees of a pension scheme.[319]

4.66 We look first at the need to disclose previous applications and then at other additions to the form designed to encourage compliance with the duty of candour.

Previous applications

4.67 In its 1984 report on "Search and Seizure", the Law Reform Commission of Canada recommended that a person applying for a search warrant should be obliged to disclose previous applications. This would cover all the applications known to the applicant concerning the same person, place or vehicle, for objects related to the same or a related transaction.[320] The recommendation was designed to control "forum shopping", whereby an applicant makes repeated applications to different courts until one of them is granted. A similar recommendation was made by the Queensland Criminal Justice Commission, to require the disclosure of previous applications within 12 months of the date on which the current application is made.[321]

4.68 We have received no evidence that forum-shopping for search warrants is a problem in England and Wales. Nevertheless, we consider that applicants should disclose any previous applications that they are aware of and that concern the same investigation

317 *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110. Both cases held that, while good character is a fact that ought to be disclosed in the application, failure to do so is not necessarily a reason to quash the decision to issue the search warrant.

318 *R (AB) v Huddersfield Magistrates' Court* [2014] EWHC 1089 (Admin), [2015] 1 WLR 4737.

319 *R (Marley Administration Services) v Commissioner of City of London Police* [2013] EWHC 4584 (Admin).

320 Law Reform Commission of Canada, *Search and Seizure* (1984) rep 24, p 18.

321 Criminal Justice Commission, *Report on a Review of Police Powers in Queensland – Volume II: Entry, Search and Seizure* (1993) p 364.

and premises. We consider that this is a necessary part of full, complete and frank disclosure. It is also a requirement that need not be unduly burdensome for applicants.

4.69 The requirement should extend to disclosing both successful and unsuccessful applications. If the application was granted, it is relevant to know that there was a previous search for similar material, as the applicant will then need to explain why another search is necessary. Similarly, if the application was refused, it will be relevant to know why it was refused and in what respect conditions have since changed.

4.70 On the other hand, we are not suggesting that all previous searches of the premises or suspect should be disclosed. This might be unduly onerous and, if it suggested a long criminal history, might prove prejudicial to the suspect. Nor do we consider that it should be incumbent on agencies to check with other agencies. Similarly, a central database would raise issues regarding data protection.

The presence of legally privileged material

4.71 An issuing authority must take particular care if there is any reason to suspect that there is legally privileged material on the premises. In applications under section 8 of PACE and many other powers, a warrant may not be issued to search for excluded material[322] and special procedure material.[323] In such cases, the applicant ought also to disclose any reasons for suspecting that these may be present. All these categories of exempted material, and the procedure to be used when the issue is raised, are discussed in Chapter 9.

4.72 Given the importance of this issue, we consider that application forms should include a specific question requiring applicants to state if there is any reason to suspect that legally privileged material may be on the premises.

The intended prosecutor

4.73 The question of whether the (police) applicants for a warrant should have to disclose who the intended prosecutor is was raised in *R v Zinga*.[324] The Court of Appeal could not understand why it was felt to be acceptable for the officer applying for the warrant not to disclose the identity of the intended prosecutor. Professor Ed Lloyd-Cape suggests that an obligation to identify the intended prosecutor ought to be covered by the duty of candour.

Other questions that might encourage candour

4.74 Given the range of different information which may be relevant to the duty of candour, it is not possible to have separate questions about each issue. Instead we envisage a general question asking if the applicant knows of any circumstances which suggest that a warrant should not be issued. The notes should provide prompts for the type of information which should be disclosed at this stage, including any reasons to think that that an informant may have acted maliciously or that the suspect or occupier are of previous good character.

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322 Medical and counselling records and confidential journalistic material.

323 Confidential business records and non-confidential journalistic material.

324 [2012] EWCA Crim 2357, [2013] Criminal Law Review 226.

Consultation Question 12

We provisionally propose that search warrant application forms should include the following questions to assist with the duty of full and frank disclosure, namely that the applicant should be required to specify on the application form:

(1) any previous search warrant applications for the same premises of which he or she is aware which concern the same investigation;

(2) whether any reason exists to suspect that legally privileged material may be on the premises;

(3) the agency which it is intended will be responsible for prosecuting the suspected offence; and

(4) any known circumstances which might weigh against the warrant being issued?

Do consultees agree?

THE SEARCH WARRANT

Current law

4.75 Section 15 of PACE provides detailed requirements for what a search warrant must contain. For example, under section 15(6)(a) the warrant must specify the name of the applicant; the date on which it is issued; the enactment under which it is issued; and each set of premises to be searched.[325]

4.76 Crucially, under section 15(6)(b), the warrant must also identify, so far as is practicable, the articles or persons sought. In the case of a warrant under section 8 of PACE, this is the material which "is likely to be relevant evidence", as identified on the application form. Therefore, the articles identified in the warrant must be described in the same terms as in the information.[326]

4.77 The House of Lords explained that the rationale behind section 15(6) is that "warrants must be sufficiently clear and precise in their terms so that all those interested in their execution may know precisely what are the limits of the power which has been granted".[327]

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325 Alternatively, an "all premises" warrant must specify the person in occupation or control of the premises, together with any premises to be searched which can be specified: see para 2.43 above.

326 *R v Central Criminal Court and British Railways Board ex parte A J D Holdings Ltd, Royle and Stanley Ltd* [1992] Criminal Law Review 669. See also *C v Nottingham and Newark Magistrates' Court* [2013] EWHC 3790 (Admin), [2014] ACD 55 at [48].

327 *McGrath v Chief Constable of the Royal Ulster Constabulary* [2001] UKHL 39, [2001] 2 AC 731 at [18] per Lord Clyde. See also *Lees v Solihull Magistrates' Court* [2013] EWHC 3779 (Admin), [2014] Lloyd's Rep FC 23 at [39]. *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [67] to [84]; *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24] and [37]; *R (Van Der Pijl) v*

4.78 The Divisional Court has acknowledged that the precision of the warrant must be viewed in light of the scale and nature of the investigation: in some investigations, it may be less practicable to identify the articles sought with precision.[328] The search warrant should not be drafted in such a way that impermissibly delegates the judgment of relevance to the investigator.[329] That being said, an exercise of judgment on the part of officers as to relevance is both necessary and inevitable.[330]

4.79 Particular issues arise in respect of electronic material. We discuss these below in Chapter 10. Under the current law, the specification of computers as opposed to their contents in not objectionable.[331] Devices should still be specified insofar as is practicable. For example, if an item to be searched for is known to be a black iPhone 8, the search warrant should say so and not simply "mobile phone".

4.80 As we mention in Chapter 3,[332] the ECtHR has also identified the precision of the search warrant as an important factor when deciding whether a search warrant is a proportionate interference with the right to privacy under Article 8 of the ECHR. Similarly, there may be instances in which a search warrant couched in broad terms is permissible, taking into account the complexity and urgency of the case.[333]

4.81 In our initial fact-finding discussions, we were told that warrants sometimes fall short of the required standards. One stakeholder complained that the warrants themselves are seldom specific or detailed. For example, warrants rarely specify a range of relevant dates for the alleged criminal wrongdoing, so it is difficult to know whether those seizing papers are going beyond the needs of the investigation. This issue was identified by the National Crime Agency review of search warrants, which noted potentially significant deficiencies in 51 out of 326 operations, including "a failure to specify any of the items sought on the face of the warrant".[334] There is a need to encourage more information to be given to the occupier.

4.82 Unlike application forms, warrants are not required to follow any prescribed form. Particular police forces often use standardised forms but there is no central coordination. We received complaints about some of the forms, though the

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Crown Court at Kingston [2012] EWHC 3745 (Admin), [2013] 1 WLR 2709 at [53] to [54]; *R (Hoque) v City of London Magistrates' Court* [2013] EWHC 725 (Admin), [2013] ACD 67 at [11] per Pitchford LJ.

328 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [70] to [73]; *R (Glenn & Co (Essex) Ltd) v HMRC* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22 at [58]; *R (Glenn & Co (Essex) Ltd) v HMRC* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22 at [58] to [60] per Simon J; *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [51] per Cheema-Grubb J.

329 *C v Nottingham and Newark Magistrates' Court* [2013] EWHC 3790 (Admin), [2014] ACD 55.

330 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [74].

331 *R (Sharer) v City of London Magistrates' Court* [2016] EWHC 1412 (Admin), (2017) 181 JP 48 at [54]; *R (A) v Central Criminal Court* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [73] to [85]; *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [74].

332 See para 3.2 above.

333 *Sher and Others v the United Kingdom* (2015) (App No 5201/11) at [174].

334 National Crime Agency, *Warrant Review Closing Report* (2016) p 15.

shortcomings identified by stakeholders concern particular instances and do not necessarily apply to all search warrants.

4.83 The complaints we received about warrant forms include:

(1) there is no longer a space for the officers executing the warrant to sign the copies and this clearly needs to be rectified to ensure compliance with sections 15 and 16 of PACE;

(2) there is no place on the new warrant form to record the address that is being searched (as required by *R (Bhatti) v Croydon Magistrates' Court*);[335]

(3) there is nowhere on the warrant to record the warrant number;

(4) there is no place on which to record the inspector's authorisation for entry to premises that are not specified on the warrant, as specified in Code B of PACE paragraphs 6.3A and 6.3B; and

(5) the courts have requested amendments to the forms, such as specifying which police force is to carry out the search instead of just stating "any constable";

(6) the warrant does not detail whether it authorises a search during reasonable hours or at any time;[336] and

(7) the right of the occupier to access the information on which the search is based should be on the face of the warrant, rather than in the Criminal Procedure Rules. The fact they can apply to the court should be clearer.[337]

Reform

4.84 These problems raise the question of whether there should be a standard warrant form, which includes space for all the required information to be included. A standard form would ensure consistent national standards. It might also reduce the volume of litigation brought as a result of inadequate and defective warrants.

4.85 An alternative view is that the range of facts that might need to be recorded in a warrant is too various to be reflected in the design of a standard form: it would be better to give guidance in non-statutory material such as Code B of PACE or the Magistrates' Adult Court Bench Book.

4.86 Our provisional view is that the answer lies in a standard form which can be adapted as necessary. Explanation of the level of detail required should be contained in non-statutory guidance rather than in primary legislation or rules of court.

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335 *R (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 WLR 948.

336 We discuss this issue in the context of the hours during which a search warrant can be executed in Chapter 6 at paragraphs 6.36 and following.

337 We discuss this issue in the context of what information ought to be provided to an occupier during a search in Chapter 6 at paragraphs 6.59 and following.

Consultation Question 13

We provisionally propose that the Criminal Procedure Rule Committee should prescribe a standard search warrant template to ensure compliance with section 15(5) to (6) of the Police and Criminal Evidence Act 1984. Do consultees agree?

If so, should this be accompanied by non-statutory guidance about the level of detail required on the actual search warrant?

THE HEARING

Current law

Arranging a hearing

4.87 The Criminal Procedure Rules, rule 47.6, state that the applicant must:

(1) apply in writing;

(2) serve the application on (a) the court officer, or if the court office is closed, (b) the court;

(3) demonstrate that the applicant is entitled to apply, for example as a constable or under legislation that applies to other officers;

(4) give the court an estimate of how long the court should allow (a) to read and prepare for the application, and (b) for the hearing of the application; and

(5) tell the court when the applicant expects any warrant issued to be executed.[338]

4.88 An application may be submitted electronically by secure email or delivered in hard copy. The applicant may choose which court to apply to, however, they cannot apply directly to a magistrate or judge. In some cases, investigators may wish to apply to the Crown Court, even though not required on the face of the statute.

4.89 An application may be submitted prior to 10am before court business is under way, on an ad hoc basis during the court day or "out of hours" at a magistrate's home. Where an application is made before court business is under way, there may be better availability than where an application is made on an ad hoc basis, in which case an investigator may be left waiting outside a courtroom.

4.90 An investigator may invite the court to deal with an application without a hearing or a judge or magistrate may decide an oral hearing is unnecessary. Where a hearing is arranged, the majority of applications are made in person at court, though as mentioned an application can also be made out of hours. We discuss the issue of out of hours applications in Chapter 5. We also discuss wider improvements to way in which search warrant applications are allocated, including arranging a hearing, in Chapter 5.

[338] This is to help assess the urgency of the application compared with other applications.

Appearing at a hearing

4.91 A hearing may take place at court in person, via live-link or over the phone. In the case of warrants issued to constables, the requirements for a hearing are spelled out in section 15 of PACE,[339] as supplemented by paragraph 3 of Code B of PACE and the Criminal Procedure Rules, rule 47.24 to 30.

4.92 Section 15(3) of PACE states that "an application for such a warrant shall be made ex parte and supported by an information in writing". In other words, the application is made without giving notice to the occupier and without the occupier being present in court. This has been described as "a practical system where an ordinary police constable can appear ex parte before a lay justice of the peace".[340]

4.93 Under section 15(4), "the constable shall answer on oath any question that the justice of the peace or judge hearing the application asks him".[341] The Divisional Court has observed that the officer applying for the warrant at court and giving information on oath should, save in exceptional circumstances, be an officer directly involved in the investigation: if not, the magistrate is unlikely to get the full picture.[342]

4.94 The Divisional Court has held that not all this material needs to be in the Information or application form: some may be given orally at the hearing.[343] The judge or magistrate should also ask questions. For example, if the application form fails to mention whether the material is likely to include items subject to legal privilege, the issuing authority should inquire so as to satisfy itself that legally privileged material is not included.[344]

4.95 Oral questions and answers are particularly important where the application relies on sensitive information.[345] Under Code B of PACE, the officer should be prepared to answer any questions the magistrate or judge may have about the accuracy of previous information from that source and any other related matters.[346]

4.96 The general principle for all warrant applications, whether or not section 15 of PACE applies, is that the information placed before the issuing authority (both in writing and orally) must contain sufficient detail to establish that all the statutory conditions for

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339 For a summary of the provisions of section 15, see Chapter 2 at para 2.22.

340 *R (Haralambous) v St Albans Crown Court* [2016] EWHC 916 (Admin), [2016] 1 WLR 3073 at [27] per Cranston J. In *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2006] 1 WLR 1316, the court noted that whilst the initial process whereby search warrants can be obtained in the first instance is in private, this is only part of an overall process; a defendant's participation in the process is delayed, not ousted.

341 Or affirmation: Oaths Act 1978, s 5.

342 *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157 at [167] per Simon J.

343 *R (Ahmed) v York Magistrates' Court* [2012] EWHC 3636 (Admin) at [53] to [54] per Hickinbottom J.

344 *R v Chesterfield Justices and another ex parte Bramley* [2000] QB 576 at 583 per Kennedy LJ.

345 *R (B) v Huddersfield Magistrates' Court*, [2014] EWHC 1089 (Admin), [2015] 1 WLR 4737 at [30] per Stuart Smith J.

346 Code B of PACE, para 3A.

issuing the warrant are complied with. Depending on the particular power under which the warrant is applied for, this includes, but is not limited to, the following:

(1) where the warrant is for the purpose of investigating a suspected offence, the grounds for believing, or in some cases suspecting, that an offence has been committed;

(2) otherwise, the grounds for believing, or in some cases suspecting, that circumstances exist requiring or justifying an investigation under the statute in question;

(3) the grounds for believing, or in some cases suspecting, that material which there is power to search for or seize is on the premises, and the nature of that material;

(4) factors relevant to the statutory conditions concerning the need for a warrant, such as the difficulty of access to the premises or material if no warrant is issued;

(5) all previous applications made with respect to the search of the same person, place or vehicle for objects of seizure related to the same or a related transaction of which the applicant is aware; and

(6) any other factor affecting the lawfulness of search or seizure of material on the premises.

Reform

Arranging a hearing

4.97 The time at which an application is made to a court, the format of the application, and to which court an application is made, can substantially affect the availability of a magistrate or judge and mode of allocation. We understand that urgent applications may restrict this element of choice. To assist in identifying the optimal reform of the process under which applications are submitted, allocated and heard, we are interested in learning about consultees' experiences of arranging search warrant hearings.

Consultation Question 14

We invite consultees to share with us their experience of how search warrant hearings are arranged.

Appearing at a hearing

4.98 We are also keen to improve the way that applicants provide information at search warrant hearings. We were informed anecdotally by one magistrate that it is not uncommon for officers who know very little about the case to apply for search warrants, leading inevitably to the application being refused and the time of both the court and the investigator being wasted.

4.99 One possibility would be to require that warrant hearings are attended by those who know enough about the investigation to answer any questions the court may have. Another would be to include more specific guidance, either in rules of court or in the PACE Codes about the duties on an applicant at a search warrant hearing.

Consultation Question 15

We invite consultees' views on whether problems commonly arise because applicants for search warrants do not have sufficient knowledge to answer the questions on oath. If so, do consultees consider that reform is needed to increase the likelihood that a person will have sufficient knowledge to answer questions asked?

We also invite consultees' views on whether there ought to be more detail in rules of court or Code B of the Police and Criminal Evidence Act 1984 on what is required from an applicant at a hearing for a search warrant.

SEARCH FOLLOWING ARREST

Current law

4.100 As mentioned briefly in Chapter 2, not all searches require a warrant. Section 18 of PACE provides that a constable may enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates to that offence or to some other indictable offence which is connected with or similar to that offence. Evidence on the premises may then be seized under section 18(2). Section 18(3) provides that the power of search conferred is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence. Section 18(4) requires authorisation in writing prior to a search being carried out.

4.101 Section 32 of PACE also gives the police power to enter and search any premises where the person was located when arrested (or immediately before being arrested) for an indictable offence.[347] This power is confined to searching for evidence of the offence for which that person was arrested. It also only applies at or around the time the arrest is made, by contrast with section 18 which applies during the time the suspect is detained.[348]

4.102 Sections 18 and 32 of PACE are therefore triggered by a lawful arrest. The power to arrest without a warrant is found in section 24 of PACE. There are, in effect, two conditions of lawful arrest, both of which must be satisfied. First, under section 24(1) to (3) of PACE, that the person arrested is about to commit, is committing or has committed an offence or the police officer has reasonable grounds for suspecting this to be so. Secondly, under section 24(4) of PACE, that the arresting officer has reasonable grounds for believing that the arrest is necessary for any of the reasons identified in section 24(5) of PACE. One of the reasons, in section 24(5)(e) of PACE, is where the police constable has reasonable grounds for believing that arrest is necessary to allow the prompt and effective investigation of the offence or of the conduct of the person in question.

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347 PACE, s 32(2)(b).

348 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 4.77; *M Zander on PACE* (7th ed 2015) para 3-39.

Stakeholder concerns

4.103 Stakeholders expressed concern regarding the interplay between sections 18, 32 and the search warrant procedure. David McCluskey, Partner at Taylor Wessing, reported concern that there may be a tendency to sidestep the warrant procedure by means of arrests without warrant under section 24 of PACE and subsequent section 18 searches, given the higher threshold and more time-consuming procedures involved when applying for a search warrant.

4.104 Alex Bailin QC of Matrix Chambers also recognised this issue and expressed a concern that, where a journalist is arrested under section 24 of PACE and premises are searched under sections 18 or 32, the protection afforded to journalistic material does not apply. This point was also raised by Jessica Parker, Partner at Corker Binning, who observed that the police have unrestricted access to journalistic material, which would have been special procedure material under Schedule 1 to PACE had the search been under a warrant. Professor Ed Lloyd-Cape argued that the lower level of protection under section 18 and 32 of PACE cannot be justified by the fact that those powers require that a person has been arrested because (a) the threshold for arrest is in practice very low, and may not even require reasonable suspicion of an offence, and (b) a search can be conducted under section 32 of premises that are not occupied or controlled by the arrested person - simply premises that they were in at the time or immediately before their arrest.

4.105 Investigative stakeholders also sought clarification surrounding the interplay between section 18 and 24 of PACE. Another question raised was, under section 32 of PACE, how far back in time the "immediately before being arrested" requirement reaches.[349] As regards section 18, HMRC considered that the power to search under section 18 of PACE was an essential addition to the power to seek a search warrant under sections 8 and 9. Alex Bailin QC was of the view that arrest under section 24 for the purpose of exercising section 18 powers constitutes a misuse of arrest. Professor Ed Lloyd-Cape indicated that the question requires further consideration and ought to be resolved.

Discussion

4.106 There are two concerns raised by stakeholders. First, whether the ground for arrest under section 24(5)(e) of PACE, namely the need to allow the prompt and effective investigation of an alleged offence, includes a need to search premises. That is, assuming that the conditions in section 24(1) to (3) of PACE are satisfied, is it justifiable to arrest the suspect solely in order to search the premises, or is this an illegitimate way of circumventing the need for a search warrant? Secondly, whether there are sufficient safeguards in relation to exempted material when a search of premises under sections 18 and 32 of PACE is being carried out. We consider this second issue in Chapter 9 on exempted material at paragraph 9.75 below.

4.107 The Divisional Court was recently asked to consider whether the intention to carry out a search pursuant to section 18 of PACE could, on its own, justify arresting a suspect under section 24(5)(e) of PACE.[350] The claimant's primary submission was that effecting a search under section 18 could not by itself constitute a ground of necessity

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349 *R v Beckford* (1992) 94 Cr App R 43, 49.

350 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047.

for arrest, because (a) section 18 presupposes the prior existence of a lawful arrest and (b) recourse to section 18 in this way would undermine the statutory scheme.[351]

4.108 Notwithstanding acceptance that in the case at hand the officers should have applied for a search warrant,[352] the court held that no conclusive answer may be drawn from the authorities[353] and that it was both unnecessary and undesirable to resolve the issue of principle in the circumstances of the case. First, the defendant was not seeking to justify the claimant's arrest solely on the basis of an intention to search his premises and, secondly, a holding by the court that the police could never deploy section 18 considerations as the sole justification for an arrest under section 24(5)(e) would have far-reaching consequences.[354]

4.109 However, several further observations were made. First, previous case law came close to answering the question in the claimant's favour, but not quite.[355] Secondly, magistrates would be wrong to refuse to grant a search warrant on the basis that the police could have recourse to section 18 instead: "the safeguards inherent in Part II of PACE are there for a purpose, and should not be circumvented systematically".[356] Thirdly, there is very considerable force in the argument that where a search warrant is applied for and refused, any attempt to circumvent that refusal through the purported application of section 18 would be unlawful, assuming that the arrest could not be independently justified.[357] Fourthly, there are no linguistic or textual reasons preventing a search being an adjunct to, or part of, a prompt and effective investigation under section 24(5)(e) of PACE.[358] Fifthly, if the claimant's submissions were correct, an important provision in Code G to PACE[359] could not be supported.[360] Sixthly:

> The textual differences between sections 8 and 18 are capable of being important, have not been fully explored, and in my view appear somewhat inscrutable. In my judgment, these differences would need very thorough exploration before important findings were mode on Mr Summers's high-level submissions.[361]

4.110 As a result, it remains unclear whether the intention to search premises on its own can constitute a lawful motive for arrest. Maia Cohen-Lask of Corker Binning argued that *R (L) v Chief Constable of Surrey Police* presented a missed opportunity and that the lack

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351 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [62].

352 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [73].

353 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [66].

354 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [71].

355 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [67] referring to *Hayes v Merseyside Police* [2011] EWCA Civ 911, [2012] 1 WLR 517 at [42] and *Lord Hanningfield v Essex Police* [2013] EWHC 243 (QB), [2013] 1 WLR 3632 at [29].

356 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [69].

357 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [70].

358 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [71].

359 See para 4.112 below.

360 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [72].

361 *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 WLR 2047 at [71].

of clarity on important questions relating to the manner in which agents of the state are entitled to exercise their coercive powers needs to be resolved.

Reform

4.111 We consider that this ambiguity should be resolved. These are important powers, which are routinely used. It is unsatisfactory that a definitive answer cannot be gleaned from the current law.

4.112 There are, in essence, three options. First, to provide that the intended search of premises, absent other intentions, can never constitute lawful ground for arrest. The Divisional Court has made clear that this would have far-reaching consequences. HMRC has informed us of the importance of these powers for effective criminal investigations. Further, such a position would be inconsistent with the terms of Code G of PACE, which provides:

> The power of arrest is only exercisable if the constable has reasonable grounds for believing that it is necessary to arrest the person. The statutory criteria for what may constitute necessity [include] … to allow the prompt and effective investigation of the offence or of the conduct of the person in question … This may arise when it is thought likely that unless the person is arrested and then either taken in custody to the police station or granted 'street bail' to attend the station later, further action considered necessary to properly investigate their involvement in the offence would be frustrated, unreasonably delayed or otherwise hindered and therefore be impracticable. Examples of such actions include: … when considering arrest in connection with the investigation of an indictable offence, there is a need: to enter and search without a search warrant any premises occupied or controlled by the arrested person or where the person was when arrested or immediately before arrest.[362]

4.113 The second option would be to provide that the intended search of premises, even without other motives, can always constitute lawful ground for arrest.[363] This, however, appears to allow the circumvention of PACE safeguards.

4.114 The third option would be to hold that the intended search of premises, absent other intentions, can constitute lawful grounds for arrest provided that there are reasonable grounds for believing that it is not practicable to obtain the evidence through other means. Consideration would therefore be given whether voluntary production of the items could be sought, or a search warrant obtained. Arrest would therefore be unlawful if, objectively viewed, there was no proper basis for believing that voluntary production would not be given or that it would not be practicable to obtain a search warrant due to the urgency and obvious delays that would accumulate.

4.115 If this third option is pursued, it may be necessary to ensure that section 24 is compatible with the accessibility conditions in section 8 of PACE and similar provisions. At present there is some confusion about whether a search following arrest or a search under a warrant is the preferred procedure.

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362 Code G of PACE, para 2.4 to 2.9.

363 That is, provided that the conditions relating to the suspected offence, in PACE, s 24(1) to (3), are satisfied.

(1) One of the possible conditions for the issue of a search warrant is that there are reasonable grounds for believing that entry to the premises will not be granted unless a warrant is produced, and other powers have similar conditions about the impossibility of gaining access without a warrant. If it is possible to obtain access by making an arrest, there is an argument for saying that this condition is not satisfied. This produces the unintended appearance of saying that the arrest route is the procedure of choice and that a warrant should only be issued if proceeding by way of arrest is impracticable.

(2) On the other hand, the condition in section 24(5)(e) of PACE is that an arrest is "necessary" to progress the investigation. If it is possible to obtain the material by means of a search warrant, arguably an arrest is not necessary, in the sense of being the only way to obtain the material.

4.116 Whichever interpretation is right, the present legislative position is confusing and should be clarified. We consider that the preferable position is that the normal procedure should be by way of search warrant, and an arrest for the purpose of search should only be made if using a warrant would be impracticable.

4.117 We are provisionally of the view that the third option discussed above seems preferable. This is because it recognises the preference of obtaining a search warrant whilst also recognising that there are instances in which arrest will be necessary to search premises. We therefore embody the third option in our provisional proposal below. If consultees prefer a different option we would be grateful for their views.

Consultation Question 16

We provisionally propose that the intended search of premises under section 18 of the Police and Criminal Evidence Act 1984 should, absent other intentions, be capable of constituting lawful grounds for arrest under section 24(5)(e) of the Police and Criminal Evidence Act 1984 provided that there are reasonable grounds for believing that it is not practicable to obtain the evidence through other means. Do consultees agree?

Chapter 5: Issuing a search warrant

INTRODUCTION

5.1 In this chapter we look at the how warrants are issued from the perspective of the issuing authority, that is the court, magistrate or other person who has the power to issue the warrant. We discuss:

(1) who may issue a search warrant;

(2) the composition of a court or body considering an application for a search warrant;

(3) the level of scrutiny given to the application;

(4) recording additional material provided during hearings;

(5) providing written reasons for issuing the warrant; and

(6) record keeping and statistics.

5.2 Our focus is on how procedures can be improved, to ensure that the legal requirements are fully respected and the number of challenges can be kept to those strictly necessary. Several stakeholders have reported a tendency for courts to treat applications for search warrants as a rubber-stamping exercise to be got out of the way before the "real" work of the day starts. We therefore consider ways of improving judicial oversight.

5.3 By simplifying the procedure by which a search warrant is issued, we seek to reduce the scope for error and make the law more efficient. We also consider a uniform procedure to screen search warrant applications to ensure they are in a suitable state to be considered by the issuing authority, thereby making the law more cost-efficient and heightening judicial scrutiny. At the same time, we consider that the law ought to be more transparent and we propose a requirement to record and publish statistics to monitor the use of search warrants.

WHO MAY ISSUE A SEARCH WARRANT

Current law

5.4 A warrant under section 8 of PACE must be issued by a justice of the peace (or magistrate). However, every High Court judge and Circuit judge has the powers of a justice of the peace "in relation to criminal causes and matters".[364] They can therefore grant any application which could be granted by a magistrate.

5.5 Most other powers to issue search warrants are also exercisable by magistrates. For some types of warrant the power is reserved to a Circuit judge or District Judge

[364] Courts Act 2003, s 66.

(Magistrates' Courts),[365] a High Court judge[366] or a specialist tribunal.[367] Several provisions which extend to Scotland provide that a sheriff may issue a warrant.[368]

5.6 The application procedure for any type of warrant varies depending on whether the application is made to a magistrates' court or a higher court. In the case of magistrates' courts, technically speaking an application for a warrant is considered, and granted or refused, by an individual magistrate rather than by the court: this individual magistrate may be either a lay justice or a District Judge (Magistrates' Courts).

5.7 We understand that the normal procedure for issuing a search warrant in the magistrates' court is as follows:

(1) the investigator who intends to apply for a warrant will contact the magistrates' court staff, who will then contact a court legal adviser (justices' clerk). A magistrate or judge will never be contacted directly;

(2) the legal adviser will then arrange for the hearing of the application before a single magistrate. This is based on the interpretation of the requirement to hold a hearing "in private" under rule 47.25 of the Criminal Procedure Rules to mean that there should only be one magistrate;

(3) the decision of which lay magistrates are to hear the application, or whether to put the application before a District Judge (Magistrates' Courts), is made by a legal adviser delegated by the justices' clerk in accordance with the Judicial Deployment Protocol;[369] and

(4) different arrangements exist for emergency cases in which a warrant needs to be issued out of hours, which we discuss at paragraph 5.33 below. In these cases, the investigator must go through a legal adviser who vets the application and advises the magistrate. In the South East of England the legal adviser accompanies the justice during the application.

5.8 In *R (Chatwani) v National Crime Agency*, Mr Justice Hickinbottom, as he then was, observed that, in cases involving money laundering or other financially complex matters, a lay magistrate may "be less able [than in other types of case] to consider and question applications with the same experience and informed rigour as would (e.g.) a Circuit judge".[370] The purpose of this observation was to encourage applicants to take

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365 PACE, sch 1 para 17; Drug Trafficking Act 1994, s 56; Terrorism Act 2000, sch 5, para 11; International Criminal Court Act 2001, s 37 and sch 5. Under the PACE (NI) Order 1989, the equivalent of sch 1 is only exercisable by a county court judge.

366 For example, Incitement to Disaffection Act 1934, s 2; Credit Rating Agencies Regulations 2010, reg 33(5).

367 Under the Armed Forces Act 2006, s 83 and sch 1, para 12, a judge advocate may issue a warrant.

368 In Scotland a sheriff is a judge of a regional court with both civil and criminal jurisdiction, roughly equivalent to a Circuit judge in England and Wales. Powers which provide for this exist under the Misuse of Drugs Act 1971, Official Secrets Act 1911 and several immigration statutes.

369 Protocol to support judicial deployment in the Magistrates' Courts (November 2012), available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/support-judicial-deployment-in-magistrates-court.pdf (last visited 29 May 2018).

370 *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110 at [105].

additional care to ensure that, when applications are made to a lay magistrate and the matter is complex, all relevant information is disclosed. However, the same reasoning could suggest indirectly that where an application is of exceptional complexity it would be preferable for it to be considered by a Circuit judge.

Reform

Allocation between justices and more senior judges in complex cases

5.9 Unless specified in the warrant provision, the investigator has complete discretion regarding the court to which an application is made. Apart from the case of out of hours applications, applications for warrants are never made directly to an individual magistrate or judge; in a large court centre it would be impossible for an investigator to have confidence that their application would be heard before a particular magistrate or judge.

5.10 The decision on whether an application should be made to a magistrates' court or the Crown Court is far from straightforward. It does not depend on the statutory basis of the warrant alone, but usually on the overall complexity of the application. This may involve a range of factors. The Metropolitan Police Service suggested that a case would often be regarded as complex where there are issues of legal privilege, client privilege, particular access conditions or where a search warrant is sought on the basis of sensitive material.

5.11 We consider that it would be impracticable to devise a comprehensive statutory test for what qualifies as a complex case. The issue depends on too many factors, many of which are fact-specific. Furthermore, labelling too many cases as complex could have implications for the effective operation of the Crown Court.

5.12 Although particular agencies already issue informal guidelines about which cases in their area of specialisation require the attention of the Crown Court, we consider that there is a need for greater consistency across agencies. We are interested in consultees' views on whether there should be greater guidance on this issue, or even a requirement that certain types of application should be made to a particular court.

5.13 One possibility would be to amend the Criminal Procedure Rules or the Criminal Practice Direction to specify that in complex cases, applications should be made to the Crown Court or before a District Judge (Magistrates' Courts) rather than a lay magistrate.[371] We were informed that it is common in magistrates' courts for cases considered more legally complex to be listed before District Judges (Magistrates' Courts) instead of the lay magistracy. This is in line with the Judicial Deployment Protocol, which provides a non-exhaustive set of working presumptions for when a case in the magistrates' court ought to be heard by a District Judge (Magistrates' Courts), including:

(1) cases involving complex points of law, evidence and procedure; and

[371] We have had preliminary discussions with the Secretary to the Criminal Procedure Rule Committee about the viability of such an approach. Questions may also arise as to whether the Committee has legal power to make rules to this effect.

(2) cases that are long, interlinked or for which armed police officers are required in court.[372]

5.14 This raises the question, however, in the context of search warrant hearings, of what constitutes a complex case. We consider that this will depend on many factors, including:

(1) the type of search warrant applied for. As we have seen, some types of search warrant are required to be issued by a Circuit judge, though this may not always be because the case is considered to be complex.[373] In addition, the National Crime Agency gives the example of a search warrant under the Crime (International Co-operation) Act 2003 as involving "complex areas of the law which may not be familiar to all courts",[374] but do not explicitly state that these applications are or should be always made to a Circuit judge;

(2) the amount of detail to consider. A case might be considered "complex" where the application form and its attached material exceed a given number of pages, or where the estimate of the time required for consideration exceeds a given length. This however could act as an inducement to include less information, or to "manipulate" the time estimate, so that the application may be channelled to a different court;

(3) the likely presence on the premises to be searched of legally privileged, excluded or special procedure material is another factor that may indicate that the case is complex. The type of premises is another indication of complexity. Any case involving a solicitors' office, doctor's surgery or media firm's office could involve complex issues; and

(4) the existence of sensitive material, to which public interest immunity may apply.

5.15 Given the range of factors which impact on the complexity of a case, it may be that the person applying for a search warrant is best placed to consider this on case by case basis, as indicated to us by HMRC. In addition to the complexity of the case, there are other criteria which may influence court allocation. For example, whether the alleged offence under investigation is indictable only or triable either way, which may influence in which court a potential future case is heard. We are interested in consultees' views on what criteria should influence or determine to whom a search warrant application is made.

5.16 Any changes would, admittedly, reduce the level of discretion currently afforded to investigators; they would instead be required to follow, or be guided by, a list of factors when determining to which court to apply. At paragraph 5.67 below, we discuss whether a legal adviser should decide whether an application is put before a professional judge

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372 Protocol to support judicial deployment in the Magistrates' Courts (November 2012), available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/support-judicial-deployment-in-magistrates-court.pdf (last visited 29 May 2018).

373 Under the current law, an applicant must apply to a Circuit judge where a search warrant is sought under the Drug Trafficking Act 1994, s 56; Terrorism Act 2000, sch 5, para 11; or International Criminal Court Act 2001, sch 5, para 37.

374 National Crime Agency, *Warrant Review Closing Report* (2016) p 15.

or a lay magistrate, having regard to these factors. At present, we seek views on whether there should be a requirement or guidance regarding allocation and what form it should take.

Consultation Question 17

We invite consultees' views on whether, in certain cases, it ought to be compulsory for a search warrant application to be made to the Crown Court or District Judges (Magistrates' Courts) rather than the lay magistracy.

If so, we welcome views on:

(1) to which types of cases this rule ought to apply; and

(2) whether the distinction between such cases and routine cases requires to be in legislation.

Justices qualified to hear applications

5.17 In a few cases, the power to issue a warrant is limited to a Circuit judge or a High Court judge. The power to make production orders and issue warrants under Schedule 1 to PACE may be exercised by either a Circuit judge or a District Judge (Magistrates' Courts).[375] We have also been informed that magistrates who deal with search warrants out of hours are specialists who receive additional training and that is the case in much of the country for in-hours cases.

5.18 Stakeholders raised the possibility of confining warrant applications to professional magistrates (those appointed as a District Judge (Magistrates' Courts)), or to magistrates who have undergone training in applying the law of search warrants. One stakeholder argued that, to scrutinise warrant applications properly, magistrates need to know how to apply the different standards and tests. Professor Richard Stone also queried whether magistrates were the appropriate people to be issuing search warrants, as they must be in a position properly to challenge the investigator's request by asking the appropriate questions.

5.19 In other jurisdictions with a lay magistracy, there are some restrictions placed on their power to issue warrants. The Commonwealth of Australia, for example, recognises three categories of justices of the peace,[376] of which only two categories are empowered to issue warrants.[377] When the Queensland Criminal Justice Commission was

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375 PACE, sch 1, para 17, inserted by the Courts Act 2003, sch 4, para 6 (Schedule 1 as enacted conferred these powers only on a Circuit judge). These functions may also be exercised by a qualifying judge advocate.

376 Justices of the Peace and Commissioners for Declarations Act (Australia) 1991, s 15. Those categories are justice of the peace (Magistrates' Courts), justice of the peace (qualified) and justice of the peace (commissioners for declaration).

377 Justices of the Peace and Commissioners for Declarations Act (Australia) 1991, s 29. Warrants may only be issued by justices of the peace (qualified) and justices of the peace (Magistrates' Courts).

considering whether similar restrictions should be imposed in the State jurisdiction,[378] consultees argued that many justices of the peace would find it difficult to decide whether or not a search warrant was justified.[379]

5.20 In the Republic of Ireland, most applications for a search warrant are made to a judge of the District Court. Only a limited number of search warrants are issued by Peace Commissioners (the equivalent of lay magistrates),[380] and no legislative provision allowing a lay Peace Commissioner to issue a search warrant has been enacted since 1990.

5.21 In England and Wales, most stakeholders whom we met or contacted argued against requiring applications to be made to District Judges. There are just under 100 High Court judges[381] and around 600 Circuit judges in 77 court centres, compared with around 16,000 lay magistrates and 140 District Judges (Magistrates' Courts) in 330 magistrates' courts.[382] Given the small number of these compared with the number of lay justices, the effect would be to overburden the District Judges and lead to delay.

5.22 There was more support for a formal requirement of special training. For example, Samantha Riggs of 25 Bedford Row suggested that, just as Crown Court judges must have special training to hear sex and murder cases and hold "a ticket" to do so, there should be an equivalent system for magistrates dealing with such applications given the serious consequences of their decisions.

5.23 We consider that there is a convincing argument for a formal requirement to undergo special training. Search warrant decisions are not necessarily more difficult than other decisions, such as sentencing, with which judges and magistrates have to deal every day. The difference is that search warrants hearings involve only one party, so the decision is made without the benefit of arguments from the other side.

5.24 On the other hand, there are a number of problems with a system of ticketed magistrates. First, there is an element of randomness about which magistrates will be available on a given day. Therefore, it may be impossible to constitute a bench of

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378 Criminal Justice Commission, *Report on a Review of Police Powers in Queensland – Volume II: Entry, Search and Seizure* (1993) pp 353 to 354.

379 The final recommendation was that "the power to issue a search warrant be available to stipendiary magistrates, justices of the peace (Magistrates' Courts) and justices of the peace (qualified)", corresponding to the Commonwealth rule. This recommendation would not have the effect of excluding lay justices or requiring special training for them. This recommendation was implemented by the Justices of the Peace and Commissioners for Declarations Act 1991 (Qld), s 3, with a saving for justices of the peace appointed before 1991 who do not fall within these specialised categories.

380 These include: Road Traffic Act 1961; Control of Dogs Act 1986; Prohibition of Incitement to Hatred Act 1990, among others.

381 Section 4 of the Senior Courts Act 1981 (as amended) provides for a statutory maximum of 108 High Court judges, however, not all of the posts have been filled. Further, it is only those High Court judges assigned to the Queen's Bench Division who will deal with search warrant matters, of which there are about 73 judges.

382 See statistics on the number of judges at https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/ and https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf (last visited 29 May 2018).

ticketed magistrates. Secondly, there is not at present a ticketed system of magistrates. To set up such a system would require substantial work.

5.25 As an alternative, there could be a requirement for all bench chairs[383] to undergo specialist search warrants training as part of the extra training they receive in order to become a bench chair. The advantage of delivering training in this way is that, in the case of an application heard by a full bench under the normal procedure, there will invariably be a bench chair present.

5.26 The alternative argument is that all magistrates should receive appropriate training. If our proposals are enacted, there will be a need for new training in any event. We welcome views on whether more in-depth training should be given to all magistrates. Alternatively, specialised training could be given to some magistrates, and only those who have had such training would be authorised to issue search warrants. On balance, we provisionally propose that some form of specialist training ought to be undertaken.

Consultation Question 18

We provisionally propose that only those lay magistrates who have undergone specialist training should have the power to issue a search warrant. Do consultees agree?

ISSUING A SEARCH WARRANT DURING COURT HOURS

Current law

5.27 At present there is no legal requirement that a magistrate deciding a warrant application should be advised by a legal adviser (a justices' clerk). This contrasts with trials and sentencing, where the Criminal Procedure Rules require a clerk to be present, unless the magistrate is a District Judge and directs otherwise.[384] However, there was general agreement among stakeholders with whom we have discussed this to date that a magistrate should be advised by a legal adviser, to understand each separate legislative provision and to assess whether each of its requirements has been met.

5.28 During working hours, this is rarely an issue: we were informed that it would be almost unheard of for a magistrate to deal with an application without it being screened at some level by a legal adviser and that they should always have access to a legal adviser.

Reform

Availability of a legal adviser

5.29 Anthony Edwards, solicitor at TV Edwards, suggested that the need for magistrates hearing an application for a search warrant in court to be advised by a legal adviser or clerk should be formalised. HMRC have also indicated that they would welcome the requirement that a legal adviser is always available to magistrates hearing search

383 For information on magistrates' bench chairs see https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/magistrates/bench-chairmen/ (last visited 29 May 2018).

384 Criminal Procedure Rules, r 24.15.

warrant applications. This would arguably be unnecessary when the magistrate is a District Judge (Magistrates' Courts). We invite consultees' views on this.

Consultation Question 19

We invite consultees' views on whether, when a search warrant application is made in court, there should be a requirement for a magistrate to be advised by a legal adviser. If so, should this requirement also apply to a magistrate who is a District Judge (Magistrates' Courts)?

Minimum number of magistrates

5.30 As discussed at paragraph 5.7(2) above, when a search warrant application is made in court there is usually a single magistrate who considers the application. Given the invasive nature of search warrants, it has been queried whether such a decision should ever be taken by a single lay magistrate.

5.31 Against this, if it were the case that the availability of a legal adviser was formalised, the need for at least two magistrates would arguably be unnecessary. There would also be potential cost implications by introducing such a requirement.

5.32 We therefore invite views on whether, when a search warrant application is made during court sitting hours than out of hours to a lay magistrate, there ought to be a minimum of two magistrates on a bench to consider the application in order to improve judicial scrutiny. Given the interpretation of "in private" under rule 47.25 of the Criminal Procedure Rules, there would likely need to be an amendment to the Criminal Procedure Rules.

Consultation Question 20

We invite consultees' views on whether, when a search warrant application is made in court to a lay magistrate, there ought to be a minimum of two lay magistrates on a bench to consider the application.

ISSUING A SEARCH WARRANT DURING OUT OF COURT HOURS

Current law

5.33 Applications for search warrants can be made to a magistrate out of hours, at the magistrate's home address where a warrant is required urgently. Out of hours, roughly speaking, covers the hours of 6:00pm to 9:00pm, weekends and bank holidays.

5.34 As discussed at paragraph 5.7(4) above, when applying for a search warrant out of court hours, the investigator must go through a legal adviser who vets the application and advises the magistrate. An investigator will never contact a magistrate directly. We are informed that magistrates who deal with search warrant applications out of hours are specialists who have received additional training.

5.35 In the South East of England the legal adviser accompanies the justice during the application. Additionally, in the South East region, from April 2018, applications are to be heard by telephone conference so the legal adviser is present throughout the application. In the rest of the country, the legal adviser vets the application, advises the magistrate, and is available for the magistrate to telephone for further advice if required.

5.36 The Judicial College's *Adult Court Bench Book* for magistrates provides advice on dealing with out of hours applications.[385] Guidance is also provided by the Justices' Clerks' Society.

Reform

5.37 We are keen to understand from the experience of consultees whether the way the system for out of hours applications works in practice creates concerns. We are particularly interested to know whether magistrates are able to obtain the legal advice they need in these circumstances without undue delay and difficulty.

5.38 We also seek views on the desirability of an alternative approach whereby out of hours applications are always made to a legally qualified judge, who could be approached remotely, by email, telephone or video-link. There is an argument that the out of hours system should be formalised. Given digital capabilities, there could be a centralised system with a rota of Circuit judges and District Judges (Magistrates' Courts). This would remove the need for both a legal adviser and a magistrate to be available at the same time.

Consultation Question 21

We invite consultees' views on whether, when applications for search warrants are made to magistrates out of court sitting hours, the magistrates are able to obtain the legal advice they need.

Consultation Question 22

We invite consultees' views on the desirability of formalising the magistrates' courts' out of hours procedure for hearing search warrant applications. In particular, should applications for warrants be:

(1) submitted and heard remotely, unless otherwise directed; and

(2) always made to a legally qualified judge on a regional rota system.

JUDICIAL SCRUTINY OF SEARCH WARRANT APPLICATIONS

[385] Judicial College, *Adult Court Bench Book* (August 2017), pp 174, available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Adult-Court-Bench-Book-April-20161.pdf (last visited 29 May 2018) (emphasis in original).

Current law

5.39 The courts have repeatedly emphasised the importance of proper judicial scrutiny of search warrants. Concerns have been raised by courts in England and Wales[386] and in other jurisdictions.[387] Observations on the need for proper judicial scrutiny have been raised since the seventeenth century.[388] There is also considerable academic comment suggesting that the level of scrutiny remains inadequate.[389] As Professor Michael Zander put it:

> When deciding whether to grant a police application for a search warrant, magistrates must not allow themselves to act as rubber stamps for the police. All too often, it seems, this is what happens in practice.[390]

5.40 Given the serious inroad created by search powers on the privacy of the subject, the issuing of a search warrant should never be treated as a formality. As we explore below, effective scrutiny is needed not only to check that the statutory conditions are satisfied,[391] but also to ensure that the search power is used in a way which is compatible with Convention rights.[392]

Compatibility with Article 8 of the European Convention of Human Rights (ECHR)

5.41 Compliance with Article 8 of the ECHR requires a judge to consider whether the warrant is necessary and proportionate, both in the way it is issued and the way it is to be executed.[393] Professor Richard Stone emphasises that, when considering the proportionality of a measure, the court should consider whether it is possible to achieve the object by less intrusive means.[394]

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386 *Williams v Summerfield* [1972] 2 QB 512; *R v Chesterfield Justices ex parte Bramley* [2000] QB 576; *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157 at [48] per Simon J; *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634 at [89] per Sir John Thomas PQBD; *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin), (2014) 178 JP 336.

387 *Hunter v Southam Inc* [1984] 2 SCR 145, 146. The Supreme Court of Canada held that "for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner". *Parker v Churchill* (1985) 9 FCR 316, 322. The Federal Court of Australia observed that "The duty, which the Justice of the Peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by an inevitable signature".

388 M Dalton, *The Country Justice: Containing the Practice, Duty and Power of the Justices of the Peace Out of Their Sessions* (1742) p 402; R Crompton, *Star-Chamber cases: Shewing what causes properly belong to the cognizance of that court* (1630) pp 29 to 30.

389 K Starmer, M Strange and Q Whitaker, *Criminal Justice, Police Powers & Human Rights* (2001) p 179; B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (3rd ed 2012) p 287.

390 *M Zander on PACE* (7th ed 2015) para 2-08.

391 See *R v Chesterfield Justices ex parte Bramley* [2000] QB 576.

392 *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 678 to 679. For discussion see B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (3rd ed 2012) p 291.

393 *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24(1)].

394 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 2.43.

5.42 *Archbold Magistrates' Court Criminal Practice* explains the role of the issuing authority when scrutinising search warrant applications under section 8 of PACE in the following terms:

> The requirements of section 8 of PACE 1984 must be fully complied with and the principles of the European Convention on Human Rights must be considered, particularly art. 8 which provides the right to respect for privacy and family life. The granting authority must be satisfied that the issue of a warrant is a proportional step and that the infringement of art. 8 rights is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedom of others … Questions of proportionality must also be considered not only in the issue of the warrant but also the way in which it is to be executed. Magistrates may inquire into the nature of the premises and whether families and neighbours will be treated with respect and sensitivity within the remit of the warrant.[395]

5.43 Professor Helen Fenwick has warned that a breach of Article 8 might be established where a magistrate makes little or no attempt to test the reliability of the information provided. She adds that there is a risk that in practice, those who take a rigorous approach and refuse to grant warrants may not be approached again.[396]

The need for sufficient time

5.44 Proper scrutiny takes time. In two cases, *Sweeney*[397] and *Chatwani*,[398] the Divisional Court criticised the lack of time taken to consider the applications. In *Sweeney* the issuing authority took less than 10 minutes, despite being given a 15-page document to consider at the start of the hearing. This was despite the fact that the courts had already made clear that such practices were unacceptable. Against this, the Divisional Court has observed that the fact that there was only a short hearing does not necessarily mean that there was no proper scrutiny of the application by the Issuing Authority.[399]

5.45 From a resource perspective, the Divisional Court has acknowledged that, in complex applications, proper scrutiny may involve a great deal of work and that:

> HMCTS must make the necessary resources available so that the Resident Judge at the Crown Court can discharge his responsibility for ensuring that arrangements are in place for these difficult applications to be dealt with properly.[400]

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395 *Archbold Magistrates' Court Criminal Practice* (2018) para 1-32.

396 *H Fenwick on Civil Liberties and Human Rights* (5th ed 2017) pp 872 to 873. This statement is predicated on a system in which magistrates are personally approached without support from a legal adviser, which we have been informed never happens.

397 *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin), (2014) 178 JP 336.

398 *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

399 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [47].

400 *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [26].

5.46 The Divisional Court made similar remarks in *R (S) v Chief Constable of the British Transport Police*.[401]

5.47 Many of the stakeholders we discussed this with said that courts were not always given time to consider applications properly, and sometimes treated applications as a rubber-stamping exercise. This can be a problem in the Crown Court as well as magistrates' courts. For example, Andrew Bird, a barrister at 5 St Andrew's Hill, doubted whether the Crown Court listing process provides sufficient time for judges to properly consider applications for search warrants.

Reform

5.48 In Chapter 4 we discussed proposed changes to application forms. As well as encouraging applicants to consider each requirement, we hope that new forms will also help courts in their scrutiny of applications. In this section we focus on listing practices (the way in which cases are allocated by the court), to see whether changes in listing can improve the level of scrutiny given to applications.

5.49 We were informed that, in many courts, the judge or justice is given a list of warrant applications to consider at the beginning of the court day. Another stakeholder informed us that it is in fact rare for the judge or justice to consider applications at the beginning of the day, and applications are never heard one after another. Typically, applications trickle in throughout the day and into the night as investigations proceed. In some areas, such as the South East and Birmingham, they are scheduled into a dedicated applications court.

5.50 We were also informed that there can be a temptation to regard warrant applications as a preliminary chore to be dealt with as quickly as possible before proceeding to the "real" work of the day, namely hearing trials. Anecdotal evidence suggests that, even if a fixed period is set aside for warrant applications, there may be insufficient time for each application.

5.51 To combat this problem, Criminal Practice Direction 47A.2 emphasises that sufficient time must be given to each application:

> The issuing of a warrant or making of such an order is never to be treated as a formality and it is therefore essential that the judge or magistrate considering the application is given, and must take, sufficient time for the purpose.

5.52 Stakeholders made many suggestions to embed this principle further by improving listing practices. Some proposals aimed to provide more time for warrant hearings, while others attempted to allocate the time available more efficiently, but reducing the time in routine cases so as to provide more resources for complex ones.

Electronic submission, staff sifting and administrative procedures

5.53 Several stakeholders suggested that applications should be sent electronically. We were informed by HMCTS that applications are almost invariably sent electronically to

[401] *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647.

court staff. In the South East, out of hours applications are shared with justices via eJudiciary, the judicial intranet.

5.54 Samantha Riggs, a barrister at 25 Bedford Row, suggested that document-heavy applications should be sent at least seven days in advance to give time for the judge or magistrate to read the papers thoroughly.

5.55 Electronic submission of warrant applications also allows them to be sifted by court staff before being submitted to magistrates and judges. Jonathan Hall QC of 6KBW College Hill invited us to consider whether it is possible, or desirable on cost and administrative grounds, to achieve a filter mechanism, so that only applications that are formulated in sufficient detail and comply with the requirements of the legislation are put before a judge. For example, court officials, or officials at a central body, could check the compliance of the draft application with the necessary formalities before a judge considers the merits. He observed that the law reports are littered with cases of quashed warrants where the failure appears largely one of drafting. With such a mechanism, non-compliant applications could be rejected without taking up valuable court time. We were informed that, in the South East region, legal advisers already return inadequate applications, however, it is not always successful in eliminating errors.

5.56 Andrew Bird of 5 St Andrew's Hill also pointed out that there are no facilities to amend a draft search warrant at court, so the judge cannot in practice re-draft it. In the High Court, advocates appear and are sent away to re-draft and print out a paper copy for the judge to sign, which does not happen in the Crown Court. We were informed that, as draft warrants are received digitally, they can be amended, either by the legal adviser (for example, to insert a correct court address) or by the officer on advice from the legal adviser and then resent.

5.57 The Criminal Procedure Rule Committee has done a significant amount of work to improve the application process in recent years. An administrative system allowing investigative orders to be granted without an oral hearing was piloted successfully in several courts.

5.58 One such system has been implemented at Isleworth Crown Court. The resident judge, HHJ Martin Edmunds QC, explained to us that Isleworth Crown Court receives most applications by email from recognisable secure email addresses, for example the police.[402] If it appears that an application can be dealt with administratively, a staff member will print out the application and draft order and forward it in hard copy to the judge. Applications are allocated among judges according to workloads and will be dealt with by the assigned judge administratively, unless an oral hearing is clearly necessary or one is requested. Judges record their reasons for granting or refusing the order in manuscript and (where granted) sign and date the warrant. Court staff then collect the paper work and inform applicants of the outcome.

5.59 The aim was to roll out this system on a national basis. However, HHJ Edmunds QC told us that take-up of the system among Crown Courts has been "patchy", with some courts continuing the process of listing all applications before a judge for an oral hearing.

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[402] Criminal Procedure Rules, r 5.1.

This has resulted in a degree of "forum shopping", where applicants may choose courts with no local connection, based on the application process and likelihood of success.

5.60 We were also told about an innovative scheme for magistrates' courts. In the South East region, search warrant applications are directed to a dedicated regional service where applications are heard by live link. Two magistrates, supported by two legal advisers, are able to offer 32 slots a day. It was said that this has several advantages:

(1) applicants save travel and waiting times;

(2) advisers screen information in advance;

(3) magistrates read information before the hearing;

(4) advisers type notes of what was said and the magistrates' reasons; and

(5) it saves accommodation costs. We were told that a private room, an internet enabled computer and a phone are sufficient. This would also fit in more broadly with the ongoing programme of digitisation of the courts.

5.61 A recent National Audit Office report on efficiency in the criminal justice system drew attention to the saving in police time from timed appointments, rather than requiring applicants to wait at court.[403]

5.62 Stakeholders also mentioned other pilot schemes. Some were met with some judicial resistance, for three reasons.

(1) Judges prefer to see applicants face to face, so that information can be given on oath and questioned by the judge. Against this, other stakeholders said that it was easier to concentrate on reading the documents without the applicant in the room. Furthermore, if the magistrate had questions, the applicant might find it easier to answer them from their desk, with access to the files. We also note that an oath can be taken by live link.

(2) An expedited procedure may encourage more applications to that court in preference to other courts, resulting in judicial overload.

(3) Funding arrangements for the courts are calculated on the basis of hearings during court hours, and do not reflect work done electronically and out of hours.

Options for reform

5.63 While pilots are a useful way of testing new ideas, there is also a need for a more consistent system, which does not overload some courts compared to others. We are also concerned that some schemes might be perceived as emphasising the efficiency of administrative processes at the expense of full judicial scrutiny.

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403 National Audit Office, *Efficiency in the criminal justice system* (1 March 2016) p 32. The report mentioned a scheme at Birmingham Crown Court, where police officers can request appointment times to make applications for search warrants.

5.64 In principle, we consider that applications to both the Crown Court and magistrates' courts should be submitted electronically. We are informed that this is what happens in the majority of cases in the magistrates' court, as the Criminal Procedure Rules do not require a "wet-ink" signature.[404]

5.65 If such a scheme were formally adopted, the procedure would be as follows:

(1) applications to a magistrates' court would be sifted (and logged)[405] by a legal adviser;

(2) the legal adviser would return inadequate applications for re-submission;

(3) simple and clear cases could be forwarded to a judge or magistrate to be decided on the documents alone (though the judge or magistrate would be able to ask for a hearing instead); and

(4) in other cases, a hearing should be arranged by video link, telephone or face to face. We were informed that applications can be done most effectively by phone as the technology is available to everyone everywhere. In these cases, it is important that the judge or magistrate is given enough notice to be able to read the papers beforehand, and has enough time to probe the evidence at the hearing. One stakeholder also suggested that it would be helpful for a magistrates' court legal adviser to be able to forward a particularly complex application to a Circuit judge.

5.66 There are strong arguments that these arrangements should be adopted. There is also an argument that they could be put in place almost immediately without legislation, by amendment to the Criminal Practice Direction. This would enable the new procedures to be introduced in all courts simultaneously, and would not lead to a flood of applications to the first courts to implement them.

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404 As discussed at para 5.37 above.

405 We discuss the requirement to keep records and statistics at para 5.101 below.

Consultation Question 23

We provisionally propose formalising the following application process to improve judicial scrutiny:

(1) applications for a search warrant to a magistrates' court or the Crown Court should be submitted electronically, unless it is not practicable in the circumstances to do so; and

(2) applications to a magistrates' court should be filtered by legal advisers who would:

(a) return applications that do not comply with statutory criteria;

(b) forward simple applications to the magistrate or judge, to be decided on the documents alone; or

(c) list other cases for a hearing by video link, telephone, or in court, to be arranged with sufficient notice to read the documents in advance and sufficient time at the hearing for adequate scrutiny.

Do consultees agree?

5.67 Under this reformed procedure, an application to the Crown Court would go straight to the judge, as there is no other qualified court staff to sift the application. There is an argument that all applications should be sent to a magistrates' court legal adviser to ensure compliance. Therefore, in the absence of the search warrant provision requiring the application to be heard by a particular issuing authority, the legal adviser would make a determination whether the application should go before a magistrate or be sent to the Crown Court.

5.68 The main advantage of extending the filter procedure proposed above to include applications to the Crown Court would be to ensure that every application is screened by a legally qualified individual. It may also lead to a better allocation of applications between court centres, with the potential for cost saving by taking some search warrant applications out of the Crown Court where adequate scrutiny can be given by a lay magistrate.

5.69 This, however, might be inconvenient to investigators, as they would no longer have the choice of which court to apply to. A modified form of this suggestion would allow investigators to indicate their preferred court in the application. In this scheme the legal adviser would still have the duty of ensuring that applications are adequate before allocating them to a magistrate or forwarding them to the Crown Court.

5.70 Additionally, there may be delay where every application for a search warrant must be sifted. This may be regarded as unnecessary where certain agencies prefer to submit applications to particular court centres.

5.71 Another counter argument is that additional work would be generated for legal advisers, who would in effect be undertaking work for the Crown Court owing to the lack of staffing

in Crown Courts generally. In response, it is likely only a small proportion of search warrant applications are made to the Crown Court.

5.72 We seek consultees' views on this issue.

Consultation Question 24

We invite consultees' views on whether all search warrant applications should in the first instance be sent to a magistrates' court legal adviser who would:

(1) determine whether the application meets the statutory criteria; and

(2) send on those which do comply to a Circuit judge or District Judge (Magistrates' Courts) or lay justices as appropriate given the complexity of the case.

RECORDING ADDITIONAL MATERIAL PROVIDED DURING HEARINGS

Current law

5.73 Unlike the Crown Court, magistrates' courts are not courts of record, although there is a duty to make notes in certain proceedings. In relation to search warrant applications, rule 47.29(5) of the Criminal Procedure Rules provides that:

> If the court requires the applicant to answer a question about an application—
>
> (a) the applicant's answer must be on oath or affirmation;
>
> (b) the court must arrange for a record of the gist of the question and reply; and
>
> (c) if the applicant cannot answer to the court's satisfaction, the court may—
>
> (i) specify the information the court requires, and
>
> (ii) give directions for the presentation of any renewed application.[406]

This is further reflected in the applications forms for section 8 and sections 15 and 16 of PACE, which prompt the judge to summarise any questions and answers raised at the hearing.

5.74 This can be contrasted with the rules for other types of proceedings, such as the Civil Procedure Rules in relation to Freezing Orders, which require a written note of the hearing.[407] Further, in civil law, the duty to keep a full and proper note of the without notice hearing, and to provide a copy to the respondent, is sometimes viewed as being part of the duty of full and frank disclosure.[408]

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406 Criminal Procedure Rules, r 47.25.

407 Civil Procedure Rules, Practice Direction 25A, para 9.2.

408 *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, *The Times* 10 November 1999 (Lightman J); *Cinpres Gas Injection Ltd v Melea Ltd* [2005] EWHC 3180 (Pat).

5.75 The courts have held that any additional information provided by the applicant during the hearing of a search warrant application should be recorded.[409] In *R (S) v Chief Constable of the British Transport Police*, Lord Justice Aikens commented that all hearings of a search warrant application must be recorded so that there can be no dispute about what was or was not said to and by the judge.[410]

5.76 Some warrants fail because the court keeps an inadequate record of the applicant's answers to questions posed at the hearing. As Lord Justice Latham observed in *(Redknapp) v Commissioner of the City of London Police*:

> It is wholly unsatisfactory, where the validity of such a warrant is in issue, to be asked to rely on anything other than the application itself, and if necessary, a proper note or record of any further information given orally to the magistrate. As the conditions set out in section 8(3) have accordingly not been met, the warrant was unlawfully issued.[411]

5.77 In *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court*, Lord Justice Kennedy gave the following advice about how information should be recorded:

> It seems that sometimes proceedings before the District Judge are tape-recorded, and if that can be arranged that is clearly the best form of record, but if that is impracticable the party applying for a warrant must prepare a note which can be submitted to the judge for approval if any issue arises as to the way in which the warrant was obtained.[412]

5.78 Poor record keeping of the hearing is often linked to inadequacies in the application forms and a lack of written reasons for the decision. The accumulative effect of these failures can result in those who are the subject of a search warrant not knowing, and being unable to find out, what information the issuing authority relied upon. These problems are illustrated in a large number of cases.[413]

5.79 Recently, Mr Justice Williams expressed his reluctance to determine whether a search warrant was issued unlawfully, and explained that this was due to the lack of notes of the hearing:

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409 See *R v (Austen) v Chief Constable of Wiltshire* [2011] EWHC 3385 (Admin) at [49]*; R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091 at [16]; *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24(7)].

410 *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647 at [46].

411 *R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091 at [16].

412 *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24(7)].

413 *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1, [2018] 2 WLR 357; *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin), (2014) 178 JP 336; *R (Mills) v Sussex Police* [2014] EWHC 2523 (Admin), [2015] 1 WLR 2199; *R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

> The reality is that there is no proper basis for concluding that the search warrants were obtained by acts or omissions which were in excess of the powers conferred upon [the investigator]. It was for the District Judge to apply section 8 of PACE. There is no reason to suppose that he did not have the statutory criteria well in mind when he granted the search warrants in respect of the Claimants … At this distance, however, it is impossible for me to know whether that information was imparted to him.[414]

5.80 Commentators have warned that, in the absence of a record of the hearing, a human rights challenge may be more likely to succeed. Associate Professor Ruth Costigan and Professor Richard Stone, commenting on the continual deficiencies in compliance with the courts' repeated calls for recording notes, write:

> It hardly needs stating that a detailed record is essential to enable the person affected to understand the basis and extent of the interference with his or her rights, and to facilitate review by the courts.[415]

5.81 That said, the ECtHR, rejecting an Article 8 complaint about the Divisional Court's decision in *R (Cronin)*, observed that:

(1) the Information laid before the justices could be regarded as containing all the relevant material on which they based their decision;

(2) the applicant was in a position to assess whether the procedure for the grant of the warrant had been properly adhered to, given that he had access to the Information; and

(3) it was not apparent that a verbatim record of the particular questions asked could have assisted the applicant any further in challenging the lawfulness of the search.[416]

Reform

5.82 Although there is a requirement to provide the "gist" of additional issues which arise during a warrant application hearing, stakeholders have argued that this does not go far enough: instead, hearings should be recorded, either by an audio recording or a verbatim note.

5.83 Anthony Edwards of TV Edwards Solicitors argued that there should be a standard way to record additional information obtained at a hearing to prevent warrants failing because the court keeps insufficient notes. Samantha Riggs of 25 Bedford Row stated that, unless a voice recording system is used, the defence can be completely left in the dark about what is said at the hearing of the application. HMRC inform us that they see it as good practice for officers to record in their notebook any questions and answers

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414 *Mouncher v The Chief Constable of South Wales Police* [2016] EWHC 1367 (QB) at [557].

415 R Costigan and R Stone, *Civil Liberties and Human Rights* (11th ed 2017) p 240.

416 *Cronin v United Kingdom* (2004) 38 EHRR CD233. See also *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752.

given during the issuing of a warrant or order and would therefore welcome a move to formalise the process to support the issue of the warrant or order.

5.84 We have identified six reasons why recording hearings is desirable:

(1) agencies sometimes send two officers to attend a hearing, with the second officer tasked to keep a full note;

(2) it is of benefit for any individual who may wish to challenge the legality of the warrant;[417]

(3) it enables occupiers to understand the basis and extent of the interference with their rights;[418]

(4) it may protect both the applicant and the issuing authority from unfounded allegations of impropriety in the process;[419]

(5) it may demonstrate that proper independent scrutiny has been applied by the issuing authority;[420] and

(6) it avoids the unsatisfactory position whereby a judge hearing a challenge to a search warrant is unable to determine whether it was issued unlawfully.[421]

5.85 Against this, it can be said that:

(1) detailed recording is resource intensive. Not all courts have audio-recording facilities. As mentioned, magistrates' courts are not courts of record. It may also be impractical where applications are made to justices at home out of hours.[422] This point was also raised by a stakeholder: courts are unlikely to have tape-recording facilities and in the case of magistrates who sign warrants at home, this could be very challenging. Arguably, however, it is especially in these cases that there is a pressing need for a detailed note. In respect of cost, in the Crown Court, transcripts of search warrant hearings can be ordered to be prepared at the claimant's cost;[423]

(2) when an issuing authority accepts an Information as containing all the necessary material, it is unnecessary to go further.[424] Taking a full note of the applicant's

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417 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [23] per Lord Woolf CJ.

418 R Costigan and R Stone, *Civil Liberties and Human Rights* (11th ed 2017) p 240.

419 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [23] per Lord Woolf CJ.

420 K Starmer, M Strange and Q Whitaker, *Criminal Justice, Police Powers & Human Rights* (2001) p 179.

421 *Mouncher v Chief Constable of South Wales Police* [2016] EWHC 1367 (QB) at [557].

422 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [22] per Lord Woolf CJ.

423 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [8].

424 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [23] per Lord Woolf CJ.

evidence would prolong the hearing for no significant benefit as it would amount to a simple restatement of facts in the Information;[425]

(3) the Information should also be sufficient to provide the occupier with enough material to explain and justify the warrant.[426] This of course assumes that the occupier is given the Information and that it is, in fact, sufficiently detailed; and

(4) one stakeholder pointed out that a further issue with recording hearings is the need for a high level of security in storage. It was observed that there have been instances of tipping off based on written applications in the past. A recording, however, could provide more detail, which could endanger both the enquiry and informants.

5.86 In conclusion, we consider that some form of record is needed and that it would be helpful to have a standard procedure for how the record is made. One possibility is that the hearing should always be recorded, but not transcribed unless the applicant or the occupier asks for this. The record should be made available to the occupier on the same basis as the Information: that is, it should be disclosed unless there are reasons of public policy against this. We invite consultees' views.

Consultation Question 25

We provisionally propose that:

(1) there ought to be a standard procedure for audio recording search warrant hearings; and

(2) this should only be transcribed and made available to the occupier in the same way, and on the same conditions, as the Information sworn in support of the warrant under the Criminal Procedure Rules.

Do consultees agree?

PROVIDING WRITTEN REASONS FOR ISSUING THE SEARCH WARRANT

Current law

5.87 As they stand, neither PACE nor the Criminal Procedure Rules contain an explicit requirement for an issuing authority to produce a written record of their decision to grant a search warrant. Search warrant application forms do, however, invite the issuing authority to give reasons for the grant or refusal of a search warrant.

5.88 Repeated judicial observations indicate that reasons for issuing a search warrant ought to be given.[427] The Divisional Court in *R (Newcastle United Football Club) v Revenue and Customs Commissioners* confirmed that there is a common law duty on courts to

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425 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [17].

426 *Cronin v United Kingdom* (2004) 38 EHRR CD233.

427 *R v Southwark Crown Court ex parte Sorsky Defries* [1996] COD 117.

give reasons, even though the absence of reasons is not necessarily fatal in every case.[428]

5.89 The Court further observed that, despite repeated observations made in case law, the High Court continues to receive a surprisingly large number of cases in which it is argued that no or inadequate reasons have been given by magistrates or the Crown Court.[429]

5.90 In *R (Newcastle United Football Club) v Revenue and Customs Commissioners*, the Court reconciled two lines of cases, which were ostensibly at variance with each other.[430]

(1) In the first line of cases, the Divisional Court quashed the warrant because no reasons (or inadequate reasons) had been given.[431]

(2) In the second line of cases, the court upheld the decision, despite the absence of reasons.[432]

5.91 According to the Divisional Court in *R (Newcastle United Football Club) v Revenue and Customs Commissioners*:

> The authorities can be reconciled. For the reasons given in what we will refer to as the *Tchenguiz* line of cases [the first line], and indeed also referred to in *Glenn …* it is undoubtedly preferable for reasons to be given when a warrant is issued. But the failure to give reasons is not the end of the matter. When faced with a challenge to the warrant on the ground of lack of reasons, the reviewing Court will ask itself the ultimate question, which is whether the statutory test has been applied. If, despite the lack of a fully reasoned decision, the court is able to discern a sufficient basis for the decision to issue the warrant, the challenge will fail.[433]

5.92 In *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners*, the court held that, in most cases, magistrates should ensure that reasons for decision are given and recorded at the time.[434] This is particularly important where the Information is given or

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428 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [51].

429 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [53].

430 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [53] to [59].

431 See *R v Southampton Crown Court ex parte J and P* [1993] Criminal Law Review 962, [1993] COD 286; *R v Lewes Crown Court ex parte Nigel Weller* [1999] EWHC 424 (Admin) per Kennedy LJ at [46] to [47]; *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647 at [46] to [47] and [106]; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [26] and [137].

432 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 and *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners* [2011] EWHC 2998 (Admin).

433 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [56].

434 *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22, at [29].

supplemented orally. However, this does not mean that there must be always be a formal written judgment: often the written information combined with the notes of the hearing will be sufficient.

5.93 In *R (Atwal) v Lewes Crown Court*, it was considered best practice for judges to explain why they were satisfied that there were reasonable grounds for suspicion of money laundering offences.[435] However, the court rejected the argument that the absence of any reference to a production order invalidated the warrants. There is a clear distinction between omitting material which goes directly to the existence of reasonable grounds for suspecting money laundering offences and other, less essential, omissions.[436]

5.94 In *R (S) v Chief Constable of the British Transport Police*, Lord Justice Aikens held that, although there is no statutory requirement to give reasons, this should be done as a matter of good practice in case of any future challenge.[437] In particular the reasons should:

(1) be sufficient to identify the substance of any relevant material put before the judge in addition to the written Information;

(2) set out the inferences drawn from the material which are relevant to the statutory conditions governing the content and form of the order; and

(3) explain decisions about why material is or is not covered by legal privilege. This is particularly pertinent to applications under section 9 of PACE.[438]

5.95 In *R (Sweeney) v Westminster Magistrates' Court*, the Divisional Court made plain there is a need for "notes, recordings and reasoning".[439]

5.96 Human rights commentators have also argued that:

> Magistrates will need to provide a proper independent scrutiny of police activities to avoid violating the Convention. With this in mind, it would be advisable for any magistrate granting a search warrant to make a note of his or her reasons for doing so.[440]

Reform

5.97 The Divisional Court in *R (Newcastle United Football Club) v Revenue and Customs Commissioners* invited the Criminal Procedure Rule Committee to consider whether Part 47 of the Criminal Procedure Rules should be amended to require reasons to be

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435 *R (Atwal) v Lewes Crown Court* [2015] EWHC 1783 (Admin) at [30].

436 *R (Atwal) v Lewes Crown Court* [2015] EWHC 1783 (Admin) at [23]. See also *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [39].

437 *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647 at [46].

438 J English and R Card, *Police Law* (12th ed 2015) p 71.

439 *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin), (2014) 178 JP 336 at [45].

440 K Starmer, M Strange and Q Whitaker, *Criminal Justice, Police Powers & Human Rights* (2001) p 179.

given by the issuing authority.[441] The Criminal Procedure Rule Committee, however, drawing a distinction between *inviting* the court to give reasons and *requiring* the court to do so, considered that it would not be appropriate to add to the Rules an explicit requirement for reasons to be given where there is no explicit statutory impetus to do so. Further, including an explicit requirement where there only exists a common law duty to give reasons risks giving a misleading impression that rules are required to give effect to the common law.

5.98 In considering whether a duty to give reasons should be spelled out in statute, we have identified at least six arguments in favour of a statutory duty to give reasons.

(1) It would provide a stronger check on decision-making. Written reasons would demonstrate that the issuing authority has considered all the relevant factors and was satisfied that the warrants should or should not be made.[442] We are also informed that, in the South East region, a sample of magistrates' reasons for issue or refusal of search warrants is regularly reviewed by a team of deputy justices' clerks to check on quality. A requirement to provide written reasons would make this procedure feasible everywhere.

(2) It would ensure more reasons are provided, to assist the court with any subsequent proceedings. In particular, the court would be able to learn the reasons for the decision without the fear that they were mere *ex post facto* justifications.[443]

(3) Providing reasons assists applicants, in the event that a warrant is challenged. In *R (Newcastle United Football Club) v Revenue and Customs Commissioners*, HMRC explained that their counsel in the case had been instructed to ensure that the judge articulated reasons for the decision as:

> A lack of reasons or anything else that suggests that the Court has given the application less than vigorous scrutiny does not assist HMRC as it causes difficulty come any future judicial review.[444]

(4) It would enhance public confidence in the transparency of public institutions. As Guidance from the National Crime Agency explains:

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441 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [60].

442 See *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [44].

443 *R v Southampton Crown Court ex parte J and P* [1993] Criminal Law Review 962, [1993] COD 286; *R v Lewes Crown Court ex parte Nigel Weller* [1999] EWHC 424 (Admin) per Kennedy LJ at [46] to [47]; *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157 per Moses LJ at [25].

444 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [44].

The provision of written reasons (and the taking of a written note) will ensure that there is a greater degree of transparency in relation to the hearing of the application.[445]

(5) It would lead to greater likelihood of compliance with human rights obligations. The ECtHR has highlighted the importance of providing reasons when authorising a search. A breach of Article 8 was found in *Robathin v Austria* where the domestic court did not provide sufficient reasons as to why a search of all the applicant's data was necessary, which went beyond the data concerned with the offence.[446]

(6) Elsewhere, there is precedent for the imposition of a statutory duty to give reasons for decisions in the criminal process from bail through to sentencing.[447] Section 174 of the Criminal Justice Act 2003, headed "Duty to give reasons for and to explain effect of sentence", requires a sentencing court to "state in open court, in ordinary language and in general terms, the court's reasons for deciding on the sentence" and to "explain to the offender in ordinary language" the effect of the sentence and certain other matters. The section provides also, by subsection (4), that "Criminal Procedure Rules may (a) prescribe cases in which either duty does not apply, and (b) make provision about how an explanation under subsection (3) is to be given". Section 110 of the Criminal Justice Act 2003 also requires the court to give reasons where it makes a "relevant ruling" on admissibility.[448]

5.99 Four arguments against requiring reasons can be raised in response.

(1) It could be argued that providing written reasons should remain a matter of best practice rather than a statutory rule, as it would be undesirable to require written reasons in every case. The Divisional Court has repeatedly held that a lack of written reasons is not fatal for a warrant.[449] Further, the Divisional Court has acknowledged exceptional circumstances for not providing reasons in public for granting a search warrant, such as a valid claim to public interest immunity.[450]

(2) Well-designed application forms could negate the need for a strict statutory duty if they guided the judge through each element of the decision, so that the reasons for granting the application were evident. In Chapter 4 we argue that more carefully structured application forms can assist the issuing authority by guiding

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445 National Crime Agency, *Warrant Review Closing Report*, p 20.

446 *Robathin v Austria* (2012) (App No 30457/06) at [51] to [52].

447 Bail Act 1976, s 5; Criminal Justice Act 2003, s 174.

448 Criminal Justice Act 2003, s 110: a "relevant ruling" means a ruling on whether an item of evidence is evidence of a person's bad character; a ruling on whether an item of such evidence is admissible under section 100 or 101 (including a ruling on an application under section 101(3)); and a ruling under section 107.

449 *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752; *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22; *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187.

450 *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [12].

them through the relevant statutory criteria.[451] However, as the Divisional Court held in *Tchenguiz*,[452] the use of an application forms does not obviate the need to give reasons. Over-reliance on forms may also promote a tick box culture.[453]

(3) In trials and civil actions, judges are invariably required to give reasons for their rulings, but this is often understood as a matter of basic principle rather than being laid down in statute or rules of court. It would be odd if search warrants were singled out for a formal rule to this effect. Dr Jo Easton of the Magistrates' Association also pointed out that written reasons are not necessarily recorded in magistrates' courts.

(4) Providing reasons is resource-intensive; as the Divisional Court observed in *R (S) v Chief Constable of the British Transport Police*, judges are often hard-pressed.[454] The Divisional Court in *R (Newcastle United Football Club) v Revenue and Customs Commissioners*, conscious of this fact, nonetheless observed:

> Reasons need not be elaborate and the [Criminal Procedural Rules] emphasise the need for adequate time to be given for the consideration of applications. Giving succinct reasons for the decision should be seen as part of that consideration. Moreover, the structured nature of the application form, addressing as it does each of the statutory criteria, should make the production of succinct reasons for decisions much less burdensome.[455]

Magistrates may need to be given training in how to provide succinct reasons for the decisions to grant or refuse warrants.

5.100 On balance, our provisional view is that there should be a duty in rules of court for the court to give reasons for its decision. However, a failure to give reasons should not necessarily invalidate the warrant if it is clear that the court was presented with evidence of sufficient grounds to issue the warrant.

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451 See para 4.29 above.

452 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634 at [43]. See *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187.

453 *R v Southampton Crown Court ex parte J and P* [1993] Criminal Law Review 962, [1993] COD 286; *R v Lewes Crown Court ex parte Nigel Weller* [1999] EWHC 424 (Admin) per Kennedy LJ at [46] to [47]; *R (Wood) v North Avon Magistrates' Court* [2009] EWHC 3614 (Admin), (2010) 174 JP 157 per Moses LJ at [25].

454 *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647.

455 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [61].

Consultation Question 26

We provisionally propose that the requirement for the issuing authority to provide written reasons for issuing or refusing a search warrant should be enshrined in statute. This should not displace the current position in law that a failure to give reasons does not necessarily invalidate a search warrant if it is clear that the court was presented with evidence of sufficient grounds to issue the warrant. Do consultees agree?

If not, we invite consultees' views on by which other means the issuing authority ought to be encouraged to give reasons.

REQUIREMENT TO KEEP RECORDS AND STATISTICS

Current law

5.101 There have been many complaints about the lack of statistical information on search warrants. Professor Keith Ewing commented that there "is little research and little insight" into this issue, including how the police choose which court to approach, or the frequency with which requests for a warrant are refused.[456]

5.102 Harry Snook argues that:

> Proper record-keeping … would enable citizens to obtain information on how many powers were being exercised, which agencies or local authorities were the heaviest and lightest users of them, and how many times they had failed to convince a [Justice of the Peace] that this use was necessary.[457]

5.103 Although the police collect data on detentions, road checks, intimate searches and detention warrants[458] this does not extend to search warrants. One difficulty, however, is that the police are not the only agency making search warrant applicants. To get an accurate picture, statistics must be produced by the court services.

5.104 In 2006, HMCTS rolled out a new business application called "Applications Register" specifically to cater for the centralised recording of work done by magistrates that fell short of a court hearing. The system allows for the recording of applications made and their outcomes. Information is extracted from the AR system on a monthly basis and provided to the HMCTS Governance and Performance Directorate. No statistics have yet been published from this source, however, we have been informed that data can be extrapolated to identify how many warrants are granted or refused by type and area (for example, in Thames Valley, [insert number] search warrants for stolen goods and [insert

456 K Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (2010) p 41.

457 H Snook, *Crossing the Threshold: 266 ways the State can enter your home* (2007) p 59.

458 The Home Office produces national statistics on police powers and procedures, which show for example that in the year ending March 2017, police in England and Wales applied to magistrates for 365 warrants of further detention. Of these applications 12 were refused, meaning warrants were granted in 97% of cases. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/658099/police-powers-procedures-mar17-hosb2017.pdf (last visited 29 May 2018).

number] search warrants for drugs were granted over a period of [date 1] to [date 2]). We have also been informed that further searchability is to be developed for the system.

Reform

Recommendations in other jurisdictions

5.105 The Victorian Commonwealth Senate Scrutiny of Bills Committee recommended that each agency which exercises entry and search powers should maintain a centralised record of all occasions on which those powers are exercised, and should report those figures annually to Parliament.[459] The New Zealand Law Commission argued that reporting requirements allow enforcement powers to be monitored. Data can shed light on the value and appropriateness of these powers, together with the need for changes in substance or procedure.[460]

5.106 Other jurisdictions provide for independent scrutiny of applications by a centralised body. Part 5 of the Police Powers and Responsibilities Act 2000 (Queensland) establishes a "public interest monitor", whose functions include:

(1) monitoring compliance of applications for, and the use of, surveillance device warrants, retrieval warrants and covert search warrants; and

(2) gathering statistical information about the use and effectiveness of covert search warrants and surveillance device warrants.[461]

5.107 Against this, there are concerns about the cost and time burdens.[462] The Law Reform Commission of Canada took the view that requiring detailed reporting of the exercise of all search and seizure powers would impose a burden on the police by record keeping.[463] A similar conclusion was ultimately reached by the New Zealand Law Commission.[464]

Reform in England and Wales

5.108 In our view, there ought to be a requirement for HMCTS to compile records and publish data on the numbers of search warrant applications received and the statutory basis of these applications, together with the numbers granted and refused. This could be logged onto a system when applications are submitted electronically. The outcome would then be recorded following determination by a magistrate or judge.

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459 Senate Standing Committee for the Scrutiny of Bills*, Entry and Search Provisions in Commonwealth Legislation*, Fourth Report of 2000, p 80. The Victorian Parliament Law Reform Committee also considered that agencies should report their entry and search activities to Parliament, as a way to ensure that the process is open to public scrutiny. See Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure, Questioning and Detention by Authorised Persons: Discussion Paper* (2001) p 25.

460 New Zealand Law Commission, *Search and Surveillance Powers* (2007) Report 97, p 433.

461 Police Powers and Responsibilities Act 2000 (Queensland), s 742.

462 It is worth noting that section 16(9) to 16(12) of PACE already requires records of executed warrants to be kept, which may make it easier to implement a monitoring system.

463 Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement* (1983) pp 246 to 247.

464 New Zealand Law Commission, *Search and Surveillance Powers* (2007) Report 97, p 436.

5.109 There are several benefits to introducing such a system. First, publishing data would enhance transparency into the processes involved in the granting of one of the most invasive powers of the state. Secondly, publishing data would reduce the risk of "forum shopping", whereby applicants chose courts which are known for their propensity to grant applications. Central data would show whether a disproportionate number of applications are made to a particular court; and whether some courts are particularly likely to grant applications.[465] Thirdly, understanding more about the statutory grounds on which applications are made would also ensure that forms were provided for all commonly used powers. Fourthly, data about how many warrants are issued would also provide a basis for assessing information about how many warrants are challenged.

5.110 A final benefit would be that in the future, it might be possible to adjust the funding model for courts by taking into account their work on search warrants. If search warrant work were to be included as funded work, it would encourage courts to give more priority to this area.

5.111 We welcome the steps taken by HMCTS to collect information about applications. We propose a relatively small and simple data collection exercise, which we hope would not impose an undue burden on the courts.

Consultation Question 27

We provisionally propose that data on the number of search warrant applications received under each statutory basis, together with the number of warrants granted and refused should be gathered for each court centre. Do consultees agree?

If so, we invite consultees' views on what other data ought to be collected.

[465] Though conversely, it could be argued that making detailed statistics of applications granted by different courts publicly available would be a further encouragement to forum shopping.

Chapter 6: Conduct of a search under warrant

INTRODUCTION

6.1 In this chapter, we examine possible reform to various procedural aspects of executing a valid search warrant. We discuss:

(1) who may carry out a search under a search warrant;

(2) who may accompany the person conducting a search under a warrant;

(3) how long a search warrant should remain valid;

(4) the number of visits to premises that may be authorised under a single search warrant;

(5) the time of day during which the search takes place;

(6) the information provided to the occupier during the search; and

(7) the presence of legal representatives.

6.2 Statutes providing for different types of search warrant differ in several of these areas. We consider that there ought to be greater consistency in powers under warrant whilst ensuring that occupiers' rights are respected.

6.3 We consider that there should be greater consistency across search warrant powers in relation to who may execute a search warrant and who may accompany a person during the search. We also consider that greater consistency could be achieved in relation to the length of time a warrant remains valid and the availability of multiple entry warrants. At the same time, we consider that there should be greater protection for occupiers. We propose judicial oversight of the time of the search, that more information should be provided to occupiers and clarity around the presence of legal representatives during a search.

WHO MAY EXECUTE A SEARCH WARRANT

Current law

6.4 Section 16(1) of PACE provides that a warrant to enter and search premises may be executed by any constable. This applies to all search warrant provisions, irrespective of whether the relevant legislation under which the warrant was obtained specifies that a constable is empowered to execute the search warrant. As mentioned in Chapter 3, this includes officeholders who have the powers of a constable.

6.5 Individuals who are not constables can only execute a search warrant where expressly empowered to do so by legislation under which the warrant has been issued. Often, the legislation will empower an investigative authority to authorise a person to execute the

warrant.[466] In some instances, someone other than a constable can only execute a search warrant under the supervision of a constable, if the warrant so provides.[467]

Reform

6.6 The reason that some statutes provide for warrants to be executed by constables while others refer to other kinds of official arises from the distinct nature of the investigations envisaged by the legislation. For these reasons, a fixed and uniform rule applying to all types of search warrant and specifying who can execute the warrant would be impractical. We nonetheless invite consultees' views on whether, in particular circumstances, there are investigative agencies whose investigatory or enforcement powers are unnecessarily hindered because they are unable to execute a search warrant.

6.7 In Chapter 4 we discussed the merits of expanding the class of persons able to apply for a search warrant. We consider that the pool of persons empowered to execute a search warrant should not be expanded unless there are compelling reasons for doing so. This is for a number of reasons. First, reform would involve increasing the number of agents of the state authorised to conduct intrusion into the home. Secondly, occupiers may be less compliant if someone other than a police officer conducts the search. Thirdly, there would be training requirements and cost implications for investigative agencies. Fourthly, agencies would need to consider how seized items are then stored. Fifthly, it is difficult to predict what an investigator will find on premises: there may be dangerous substances, evidence of further crimes or hostile occupants. A police officer is suitably trained and has the necessary enforcement powers to deal with these cases.

Consultation Question 28

We invite consultees' views on whether, in light of their experiences in practice, there are investigative agencies whose investigatory or enforcement powers are unnecessarily hindered because they are unable to execute a search warrant.

WHO MAY ACCOMPANY A PERSON EXECUTING A WARRANT

Current law

6.8 In the case of a constable, section 16(2) of PACE provides that a warrant to enter and search premises may authorise persons to accompany any constable who is executing it. In other words, the person accompanying the constable must be named in the warrant, rather than chosen after the search warrant has been issued.

[466] For example, Broadcasting Act 1990, s 196.

[467] For example, Anti-terrorism, Crime and Security Act 2001, s 52.

6.9 If unauthorised persons accompany a constable, their presence must be revealed to the occupier, who must give permission for their entry.[468] Where civilians are authorised to attend, they must act under the supervision of the police.[469]

6.10 There is some uncertainty over whether the person accompanying the constable must be a named individual ("Jane Smith") or whether it is sufficient to refer to the role ("a locksmith"). In policy terms, we do not consider that the law should require a named individual to be identified. This risks being unnecessarily restrictive, especially as some search warrants are valid for three months; a named locksmith may not be available on a given date. It is the function of the individual that is relevant, not their name. Specifying a function rather than an individual would enable the court issuing the warrant to focus on whether there is a need for that function to be performed.

6.11 In some instances, a constable executing a warrant may be required to be accompanied by an appropriate person.[470] Again, this arises from the distinct nature of the investigations envisaged by the legislation.

6.12 For warrants issued to persons other than a constable, the procedure varies. In some cases, the person executing the warrant is empowered by statute, rather than warrant, to have others accompany the officer executing the warrant. In other cases, the warrant will specify that the officer empowered to search may or must be accompanied by persons named in the warrant, or by persons of the searcher's choice, or by one or more constables. The fact that there is such diversity between search warrant provisions is not in itself a problem, as the rules governing the categories of individual who must or may accompany those authorised to execute the search are closely tailored to the purpose of the search. The obvious examples are cases involving specialised financial investigations and cases involving the removal or disposal of dangerous substances, both of which clearly require the presence of the appropriate experts.

6.13 Stakeholders told us that members of investigative agencies sometimes attend premises with independent lawyers. This is especially useful if issues of legal privilege arise. There is some case law which supports this approach.[471] We discuss the use of independent lawyers at paragraph 9.9 below and consult on whether their use should be put on statutory footing.

6.14 Clause 7 of the Powers of Entry etc. Bill 2009-10 provided that a maximum of four persons may enter premises, unless a warrant provided otherwise.[472]

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468 *R v Southwark Crown Court ex parte Gross, Gross and Gross*, unreported, Case No.CO 3920-96, March 18, 1997.

469 PACE, s 16(2B). See also *R v Reading Justices ex parte South West Meat Ltd* [1992] Criminal Law Review 672.

470 Criminal Justice Act 1987, s 2(6): unless it is not practical in the circumstances, a member of the Serious Fraud Office must accompany a constable executing a search warrant under s 2(4).

471 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634; *R (McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), [2016] 1 WLR 1308.

472 Powers of Entry etc. Bill 2009-10 [HL 71] available at https://publications.parliament.uk/pa/ld200708/ldbills/071/2008071.pdf (last visited 29 May 2018).

Reform

6.15 In our view, section 16(2) should be extended to apply more widely to this issue of who may accompany the official authorised to execute the warrant. We consider that a search warrant relating to a criminal investigation should authorise the agency executing the warrant to be accompanied either by a named individual or by a person exercising the role or position named in the warrant.

6.16 We are also of the view that this should not displace current arrangements for warrants where the person executing it is empowered by statute, rather than warrant, to take others with them.

Consultation Question 29

We provisionally propose that section 16(2) of the Police and Criminal Evidence Act 1984 should permit a search warrant relating to a criminal investigation to authorise the agency executing the warrant to be accompanied either by a named individual or by a person exercising the role or position specified in the warrant. Do consultees agree?

Do consultees agree that this should not displace current statutory provisions which enable persons executing a warrant to take others with them without this being specified in the warrant?

HOW LONG SHOULD A SEARCH WARRANT REMAIN VALID

Current law

6.17 Section 16(3) of PACE provides that entry and search under a warrant must be within three months from the date of its issue.[473] This was increased from one month by the Serious Organised Crime and Police Act 2005.[474] The Home Office consultation which preceded that amendment stated:

> There is no obvious reason to maintain an arbitrary limit of one month on the validity of search warrants. The magistrate or judge issuing the warrant could be given discretion to fix the duration according to the specific circumstances.[475]

6.18 The three-month limit applies not only to warrants under PACE itself but also to all other warrants falling within section 16 of PACE that are issued to the police. Other powers provide different periods: for example, a search warrant under section 28(6) of the Competition Act 1998 must be executed within one month. A search warrant under paragraph 1(1) of schedule 15 to the Data Protection Act 2018 is valid for seven days from the date of the warrant.[476]

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473 PACE, s 16(3).

474 Serious Organised Crime and Police Act 2005, Pt 3 s 114(8)(a).

475 Para 3.9.

476 Data Protection Act 2018, sch 15, para 5(4).

6.19 Some search warrant provisions enacted before 2005, and issued to the police, have a limit of less than 3 months.[477] A question arises whether the 3-month limit in section 16 of PACE replaces that shorter limit. The wording of section 16(3) of PACE is "must be executed within", not "may be executed at any time within". This suggests that section 16(3) of PACE provides a cap, rather than superseding previous limits.

6.20 Powers such as that under the Competition Act 1998 which provide shorter periods may do so because they were introduced before 2005 rather than because there is a principled reason why a shorter period is needed. However, the Psychoactive Substances Act 2016 maintains one month for search warrants, suggesting that Parliament saw no reason to extent the three-month period to all warrants.

Reform

6.21 Law reform bodies in other jurisdictions have recommended that search warrants should remain valid for shorter periods. The Law Reform Commission of Ireland recommended that search warrants should be executed within seven days.[478] The executing officer may apply for a seven-day extension, but must give reasons why this is necessary. An extension may only be applied for after the initial search warrant has been issued and before it expires. In addition, no more than three orders can be made extending the period.

6.22 The Law Reform Committee of the Parliament of Victoria recommended that a seven-day execution period ought to apply, with the option to extend to 30 days when justified.[479] Such extensions would be capable of being obtained by telephone.

6.23 The period for executing warrants under PACE was recently extended by Parliament, however, there remains divergence across many search warrant provisions. We invite consultees' views on whether there ought to be greater uniformity in relation to the period for which a warrant remains valid.

6.24 We reiterate that search warrants authorise infringement of the individual's right to privacy under Article 8 of the ECHR. Any increase in powers must therefore be necessary in a democratic society for the prevention of disorder or crime or for one of the other reasons mentioned in Article 8.[480] We therefore consider that a search warrant's period of validity should not be increased unless there as a compelling reason to do so.

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477 Misuse of Drugs Act 1971, s 23(3).

478 Report on Search Warrants and Bench Warrants (LRC 115-2015) para 5.05.

479 Law Reform Committee, Warrant Powers and Procedures, No 170 of Session 2003 to 2005, p 145.

480 *KS and MS v Germany* (2016) (App No 33696/11) at [44]. See also *Buck v Germany* (2006) 42 EHRR 21 (App no 41604/98) at [45]; *Smirnov v Russia* (2007) 51 EHRR 496 (App no 71362/01) at [44].

Consultation Question 30

We invite consultees' views on whether there should be uniformity in relation to the period for which a search warrant remains valid. If so, what should this period be?

If consultees do not consider that it is necessary to have complete uniformity, we invite views on whether the period of validity for any particular search warrant provision ought to be altered.

NUMBER OF VISITS TO PREMISES

Current law

6.25 The underlying rule is that once the police have executed a warrant its authority is spent. Therefore, once the police leave the premises, the only way to re-enter lawfully is to obtain another warrant or the consent of the occupier. In *Adams*[481] it was held that the power in the Obscene Publications Act 1959, allowing for entry "at any time" within a specified period, authorises only one entry per warrant. (The position may be different if the statute states "any time or times".)[482]

6.26 Section 15(5) of PACE, as originally enacted, provided that a warrant issued to a police constable authorises entry on one occasion only. The Serious Organised Crime and Police Act 2005 amended sections 8 and 15(5) of PACE to state that a warrant may authorise entry to and search of premises on more than one occasion: if the warrant does not so specify, the rule remains that only one entry is allowed. For multiple entries to be authorised, the justice of the peace must be satisfied that it is necessary to authorise multiple entries in order to achieve the purpose of the warrant.[483] The number of entries may be either limited to a maximum or unlimited.[484] If the warrant authorises multiple entries, a police officer of at least the rank of inspector must authorise in writing the second or subsequent entries.[485]

6.27 A few other search warrant provisions include a specific power to apply for a warrant authorising multiple entries,[486] but most do not address the question.

Reform

6.28 There are two main arguments for extending the availability of multiple entry warrants which concern criminal investigations.[487] First, to improve the powers of investigating

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481 [1980] 1 All ER 473.

482 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) paras 1.57, 1.58 and 4.26.

483 PACE, s 8(IC), inserted by Serious Organised Crime and Police Act 2005, s 114(2).

484 PACE, s 8(ID).

485 PACE, s 16(3B).

486 Those powers are PACE, s 8; PACE, sch 1; Immigration Act 1971, s 28FB; Sexual Offences Act 2003, s 96B; UK Borders Act 2007, s 45(2); Serious Crime Act 2015, s 52 and sch 2; Psychoactive Substances Act 2016, s 39.

487 For the meaning of a warrant being "for the purpose of a criminal investigation", see the discussion in Chapter 3.

agencies. The National Crime Agency has informed us that the power to apply for multiple entries remains a useful provision and consideration should be given to extend it across other Acts. There are several reasons why an investigator may need to enter the premises more than once:

(1) the size of the premises, such as a farmyard, scrapyard or large warehouse,[488] or the amount of relevant material, which may be too much to process on a single visit;

(2) the search may reveal evidence to suggest that material is likely to be at the premises at a later time;

(3) an officer may need to leave the premises for some reason connected to the search and then return. This was recognised by Queensland Criminal Justice Commission, which recommended that the power to enter premises pursuant to a search warrant should be amended to authorise re-entry into premises in cases where the departure from the premises is brief and is for the purposes of the search authorised under the warrant.[489]

6.29 Secondly, allowing multiple entries saves the court time taken in applying for additional warrants and allows for quicker response times.

6.30 Thirdly, extending the availability of multiple entries to all criminal search warrants would lead to a simpler, more standardised approach across the range of search warrant powers.

6.31 Against these arguments, any extension in search warrant powers raises human rights concerns. As we considered previously, the extension must be necessary in a democratic society for the prevention of disorder or crime or for other good reasons. Therefore, we would only recommend an extension if there is clear and compelling evidence of a need.

6.32 That being said, under section 8(1C) of PACE, a multiple entry warrant can only be granted if the justice of the peace is satisfied "that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant". Were the availability of multiple entry warrants to be extended subject to similar constraints, it could be argued that the necessity test would therefore be automatically satisfied, as the magistrate or judge has evaluated the evidence and held that multiple entries are necessary and proportionate.

6.33 The power to grant multiple entries to premises would be further tempered by the consistent application of section 16(3B) of PACE, which requires a police officer of at least the rank of inspector to authorise in writing entry or search for the second or subsequent time. This safeguard is already found where search warrants are sought

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488 The Government's Explanatory Notes to the Psychoactive Substances Act 2016 give the example of using a multiple premises warrant where searching a large warehouse.

489 Criminal Justice Commission, *Report on a Review of Police Powers in Queensland – Volume II: Entry, Search and Seizure* (1993) p 357.

under the Immigration Act 1971.[490] Applying this safeguard to other investigative agencies will not be difficult given that the legislation may already specify the grade of official which is equivalent to the rank of constable.[491]

6.34 According to stakeholders with whom we have engaged, multiple entry warrants are seldom used in practice: it could therefore be argued that there is no demonstrated need to extend their availability. In addition, the "seize and sift" provisions in section 50 of CJPA, which allow the search of material off-site, are likely to have reduced the need for multiple entry warrants.[492]

6.35 We see this as a finely balanced issue and ask for consultees' views.

Consultation Question 31

We invite consultees' views on whether the issuing authority should have the power to authorise multiple searches for all search warrants relating to a criminal investigation.

If not, are there particular search warrant provisions that should allow for multiple entry warrants?

THE TIME OF THE SEARCH

Current law

6.36 Section 16(4) of PACE and Code B of PACE require any search to be conducted at a "reasonable hour" unless the constable considers that this would frustrate the purpose of the investigation.[493] From the context, "reasonable hour" means a usual and social hour which does not cause serious inconvenience. However, there is an exception for a sufficiently pressing need to conduct the search at an inconvenient time. Professor Michael Zander QC notes that the test is of whether exceptional circumstances exist is a subjective test for the constable, qualified only by the condition that the constable's belief must be honest.[494]

6.37 In *Kent Pharmaceuticals*, the claimants argued that the entry and search of their premises was at an unreasonable hour because it took place at 6:00am in one case and at 6:20am in another. Giving the judgment of the Divisional Court, Lord Woolf CJ observed that:

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490 Immigration Act 1971, s 28K(3B): specifies that an immigration officer of at least the rank of chief immigration officer must authorise in writing any second or subsequent entry to those premises.

491 Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013 (2013 No 1542), sch 2, para 1; Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015 (SI 2015 No 1783), sch 2, para 1.

492 Discussed at para 10.78 below.

493 PACE, s 16(4); Code B of PACE, para 6.2. This language differs from other search warrant provisions; for example, Data Protection Act 2018, sch 15, para 8 requires the search warrant to be executed at a reasonable hour "unless it appears to the person executing it that there are grounds for suspecting that exercising it at a reasonable hour would defeat the object of the warrant".

494 *M Zander on PACE* (7th ed 2015) para 2-38.

> The entry of premises which are occupied by a family at 6am causes me some concern as to whether it is a reasonable hour. The matters depend, however, on all the circumstances of the case.[495]

6.38 He felt that on evidence before the court, it was not clearly an unreasonable hour, bearing in mind the need for the claimants to be present when the warrant was executed. He commented that:

> Many busy businessmen leave their homes early in the morning. Indeed they may leave before 6am, never mind after 6am. [496]

6.39 In *Redknapp*, the Divisional Court also held that a search at 6.06am did not breach section 16(4) of PACE. The police submitted that they needed to execute all the search warrants and arrest all the suspects at the same time to ensure that there was no communication between the various proposed interviewees. The statute leaves to the police entirely the question of whether exceptional circumstances exist. Therefore, in the absence of evidence on this point, the court accepted that the statutory requirements were met.[497]

6.40 Professor Helen Fenwick has criticised *Redknapp* and the legal uncertainty that remains:

> [The lack of constraint] on the non-urgent entry and search of property at night by state agents – perhaps one of the most unpleasant invasions of privacy possible – requires a clearer and more certain basis in law. This view of 'reasonable' is clearly open to doubt and the application of the search powers at that hour is, it is suggested, in doubtful compliance with Art 8.[498]

6.41 Similarly, Harry Snook writes:

> Even if the term "at a reasonable time" were to be applied consistently across the range of entry powers, its vagueness allows for the subjective – and surely not neutral – views of the officer effecting the entry to determine the extent of the restriction on his behaviour. The lack of clear guideline means that one officer might consider entry to a family home at 10pm to be reasonable, while another would hesitate to call after 5pm. Nor have the courts been forthcoming in laying down a firm standard for what constitutes a reasonable time, instead leaving the issue to be determined as one of fact in the individual circumstances.[499]

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495 *Kent Pharmaceuticals v Director of the Serious Fraud Office* [2002] EWHC 3023 (QB) at [18] per Lord Woolf CJ.

496 *Kent Pharmaceuticals v Director of the Serious Fraud Office* [2002] EWHC 3023 (QB) at [18] per Lord Woolf CJ.

497 *R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091 at [19] per Latham LJ.

498 *H Fenwick on Civil Liberties and Human Rights* (5th ed 2017) pp 870 to 871.

499 H Snook, *Crossing the Threshold: 266 ways the State can enter your home* (2007) p 59.

6.42 Where a search warrant is issued other than to a constable, section 16(4) of PACE does not apply.[500] However, where the warrant concerns a criminal investigation, due regard must be had to Code B of PACE, which also sets out the requirement for the warrant to be executed at a reasonable hour.[501] Further, outside of PACE, individual enactments may require the warrant to be executed at a reasonable hour.[502]

6.43 However, where an Act is silent on the times during which the warrant should be executed, the courts have held that there is no limit to the range of times at which the warrant may be executed.[503]

Reform

6.44 In our view, the requirement under section 16(4) of PACE to execute a warrant at a reasonable hour is an important safeguard. Under our provisional proposals in Chapter 3, the requirement would apply to all search warrants relating to a criminal investigation.

6.45 We have also considered whether to require judicial authorisation to execute search warrants between certain times specified in statute,. In the civil context, search warrants under the Competition Act 1998 must take place between 9:30am and 5:30pm, unless otherwise directed.[504] Clause 6 of the Powers of Entry etc. Bill 2009-10 provided that no power of entry would be exercisable between 6pm and 8am, or outside specific premises' business hours, unless authorised under a warrant.[505]

6.46 Several other jurisdictions set out specific times during which searches should not take place. For example, Finland's Coercive Measures Act provides that a search cannot be conducted outside the hours of 7:00am to 10:00pm unless there are special reasons.[506] France's Code of Tax Procedure provides that searches may not be started before 6:00am or after 9:00pm.[507] Prior judicial authorisation for the execution of searches between particular hours is also required in the United States of America[508] and Canada.[509] For example, section 488 of the Canadian Criminal Code provides:

> A warrant issued under section 487 or 487.1 shall be executed by day, unless

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500 This problem would not arise under our proposals in Chapter 4 where we propose that the provisions of sections 15 and 16 should apply whenever a warrant is applied for in relation to a criminal investigation.

501 Code B of PACE, para 6.2.

502 For example, Consumer Rights Act 2015, sch 5, para 33(1).

503 *R v Adams* [1980] 1 All ER 473.

504 Civil Procedure Rules, Practice Direction – Application for a Warrant under the Competition Act 1998, para 8.3.

505 Powers of Entry etc. Bill 2009-10 [HL 71] available at https://publications.parliament.uk/pa/ld200708/ldbills/071/2008071.pdf (last visited 29 May 2018).

506 Coercive Measures (Finland) Act, chapter 8, s 6(4).

507 The Code of Tax Procedure (France), Article L16 B, III.

508 American Federal Rule 41(e)(2)(A)(ii). The hours during which a search warrant must be executed, unless the judge for good cause expressly authorises execution at another time, are 6am to 10pm.

509 Criminal Code RSC, 1985, c C-46, s 488. The hours during which a search warrant must be executed, unless the justice is satisfied that there are reasonable grounds for it to be executed by night, are 6am to 9pm.

(a) the justice is satisfied that there are reasonable grounds for it to be executed by night;

(b) the reasonable grounds are included in the information; and

(c) the warrant authorizes that it be executed by night.

6.47 We have identified several reasons why searches should not take place at night, in the absence of reasons that a night-time search is necessary.

6.48 First, night searches can have a particularly severe impact on the human rights of families living at the premises, many of whom will not be involved in criminal activity. Stakeholders have commented that children in particular can be very frightened by searches. This is compounded if they are awoken in a disorientated state. For individuals who are vulnerable through physical or mental ill-health, their confusion and distress may be compounded by difficulty in accessing support services. As Harry Snook observes:

> For the state's servants to choose to enter in the middle of the night is a contributing factor to a power imbalance between them and the citizen: while they are prepared and focused, he is caught off his guard at a time when he is not ready to monitor events.[510]

6.49 Secondly, the ECtHR has indicated that the time of a search is an important factor in determining whether a violation of Article 8 ECHR has occurred. In *Zubal v Slovakia*, the ECtHR considered that, for the purpose of determining whether there had been a violation of Article 8, it was relevant that the police had conducted a search at the applicant's house at 6:00am.[511] In particular, the search had repercussions for his reputation (given that he was not a suspect) and disturbed his holiday as he was not at the premises. Similarly, in *Kucera v Slovakia*, the fact that the search warrant was executed at 6:00am was taken into consideration when concluding that there had been an interference with the applicant's right to respect for his home.[512]

6.50 Thirdly, where a search warrant is executed late at night or early in the morning, it may also be difficult to access legal advice. As one stakeholder commented, a lawyer may be unaware that an individual has requested his or her advice or attendance during a search until they have checked their email in the morning. By that time, the search and seizure may be near complete or finished.

6.51 Fourthly, requiring the issuing authority to authorise night time searches means that evidence to justify that more serious intrusion into the occupier's privacy would have to be adduced and challenged, which helps to overcome the problem faced by the Divisional Court in *Redknapp* discussed at paragraph 6.39 above. To provide clarity, authorisation for a night time search could also be reflected on the face of the warrant. A search warrant would state whether it permits a search between specified hours or at

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510 H Snook, *Crossing the Threshold: 266 ways the State can enter your home* (2007) p 58.

511 *Zubal v Slovakia* (2010) (App No 44065/06) at [43] to [45].

512 *Kucera v Slovakia* [2011] ECHR 1676 (App No 48666/99) at [119].

"any time", allowing the occupier to understand the extent of the power allowed under the warrant.

6.52 Against this, several arguments may be raised. First, as law reform bodies in other jurisdictions have emphasised, any test must be sufficiently flexible to adapt to different circumstances.[513] It may, for example, be reasonable to search commercial premises during business hours and to search private premises in the morning when occupiers are normally present. Even the concept of business hours depends on the type of business: casinos operate at different times from accountants' offices. Individuals also keep different hours in private dwellings. In the House of Lords case of *Inland Revenue Commissioners v Rossminster*, Viscount Dilhorne was concerned about entry to a private dwelling at 7:00am, as if HMRC had come a little later, they might have caused less disturbance and distress and still have found someone at home.[514] In response, however, requiring judicial authorisation for a search to take place during specified hours does not preclude the retention of the requirement of a search to take place at a reasonable hour in all cases.

6.53 Secondly, introducing such a scheme would create an additional hurdle for investigators to obtain a search warrant. That being said, it is already the case that the court must authorise all premises warrants (which authorise the search of all premises occupied or controlled by a person) and multiple premises warrants (which authorise search on more than one occasion). Searches conducted late at night and early in the morning raise similar issues.

6.54 Thirdly, circumstances may change once a search warrant is issued, which results in an unforeseen need to conduct a search at a particular time to prevent evidence being lost or destroyed. In these cases, an investigator would have to apply to a justice of the peace to amend the warrant to provide for search at any time.

6.55 Fourthly, the execution of a search warrant is an operation issue, which arguably should be left to the discretion of the investigator. In response, a search warrant, once issued, would still leave to the discretion of the investigator the time at which the search warrant is to be executed.

6.56 In conclusion, we consider that, where it may be necessary to execute a search warrant late at night or early in the morning, prior judicial authorisation should be required. Specifically, the issuing authority should be satisfied that it is necessary to authorise search during the hours of 10pm and 6am in order to achieve the purpose for which the warrant is issued. The reasonable hours requirement should still operate in such cases. This would balance the interests of the effective investigation of crime and the rights of the individual. Early morning and late night searches would require a clear evidential basis; and occupiers would have greater confidence that the time of the search was necessary. Officers would still retain flexibility by being able to adduce evidence as to why an early morning or late night search is necessary and decide the time at which the search takes place.

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513 See Law Reform Commission of Ireland, *Search Warrants and Bench Warrants*, LRC 115 (2015) p 105; and New Zealand Law Commission, *Search and Surveillance Powers* (2007) Report 97, p 163.

514 *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1001 per Viscount Dilhorne.

6.57 We also consider that, where judicial authorisation has not been obtained to execute a search warrant during the hours of 10pm and 6am, the search warrant ought to remain subject to the reasonable hour requirement. However, we consider that Code B of PACE could give more guidance on this issue. At present, Code B of PACE states that the officer in charge should have regard to the times of day at which the occupier is likely to be present and should not search at a time when the occupier, or any other person on the premises, is likely to be asleep, unless this is unavoidable.[515] We invite views on whether more guidance ought to be given.

6.58 The combined effects of these proposals would be that:

(1) where an investigator wishes to conduct a search between the hours of 10pm and 6am, prior judicial authorisation would be required. In such cases, the issuing authority must be satisfied that it is necessary to authorise search between these hours in order to achieve the purpose for which he or she issues the warrant. A search warrant will then be required to show on its face that it authorises the search of premises at any time;

(2) where a search warrant does not authorise a search at any time, the investigator can only conduct a search between 6am and 10pm. A search warrant will be required to show on its face that it authorises the search of premises during the hours of 6am and 10pm; and

(3) in both instances, any search must be at a reasonable time, unless it appears to the constable that the purpose of a search may be frustrated by an entry at a reasonable hour.

[515] Code of Practice B (1999 ed) para 5A provided: "In determining at what time to make a search, the officer in charge should have regard, among other considerations, to the time of day at which the occupier of the premises is likely to be present, and should not search at a time when he, or any other person on the premises, is likely, to be asleep unless not doing so is likely to frustrate the purpose of the search".

Consultation Question 32

We provisionally propose that:

(1) where an investigator seeks to execute a search warrant between the hours of 10pm and 6am, prior judicial authorisation to do so should be required;

(2) the existing rule, that searches under warrant must take place at a reasonable hour unless it appears to the constable that the purpose of a search may otherwise be frustrated, should continue to apply; and

(3) a search warrant should be required to state whether it authorises a search only between 6am and 10pm or at any time.

Do consultees agree?

We also invite consultees' views on whether further guidance should be provided on what is likely to constitute a reasonable hour in the case of residential and commercial premises.

INFORMATION TO BE PROVIDED TO THE OCCUPIER

Current law

During the search

6.59 PACE requires the occupier, or some other person who appears to be in charge of the premises,[516] to be provided with documentary evidence of the identity of the person conducting the search;[517] have the search warrant itself produced;[518] and be supplied with a copy of it.[519] If no one is present who appears in charge of the premises, a copy of the warrant must be left in a prominent place.[520]

6.60 The warrant which must be produced is the original warrant, as signed by the judge or magistrate.[521] This includes a duty to supply a copy of the full warrant,[522] including any schedule appended to it.[523] The warrant must be produced and not simply shown and held onto until the search and seizure is complete.[524] A warrant is "produced" within the

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516 PACE, s 16(6).

517 PACE, s 16(5)(a).

518 PACE, s 16(5)(b).

519 PACE, s 16(5)(c).

520 PACE, s 16(7).

521 *R v Chief Constable of the Lancashire Constabulary ex parte Parker* [1993] 2 All ER 56, [1993] 2 WLR 428, 97 Cr App Rep 90.

522 *R (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 WLR 948 at [22].

523 *R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091 at [21] per Latham LJ.

524 *R (Glenn & Co (Essex) Ltd) v Revenue and Customs Commissioners* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22 at [74] to [75] per Simon J.

meaning of section 16(5)(a) and (b) when the occupier is given a chance of inspecting it.[525]

6.61 The Court of Appeal held in *Longman*, however, that non-compliance with section 16(5)(a) and (b) may be justified, in certain circumstances, where the search would otherwise be frustrated.[526] To this end, the Court of Appeal held that force or subterfuge could legitimately be used for the purpose of gaining entry with a search warrant.[527] Moreover, the constable need not produce the warrant where the occupier immediately attempts to frustrate the search or attack the officer.[528]

6.62 As discussed in Chapter 3, the Divisional Court has held that, on the facts of the case, where the warrant was produced after the search was completed, the consequence of a breach should not inevitably lead to the grant of what is discretionary relief in judicial review.[529] In reaching this conclusion, the Court referred to Code B of PACE, paragraph 6.8, which provides that, if the occupier is present, copies of the warrant shall 'if practicable' be given to them before the search has begun.

6.63 It is particularly important that the warrant specifies the address of the premises being searched, as occupiers are entitled to know that the warrant relates to their premises.[530] The ECtHR has repeatedly stressed the importance of the search warrant providing at least a minimum amount of information to enable checks to be carried out on those who have executed the warrant and to detect, prevent and report abuses.[531] However, to prevent an investigation from being compromised, it is permissible in the case of all premises warrants for the identity of other premises to be redacted when the warrant is given to the occupier.[532]

After the search

6.64 Other information which an occupier may be interested in obtaining, during or after the search, includes the Information accompanying the search warrant; the time taken to consider the application;[533] additional notes taken during the hearing;[534] and the statement of reasons by the court for why the search warrant has been issued.[535]

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525 *R v Longman* [1988] 1 WLR 619, 627 per Lord Lane CJ.

526 *R v Longman* [1988] 1 WLR 619, 625 per Lord Lane CJ.

527 *R v Longman* [1988] 1 WLR 619, 625 per Lord Lane CJ.

528 *R v Longman* [1988] 1 WLR 619, 625 per Lord Lane CJ.

529 *R (Glenn & Co (Essex) Ltd) v HMRC* [2011] EWHC 2998 (Admin), [2012] 1 Cr App R 22 at [77] per Simon J.

530 *R (Redknapp) v Commissioner of the City of London Police* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091.

531 *Van Rossem v Belgium* at [45] to [47]; *Modestou v Greece* (2017) (App No 51693/13) at [45].

532 *R (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 WLR 948 at [22].

533 In Chapter 4 we consult on whether the time taken to consider the application should be included in the Information.

534 In Chapter 5 we considered what the rule should be in respect of additional notes taken during the hearing.

535 In Chapter 5 we considered what the rule should be in respect of the statement of reasons by the court for why the search warrant has been issued.

6.65 Investigative agencies adopt different practices in respect of the disclosure to the occupier of the information used in support of an application. For example, the National Crime Agency has a system in place whereby disclosure officers are instructed that in cases where a warrant or production order has been granted, both the warrant or order itself and the application made in support should be listed for disclosure unless they contain sensitive information which needs to be protected. We discuss issues relating to sensitive information in Chapter 8.

Reform

6.66 Section 16(5) of PACE has become heavily qualified by the case law. In particular, case law states:

(1) what information is to be produced when executing a warrant (a copy of the full warrant including any schedules);

(2) the meaning of a warrant being "produced" (where the occupier is given a chance of inspecting it);

(3) the circumstances under which a warrant need not be produced (where it appears to the officer, once lawful entry is effected, that the search may be frustrated); and

(4) when it is permissible to redact the mention of other premises on the warrant (in the case of all premises warrants).

To ensure these observations are followed consistently, there is a strong argument for them to be placed on statutory footing.

6.67 Regarding other information, Professor Helen Fenwick has argued that the provisions that require occupiers to be given information are presentational in nature and in fact serve little purpose as they do not provide much detail about how a search should be conducted.[536] One stakeholder with whom we met suggested that the occupier should be given a copy of the statutory provision authorising the entry and search of their home.

6.68 We strongly agree that an occupier should be provided with information about search warrants, though we do not consider that this is best achieved by providing copies of legislation. Instead, we propose the creation of an authoritative lay guide to search warrants, setting out what investigators may and may not do. This should state that the occupier has the right to apply to the court for a copy of the Information, as discussed in Chapter 4.

536 *H Fenwick on Civil Liberties and Human Rights* (5th ed 2017) p 870.

Consultation Question 33

We provisionally propose that section 16(5) of the Police and Criminal Evidence Act 1984 ought to be amended to take account of developments in case law, namely to specify that:

(1) a copy of the full warrant must be supplied, including any schedule appended to it;

(2) a warrant is 'produced' where the occupier is given a chance to inspect it;

(3) non-compliance with section 16(5)(a) and (b) of the Police and Criminal Evidence Act 1984 may be justified where it appears to the officer, once lawful entry is effected, that the search may be frustrated; and

(4) it is permissible for all premises warrants to be redacted to omit the identity of other premises to be searched.

Do consultees agree?

Consultation Question 34

We provisionally propose that a person carrying out a search should provide the occupier with an authoritative guide to search powers, written in plain English for non-lawyers and available in other languages. Do consultees agree?

Consultation Question 35

We provisionally propose that a search warrant should be required to state that the person is entitled to the information sworn in support of the warrant and how to apply for a copy. Do consultees agree?

THE PRESENCE OF LEGAL REPRESENTATIVES DURING THE SEARCH

Current law

6.69 In large financial investigations, it is common for occupiers to ask a legal representative to be present at the search. However, there is no specific statutory right to a legal representative, nor does legislation prescribe the functions of a legal advisor during a search. There is also little guidance on the issue. Code B of PACE states:

> A friend, neighbour or other person must be allowed to witness the search if the occupier wishes unless the officer in charge of the search has reasonable grounds for believing the presence of the person asked for would seriously hinder the investigation or endanger officers or other people. A search need not be unreasonably delayed for

this purpose. A record of the action taken should be made on the premises search record including the grounds for refusing the occupier's request.[537]

Code B of PACE therefore treats a legal representative as "another person": there is no separate right to a legal representative that goes beyond the general right to have a friend, neighbour or other person present.

6.70 In the civil law context, a claimant may apply to the High Court for a search order, previously known as an Anton Piller order, which is an interim mandatory injunction.[538] Case law emphasises the importance when executing a search order that:

(1) the defendant is given the opportunity to consult his or her own solicitor;[539]

(2) the defendant is informed of his or her right to legal advice;[540] and

(3) search orders are executed on working days in office hours when a solicitor can be expected to be available should the defendant need to seek legal advice.[541]

This is in order to consider the terms of the search order and whether to apply to the court for its discharge if improperly obtained. The standard form of a search order, set out in the annex of the Civil Procedure Rules, Part 25, 25A Practice Direction, provides:

> The Respondent is entitled to seek legal advice and to ask the court to vary or discharge this order. Whilst doing so, he may ask the Supervising Solicitor to delay starting the search for up to 2 hours or such other longer period as the Supervising Solicitor may permit.

Reform

6.71 Stakeholders have informed us that the lack of statutory guidance results in a disparate practice among investigative agencies. Often, questions about what amounts to an unreasonable delay or what a legal representative is allowed to do during a search are left to the discretion of the officer in charge. It was suggested that Code B of PACE should acknowledge the distinct position of a legal representative and provide clearer guidance on the issue.

6.72 We have considered whether occupiers should be granted a legal entitlement to have a lawyer present during a search. We have concluded that this would be unworkable. A blanket entitlement would require a duty solicitor scheme to provide free legal advice. This would be costly and create arbitrary differences across the spectrum of police powers. For example, individuals are not entitled to a legal advisor when the police exercise stop and search powers. Furthermore, the delay involved in waiting for a

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537 Code B of PACE, para 6.11.

538 See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55. The power of the High Court to grant a search order has been placed on statutory footing by the Civil Procedure Act 1997, s 7 and is governed by the Civil Procedure Rules, Part 25 and Practice Direction 25A. See See D Bean, I Parry and A Burns, *Injunctions* (12th ed 2015).

539 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

540 *AB v CDE* [1982] RPC 509.

541 *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 859 per Sir Donald Nicholls VC.

lawyer to arrive could hinder the search. We are not recommending statutory reform in this regard.

6.73 However, the presence of a legal adviser may be useful for both parties. The adviser may assist individuals in understanding the police procedure and ensure that statutory safeguards are complied with. From the investigators point of view, this may facilitate the search and lead to the quick identification of legally privileged or disputed material. Legal representatives may also be in a better position to advise on whether to seek an out of hours emergency injunction during the execution of a warrant.

6.74 At the same time, we consider that disputes over relevance should not be the subject of detailed discussion at the premises. If representations regarding seizure are made during the course of the search, the search may be significantly impeded. Once a search warrant is issued, it is for the investigator conducting the search to decide whether an item may be seized under the warrant. In particular, by determining whether the material appears to relate to any matter relevant to the investigation is of the description specified in the information.

6.75 That being said, we consider that it would be helpful if Code B of PACE acknowledged the specific role of a legal representative and provided greater guidance on this issue. This would lead to more consistent practice, while retaining flexibility for the investigator and senior defence lawyer present to agree a code of conduct to enable the search to continue unhindered.

6.76 Our provisional view is that Code B of PACE should state that, if the occupier asks for a legal adviser to be present, the starting point is that this should be allowed. The more difficult question is whether a search should be delayed to allow a legal adviser to attend. Generally, we do not consider that investigators should be required to delay the search, but some delay could be justified if the presence of a legal adviser is particularly important, for example because:

(1) the investigating agency is likely to encounter legally privileged, excluded or special procedure material; or

(2) the occupier is likely to suffer grave reputational damage.

In cases where the occupier has difficulty understanding English or has a particular need, Code B of PACE could provide further guidance on other forms of assistance. If, for example, it is known that the occupier is deaf and communicates through British Sign Language, then the presence of someone who can communicate through British Sign Language would be an important safeguard. The needs will be fact dependent, however, the overarching aim ought to be achieving effective communication during the search.[542]

6.77 Guidance could also be provided on scenarios where the search should not be delayed. In some cases, for example, it might be sufficient for investigators to wait while the occupier talks to a legal representative over the phone.

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[542] See *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, [2014] 1 WLR 445.

6.78 Another disputed area is how far legal representatives should be entitled to observe the search. We have been informed by defence solicitors that, while some officers may be cooperative, others may refuse to allow a legal representative to be present in the room where an officer is searching. Instead, they are referred to a record of seized items at the end of the search, which may be written in very general terms.

6.79 In our view, guidance should clarify that legal advisors are allowed to observe officers in the act of seizure so that they can make their own notes and advise their clients accordingly. This is particularly important in document-heavy fraud and business crime cases. Of course, advisers should not be entitled to any perform any act which would obstruct the search. Also, such guidance should not be an invitation to well-resourced occupiers to flood search sites with lawyers. However, obstructing the police in the execution of their duty is already a crime generally[543] and under specific search warrant provisions.[544] Obstruction can therefore be dealt with through both the criminal law and disciplinary proceedings. Obstruction offences also exist in relation to Revenue and Customs officers;[545] National Crime Agency officers designated as having the powers of constables;[546] and accredited financial investigators,[547] Serious Fraud Office officers,[548] and immigration officers[549] exercising relevant powers under the Proceeds of Crime Act 2002.

Consultation Question 36

We provisionally propose that Code B of the Police and Criminal Evidence Act 1984 be amended to state that:

(1) if the occupier asks for a legal adviser or support to be present during the search, this should be allowed if it can be done without unduly delaying the search; and

(2) if present, a legal adviser or assistant has the right to observe the search and seizure of material in order to make their own notes.

Code B of the Police and Criminal Evidence Act 1984 should also provide guidance on how far it is reasonable to delay a search to wait for a legal representative to attend. Do consultees agree?

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543 Police Act 1996, s 89(2) provides that "any person who resists or wilfully obstructs a constable acting in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence". A person obstructs a police constable if they make it more difficult for the constable to carry out their duty: *Hinchcliffe v Sheldon* [1955] 3 All ER 406. No physical act is necessary to constitute obstruction: *Rice v Connolly* [1966] 2 QB 414.

544 For example, Firearms Act 1968, s 46(5); Misuse of Drugs Act 1971, s 23(4); Broadcasting Act 1990, s 196(3); and Anti-terrorism, Crime and Security Act 2001, s 52(6).

545 Commissioners for Revenue and Customs Act 2005, s 31.

546 Crime and Courts Act 2013, s 10 and sch 5, para 21.

547 Proceeds of Crime Act 2002, s 453A.

548 Proceeds of Crime Act 2002, s 453B.

549 Proceeds of Crime Act 2002, s 453C.

Chapter 7: Challenging a search warrant

INTRODUCTION

7.1 This chapter examines the current law on how search warrants are challenged in the courts and makes proposals for a new judicial process for redress. The chapter discusses the following areas:

(1) the judicial review of search warrants, including relevant problems with judicial review;

(2) applications for the return or retention of property under section 59 of the Criminal Justice and Police Act 2001, including problems with the current law; and

(3) a provisional proposal for a new procedure for challenging procedural breaches of search warrants to sit alongside judicial review and section 59. This new procedure seeks to reduce the problems caused to the criminal justice process including the delay, expense and risk of judicial review, which can render it inaccessible to many.

7.2 As explained in previous chapters, the law governing how search warrants are issued, and the information the applicant should provide, is both complex and uncertain. This leads to frequent challenge, often because insufficient information is provided to the court or to the person whose premises have been searched.[550] The likelihood of challenge is also increased because the complexity provides the opportunity for tactical challenge, slowing down investigations so that potential lines of enquiry which might be found within the seized material are frustrated.

7.3 At present, legal challenges to quash a search warrant must be by way of judicial review, which can be time-consuming, expensive and risky. The alternative is to apply under section 59 of the Criminal Justice and Police Act 2001 for the return of material taken. This procedure is limited to challenging the seizure of material, rather than the warrant itself. It applies, among other circumstances, if "there was no power to make the seizure".[551] However, this means that the court is focused on whether seizure was authorised by the warrant; it does not allow the court to consider whether the warrant was lawfully issued, as that question can only be determined on judicial review.

7.4 We propose a new procedure by which to challenge procedural breaches of search warrants, which would supplement the actions in judicial review and section 59 of CJPA. Some of the consultations questions we ask in this chapter are necessarily drawn in a precise manner, however, it is important for consultees to bear in mind that we are consulting on the points of policy, rather than offering potential drafting.

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550 See *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357. We have found approximately 50 reported cases since 2010 in which search warrants or their execution were challenged: we have no means of determining how many unreported cases exist.

551 CJPA, s 59(3)(a).

CURRENT LAW

Judicial review of search warrants

7.5 At present, the only procedure for challenging the validity of a warrant is by judicial review.[552] The occupier or owner of the seized property must apply to the High Court for an order quashing the warrant.[553]

Issuing a claim for judicial review

7.6 Judicial reviews of search warrants are usually brought against the court which issued the warrant, with the investigator joined as an interested party.[554] Applications for judicial review can only be made to the High Court. The applicant must first obtain "permission to proceed",[555] which may or may not require a court hearing.[556] The threshold for permission is a low one; that of reasonably arguable prospects of success.[557] Once that permission is given, the case is heard by the Administrative Court.[558] There is no appeal to the Court of Appeal from any judgment of the High Court in a "criminal cause or matter", but there is to the Supreme Court.[559] A "criminal cause or matter" has been held to include a decision concerning the issue or quashing of a search warrant in aid of a criminal investigation with a view to criminal prosecution.[560]

7.7 Section 31 of the Senior Courts Act 1981 has been amended by the introduction of section 31(2A) to (2C) and section 31(3C) to (3F) by section 84(1)(2) of the Criminal Justice and Courts Act 2015. Section 31(3C) to (3F) of the Senior Courts Act 1981 provides that the High Court must refuse to grant leave to apply for judicial review if it appears to be highly likely that the outcome for the applicant would not have been substantially different had the conduct complained of not occurred. The court may disregard this duty where not appropriate to do so for reasons of exceptional public

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552 *R (Goode) v Nottingham Crown Court* [2013] EWHC 1726 (Admin), [2014] ACD 6 at [50] to [52].

553 *Bell v The Chief Constable of Greater Manchester Police* [2005] EWCA Civ 902 at [35]; *R (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 WLR 948; *R (Chaudhary) v Bristol Crown Court* [2014] EWHC 4096 (Admin), [2015] 1 Cr App R 18. For a detailed discussion on challenging the issue of a search warrant by judicial review see Piers von Berg, *Criminal Judicial Review: a Practitioner's Guide to Judicial Review in the Criminal Justice System and Related Areas* (2014) para 4-39 to 4-49.

554 By virtue of section 88 of the Police Act 1996, the chief officer of police for a police area is liable in respect of any unlawful conduct of constables under his direction and control in the performance or purported performance of their functions.

555 Civil Procedure Rules, rule 54.4.

556 Civil Procedure Rules, rules 54.11 to 54.12.

557 *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [49].

558 A specialist court within the Queen's Bench Division of the High Court. This court consists of either one High Court judge or a Divisional Court of two or more judges. The procedure is described in the Administrative Court Judicial Review Guide 2016: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/540607/administrative-court-judicial-review-guide.pdf (last visited 29 May 2018).

559 Senior Courts Act 1981, s 18(1)(a).

560 *R (Panesar) v Central Criminal Court* [2014] EWCA Civ 1613, [2015] 1 WLR 2577 at [19]; *Malik v Manchester and Salford Magistrates' Court* [2018] EWCA Civ 815 at [15]. See *Belhaj v Director of Public Prosecutions* [2017] EWHC 3056 (Admin), [2018] HRLR 4, which sets out the court's approach to interpreting the concept of a "criminal cause or matter".

interest. Section 31(2A) to (2C) of the Senior Courts Act 1981 provides a similar test in respect of the grant of relief.[561]

Grounds for judicial review

7.8 The usual grounds for judicial review are that the body making the decision exceeded its jurisdiction, failed to exercise its discretion, acted contrary to natural justice, applied an incorrect statutory test, failed to take into account relevant factors, took into account irrelevant factors or acted irrationally.

7.9 Judicial reviews in search warrant cases usually involve challenges to the validity of the search warrant,[562] such as that the warrant itself has been issued unlawfully, and/or challenges to the way in which the warrant was executed, such as that the entry, search and seizure are rendered unlawful.[563] It is only following challenges to the validity of the search warrant that a search warrant may be quashed.[564]

7.10 A common ground for review is that the court was provided with inadequate, incomplete or misleading information.[565] This does not always mean that the court ought to have noticed the deficiency: a judge is entitled to rely on the good faith of the public body – the applicant for the warrant.[566] The test for the High Court to apply in deciding whether to quash the warrant due to non-disclosure is whether the information that is alleged should have been given to the magistrate *might* reasonably have led him or her to refuse to issue the warrant.[567]

7.11 Another common ground for review is that there were no reasonable grounds for believing, or suspecting as the case may be, that the statutory criteria were met.[568] In

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561 See *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [58]; *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [40] to [41]; *R (HS) v South Cheshire Magistrates' Court* [2015] EWHC 3415 (Admin), [2016] 4 WLR 74 at [32]. For discussion of the provisions see *Glencore Energy UK Ltd v Revenue and Customs Commissioners* [2017] EWHC 1476 (Admin), [2017] STC 1824 at [116] to [120] per Green J.

562 Material mistake of fact leading to unfairness can be available as a ground of judicial review in some circumstances, whether it is in fact available will depend upon the nature of the case before the court. See *R (Daly) v the Commissioner of Police of the Metropolis* [2018] EWHC 438 (Admin) at [31] to [33] per Sir Brian Leveson P.

563 Whilst less common, judicial review can be brought solely in respect of the way in which the search warrant has been executed. See *R (Haly) v CC of West Midlands Police* [2016] EWHC 2932 (Admin).

564 A quashing order nullifies a decision which has been made by a public body.

565 *R (Hart) v Crown Court at Blackfriars* [2017] EWHC 3091 (Admin), [2018] Lloyd's Rep FC 98; *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12; *R (Mills) v Sussex Police* [2014] EWHC 2523 (Admin), [2015] 1 WLR 2199; *R (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin), [2013] 1 WLR 220.

566 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [67].

567 *R (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin), [2013] 1 WLR 220 at [45] per Stanley Burnton LJ. See also *R (Hart) v Crown Court at Blackfriars* [2017] EWHC 3091 (Admin), [2018] Lloyd's Rep FC 98 at [19] per Holroyde LJ; *R (Mills) v Sussex Police* [2014] EWHC 2523 (Admin), [2015] 1 WLR 2199 at [47] per Elias LJ.

568 *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [84]; *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [53].

such cases, the approach to be adopted by the High Court is one of review: the court will not intervene if it was properly open to the judge below to be satisfied as to the various requirements.[569]

7.12 In some cases, where the execution of the warrant was unlawful, the actions of the investigator may also be subject to judicial review. In these cases, the respondent to the judicial review proceedings will be the investigator and not the issuing court.[570]

7.13 If a warrant is quashed on judicial review, or the conduct of the search is held to be unlawful, the High Court may exercise its discretion to order the return of any material taken during the search.[571] The court may also issue an injunction forbidding the investigator to look at or use the material.[572] In *R (Newcastle United Football Club) v Revenue and Customs Commissioners*, the court considered that there was a serious issue to be tried. The court was therefore willing to grant an interim injunction where the lawfulness of search and seizure orders was in question, despite the possibility of a section 59 application by HMRC to retain the material (discussed below).

Remedies and damages under judicial review

7.14 There are three types of remedies under judicial review:

(1) prerogative remedies;[573]

(2) declaration;[574] and

(3) injunction.[575]

7.15 The successful judicial review of a decision to issue a search warrant does not normally give any right to damages. Lord Justice Singh, however, recently observed:

> The ability of the court to award damages in claims for judicial review is an important part of its remedial powers in order to do full justice in cases in which a public authority has acted unlawfully.[576]

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569 *R (Faisaltex Ltd) v Preston Crown Court* [2008] EWHC 2832 (Admin), [2009] 1 WLR 1687 at [31]; Fitzgerald v Preston Crown Court [2018] EWHC 804 (Admin) at [54].

570 *Scopelight Ltd v Chief Constable of Northumbria Police Force* [2009] EWCA Civ 1156, [2010] QB 438; *R (Cook) v Serious Organised Crime Agency* [2010] EWHC 2119 (Admin), [2011] 1 WLR 144; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

571 *R (HS) v South Cheshire Magistrates' Court* [2015] EWHC 3415 (Admin), [2016] 4 WLR 74; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110.

572 *R v City of London Magistrates' Court ex parte Green* [1997] 3 All ER 551.

573 Quashing order, prohibiting order; and mandatory order.

574 Declarative relief can be important for those in the public eye; the courts have held that a vindication of right is a legitimate reason for bringing a claim.

575 This may prevent investigative agencies from inspecting the material seized.

576 *R (Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54 at [48] per Singh LJ.

7.16 As discussed in our Consultation Paper on administrative redress, traditionally, the function served by judicial review has not been to award compensation.[577] There are two conditions which must be met in order to claim compensation. First, compensation must be claimed in conjunction with an existing judicial review remedy.[578] Secondly, and crucially, the claimant must show that damages would ordinarily have been awarded in private law, for an action in tort or under the Human Rights Act 1998.[579] This does not lead to a new right or remedy in damages; rather, a claim for damages which exists in private law may be claimed in the judicial review proceedings alongside the public law remedy.

7.17 A third related hurdle to obtaining damages is that some investigative agencies are exempted from liability by section 6 of the Constables' Protection Act 1750.[580] Despite its age and arcane drafting, the provision is routinely cited as affording protection to police constables and Chief Constables who would otherwise be vicariously liable under section 88 of the Police Act 1996 for the actions of constables.[581] The provision extends to any persons acting by the order and in aid of such constables.[582]

7.18 Where there is a defect or irregularity in the procedure to obtain a warrant, on the face of the warrant, or in relation to the execution of a warrant, the constable who applies for or executes the warrant is immune from legal action provided that:

(1) they act in obedience to the face of the warrant in good faith; and

(2) any formal defect on the face of the warrant is not sufficiently grave to invalidate it.[583]

The quashing of the warrant is a necessary pre-requisite to bringing a civil action.[584]

7.19 In the context of search warrants, damages in private law may arise in civil claims in tort and under the Human Rights Act 1998.[585] Relevant actions in tort against the police

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577 Law Commission, *Administrative Redress: Public Bodies and the Citizen – A Consultation Paper* (2010) CP No 187 at 3.101.

578 Supreme Court Act 1981, s 31(4); Civil Procedure Rules, r 54.3.

579 *R (Fayad) v Secretary of State for the Home Department* [2018] EWCA Civ 54 at [48] per Singh LJ.

580 For a general discussion see Clayton & Tomlinson, *Civil Actions Against the Police* (3rd ed 2004) at [1-029].

581 *Tchenguiz v Director of the Serious Fraud Office* [2013] EWHC 1578 (QB), [2013] Lloyd's Rep FC 535 at [12].

582 M Jones and others, *Clerk & Lindsell on Torts* (22nd ed 2017) at 15-92.

583 *McGrath v Chief Constable of the Royal Ulster Constabulary* [2001] UKHL 39, [2001] 2 AC 731 at [12]; *Bell v Chief Constable of Greater Manchester* [2005] EWCA Civ 902 at [28] to [29]; *Khan v Chief Constable of West Midlands* [2017] EWHC 2185 (QB) at [30]. The test as to whether or not a formal defect is sufficiently grave to invalidate a warrant is not whether or not the terms of section 15 of PACE have been complied with. It is a far broader test directed to the question whether the defect relied on is such as to raise a clear doubt as to whether an application has been lawfully made to, and granted by, the Justices in the exercise of their jurisdiction. This suggests that defect must go to the very jurisdiction to issue the warrant.

584 *Mouncher v Chief Constable of South Wales* [2016] EWHC 1367 (QB) at [452].

585 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) paras 3.17 to 3.46.

or other authorities may include the tort of malicious procurement of a search warrant;[586] trespass;[587] interference with goods;[588] and negligence.[589] Damages under the Human Rights Act 1998 are available for infringement of privacy, contrary to Article 8 ECHR.[590] Damages can be claimed either in an action for tort[591] or, where the infringement is the result of unlawful administrative action, in judicial review proceedings.[592] No action in tort can be brought until the warrant has been quashed on judicial review.

7.20 There are limitations to those damages which are recoverable. In relation to trespass, damages are unlikely to be substantial unless the search comes into the category of being "oppressive, arbitrary or unconstitutional", in which case exemplary damages might be available.[593] In practice, the main damage would be damage to doors and locks, which is unlikely ever to exceed a thousand pounds. This is such a small sum compared to the cost of the litigation that cases are unlikely to come to court. We were told that in the few cases of potential wrongdoing where claims are threatened, the investigator tends to settle out of court.

7.21 Before section 59 of CJPA came into force, trespass to goods and conversion were the primary remedies for the wrongful inspection or seizing of articles during a search.

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586 This tort has been long recognised though seldom successfully sued for: *Elsee v Smith* (1822) 2 Chit 304; *Mouncher v Chief Constable of South Wales* [2016] EWHC 1367 (QB) at [452] per Wyn Williams J. Four elements must be demonstrated for a claim to proceed: *Gibbs v Rea* [1998] AC 786 at 797B to 798B; *Bell v Chief Constable of Greater Manchester* [2005] EWCA Civ 902, at [28] per Sir Mark Potter P. The requirement to prove malice is a particularly substantial hurdle and, in the context of search warrants, will likely require a motive outside the purpose of the search warrant power: *Glinski v McIver* [1962] AC 726, 766; *R (Hicks) v Metropolitan Police Commissioner* [2017] UKSC 9, [2017] AC 256.

587 As set out in *Hewlitt v Bickerton* (1947) 150 EG 421; R Clayton QC and H Tomlinson QC, *The Law of Human Rights* (2nd ed 2009) pp 1048 to 1049. A valid search warrant is a complete defence to an action of trespass to property, therefore, a warrant must be quashed on judicial review before an action can be brought. Even then, to establish the tort of trespass it is not enough to show that search warrant is unlawful. The claimant would also need to show some wrongdoing on the part of the investigator, such as a lack of reasonable belief in the validity of the search warrant: *Tchenguiz and another v Director of the Serious Fraud Office* [2014] EWCA Civ 472, [2014] Lloyd's Rep FC 519.

588 Damage done to a person's goods, or removal of them, is actionable: M Jones and others, *Clerk & Lindsell on Torts* (22nd ed 2017), 17-01; R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 3.72. The tort can be committed either deliberately or through negligence: *Fowler v Lanning* [1959] 1 QB 426, 427.

589 The police owe a duty of care to take reasonable steps to avoid causing injury during the execution of a search warrant; the Constables Protection Act 1750 does not provide a defence to police officers who caused injury in these circumstances: *Alleyne v The Commissioner of Police of the Metropolis* [2012] EWHC 3955 (QB).

590 For a discussion of Article 8 see Chapter 2 at para 2.59. Generally, damages for breach of privacy rights tend to be low. The main cases in this area concern claims brought by celebrities against the press. In *Douglas v Hello* [2003] EWHC 2629 (Ch), [2004] EMLR 2, the claimants were awarded £3,750 each for distress, when a magazine published unauthorised photographs of their wedding. Distress damages may be accompanied by aggravated damages, but aggravated damages are rare and also tend to be low: *Campbell v MGN* [2002] EWHC 499 (QB), [2002] EMLR 30.

591 M Jones and others, *Clerk & Lindsell on Torts* (22nd ed 2017), 27-34 and following.

592 H Woolf and others, *De Smith's Judicial Review* (7th ed 2013) paras 19-081 and following.

593 Jones and others, *Clerk & Lindsell on Torts* (22nd ed 2017) 19-72, citing *Rookes v Barnard* [1964] AC 1129.

Although these actions are still available in theory, in practice they have been superseded by an action under section 59 of CJPA.

Problems with judicial review

7.22 Judicial review is an expensive and time-consuming procedure. In non-urgent cases, the final hearing may be a year or more after the original application.[594] If permission is granted and the case proceeds to a substantive judicial review (particularly before a Divisional court) this will involve a delay of many months. Whilst legal aid funding is available for judicial review, stakeholders have mentioned the increasing difficulty to qualify.

7.23 Costs vary widely, reaching into the tens of thousands for a one-day judicial review hearing against a regulatory body instructing independent lawyers. These costs affect both the decisions of claimants to bring proceedings and the decisions of public authorities to resist.[595] An unsuccessful claimant will usually be responsible for both their costs and the costs of the defendant.[596] For most individuals and small organisations this risk is too great to bear.

7.24 Blackstone Chambers Public Law Group in their response to the Senior Judiciary's consultation on the proposed extension of the Fixed Costs Regime highlighted three areas of difficulty:[597]

(1) costs can be disproportionate to the issues at stake, thus creating a disincentive to apply;

(2) the amount of costs is uncertain, which introduces considerable risk into the process;

(3) the very existence of adverse cost risk, regardless of measures to cap or limit costs, puts judicial review proceedings outside the financial reach of many litigants.

7.25 We consider that these reasons are equally valid in the context of challenging search warrants by judicial review. For this reason, the cases in which warrants have been challenged are found disproportionately in cases of major fraud, business crime, revenue and customs matters and financial services. The complexity and uncertainty of the law means that, in cases of this kind, warrants can frequently be challenged for tactical reasons, whether there is merit in the challenge or not. Meanwhile, improperly issued or executed warrants in routine criminal investigations at the lower end of the

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594 Public Law Project, "An Introduction to Judicial Review" p 5, available at http://www.publiclawproject.org.uk/data/resources/6/PLP_Short_Guide_3_1305.pdf (last visited 29 May 2018).

595 R Turney, "Costs in Judicial Review" available at http://www.landmarkchambers.co.uk/userfiles/documents/resources/COSTS_IN_JUDICIAL_REVIEW_-_R_Turney.pdf (last visited 29 May 2018).

596 M Fordham, *Judicial Review Handbook* (6th ed 2012) para 18.1

597 Blackstone Chambers Public Law Group, (2017) "Consultation on proposed extension of a fixed cost regime" available at: https://www.blackstonechambers.com/news/fixed-costs-regime-extension-consultation-blackstone-chambers-response/ (last visited 29 May 2018).

financial scale may never come to light. This, stakeholders suggested, was because those affected do not have the resources to challenge them.

7.26 The situation is thus unsatisfactory in two respects. On the one hand, large scale financial investigations can fall victim to an increase in both cost and delay as a result of unmeritorious applications for review. On the other hand, the system allows only limited scope for challenge in the course of routine criminal investigations, as the barrier to access is prohibitively high for many potential claimants. This provides inadequate oversight of police powers and perpetuates a justice gap based on financial means.

Section 59 of the Criminal justice and Police Act 2001

7.27 In 2001 a new procedure was introduced to allow for the return or retention of material taken during a search, under section 59 of the Criminal Justice and Police Act 2001. This procedure was introduced primarily as part of the "seize and sift" procedures in sections 50 and 51 of CJPA. The seize and sift procedures were, in part, a response to the decision in *R v Chesterfield Justices ex parte Bramley*, which held that where police were faced with a large amount of material, they were not permitted to remove it for sorting elsewhere.[598] If they did, they would be liable for trespass to goods in respect of any items subsequently found to be outside the scope of the warrant, even where they had acted in good faith.

7.28 However, section 59 is not limited to cases of "seize and sift". It also applies "where anything has been seized in exercise, or purported exercise, of a relevant power of seizure".[599] The relevant powers of seizure are listed under Schedule 1 of CJPA, which covers 97 separate statutes. In addition, section 59(10)(c) includes any other power of seizure "conferred on a constable".[600] The Criminal Procedure Rules, rule 47.38, prescribe rules in relation to applications made under section 59.[601]

Applications for return of material taken under section 59(2)

7.29 Section 59(2) of CJPA gives anyone with a relevant interest in property,[602] which has been seized under a relevant power of seizure,[603] the right to apply to the Crown Court for its return. The procedure was described in *R (Dulai) v Chelmsford Magistrates' Court* as "conferring on the Crown Court a speedy and relatively cheap means to challenge the exercise of the relevant powers of seizure and to seek the return of property seized".[604]

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598 *R v Chesterfield Justices ex parte Bramley* [2000] QB 576.

599 CJPA, s 59(1).

600 CJPA, s 59(10)(c).

601 The power of the Criminal Procedure Rule Committee to make rules about s 59 proceedings is conferred by Deregulation Act 2015, s 82(5).

602 This includes a person from whom the property was seized, a person with an interest in the property, or person who had custody or control of it immediately before it was seized: CJPA, s 59(11).

603 The relevant powers of seizure are those conferred by section 50 and 51; those specified in Parts 1 and 2 of Schedule 1; and any power of seizure conferred on a constable by or under any enactment, including an enactment passed after CJPA.

604 *R (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin), [2013] 1 WLR 220.

7.30 The main ground (outside the specific example of seize and sift procedures) is that "there was no power to make the seizure".[605] This applies where a seizure goes beyond the terms of the search warrant. However, it does not include a case where the seizure was in execution of a search warrant but the search warrant was wrongly issued, unless in the meantime the warrant has been quashed on judicial review. In other words, the Crown Court hearing an application under section 59 of CJPA has no jurisdiction to decide whether the warrant was properly issued: under the current law that jurisdiction belongs exclusively to the High Court on judicial review.[606]

7.31 This means that the procedure has a relatively narrow scope. As explained below, it can also result in multiple proceedings, adding cost and delay to the criminal process.

7.32 Section 59(5) of CJPA provides that the Crown Court, on an application under section 52(2), has the discretion to give such directions as it thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property. This presumably includes directions regarding the destruction of information stored in electronic form, which would constitute non-retention of part of the seized property.

Applications to retain material taken under section 59(6)

7.33 If material has been taken in exercise or purported exercise of a right of seizure, and ought in principle to be returned, the investigator or other person holding the material may apply to the Crown Court for authority to retain it under section 59(6). The court may authorise retention if it is satisfied that if the property were returned "it would immediately become appropriate to issue … a warrant in pursuance of which … it would be lawful to seize the property". That is, it is for the investigator to show, to the civil standard of proof, that a warrant to re-seize the property would be justified.

7.34 The effect of this is to avoid the need for the police to return material which may be of value to their investigation and then immediately apply for a warrant to re-seize it.[607] The High Court in *Haralambous* put the justification for this provision in the following terms:

> This statutory provision was introduced to deal with a particular difficulty which arose from the previous statutory scheme. If a warrant was quashed in contested judicial review proceedings, or if a seizing authority accepted that there was a defect in a warrant or the process leading to its issue which undermined its legality and consented to its being quashed, there was a risk that in the interval between the return of the seized material and the opportunity to obtain and execute a fresh warrant evidence would be lost. The main purpose of section 59 is, in short, to enable material to be retained which would inevitably be seized if a fresh warrant was issued by a magistrate and to avoid the risk to the criminal investigation of relevant evidence being lost.[608]

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605 CJPA, s 59(3)(a).

606 *R (Chaudhary) v Bristol Crown Court* [2014] EWHC 4096 (Admin), [2015] 1 Cr App R 18; *R (Goode) v Nottingham Crown Court* [2013] EWHC 1726 (Admin), [2014] ACD 6.

607 *M Zander on PACE* (7th ed 2015) para 2-64.

608 *Haralambous* [2016] EWHC 916 (Admin) at [42].

7.35 One of the initial conditions for an authorisation to retain material under section 59(6) is that the property "would otherwise fall to be returned";[609] that is, would have to be returned were it not for the authorisation. This will be satisfied if, for example:

(1) the warrant under which it was seized was quashed on judicial review;[610]

(2) in any proceedings, the investigator admits that the warrant was defective;[611]

(3) the material seized was not of the description specified in the warrant; or

(4) the material forms part of something seized under the "seize and sift" powers in section 50 and following of the Criminal Justice and Police Act 2001, the sift has taken place and the material in question did not fall within the part which the investigator was found to be entitled to seize.[612]

This list is not intended to be exhaustive: for example, the section also applies in some situations where the seizure was not under a warrant.

7.36 In *R (El-Kurd) v Winchester Crown Court*, the Divisional Court held that the power to order the retention of material extended to material seized under the authority of a warrant that had been to some extent unlawful or defective.[613] The Crown Court can authorise the retention of the material under section 59(6) even if the Divisional Court has quashed the original warrant;[614] but not if it has ordered the return of the material.[615] Therefore, the High Court will not necessarily always allow the seizing authority the opportunity to make an application under section 59(6).[616]

Problems with section 59

7.37 The former Lord Chief Justice, Lord Thomas, has commented that section 59 of CJPA "could have been more felicitously drafted".[617] For example, it is not clear whether the situation described in section 59(6) is an instance of an order that can be made in an application under section 59(5) or a separate procedure. Aside from that, however, there are significant issues of substance.

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609 CJPA, s 59(6)(b).

610 *R (El-Kurd) v Winchester Crown Court* [2011] EWHC 1853 (Admin), [2011] Lloyd's Rep FC 469.

611 *R (Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), [2014] EWCA Civ 1613, [2015] 1 WLR 2577.

612 It is probably this last situation which s 59 was primarily designed to meet, as it forms part of the same series of sections as the seize and sift procedures.

613 *R (El-Kurd) v Winchester Crown Court* [2011] EWHC 1853 (Admin), [2011] Lloyd's Rep FC 469. See also *M Zander on PACE* (7th ed 2015) para 2-64.

614 *R (Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), [2014] EWCA Civ 1613, [2015] 1 WLR 2577; Neil Parpworth, "Retaining unlawfully seized evidence" (2014) 178 *Criminal Law and Justice Weekly* 591.

615 *R (Kouyoumjian) v Hammersmith Magistrates' Court* [2014] EWHC 4028 (Admin), [2015] ACD 27.

616 *R (Kouyoumjian) v Hammersmith Magistrates' Court* [2015] Criminal Law Review 455; *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110 at [6].

617 *R (Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), [2015] 1 WLR 2577 at [44].

A blunt instrument

7.38 Andrew Bird points out that an application for the retention of unlawfully seized material under section 59(6) requires the judge to consider each document, thereby requiring a huge amount of work from investigators and lengthy schedules of material seized. The National Crime Agency also agreed that section 59 applications can be very time consuming due to the fact that each item must be considered: in one case, this took six months.

Limited to powers of seizure

7.39 Section 59(1) provides that the procedure applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure. This creates a gap in relation to material produced in response to production orders or production notices. For example, section 2(3) of the Criminal Justice Act 1987 empowers the Serious Fraud Office to require the production of documents and take copies or extracts from them. A similar "here and now" notice may be issued by the Financial Conduct Authority under section 165(3) of the Financial Services and Markets Act 2000.[618] Were an occupier to produce an electronic device, this would not constitute material taken under a power of seizure and therefore none of the powers under sections 50, 51 and section 59 would apply. This may become problematic where the device, such as a lawyer's phone, will obviously contain legally privileged material.

7.40 In addition, section 59(10)(c) includes any other power of seizure "conferred on a constable".[619] The intention is clearly to include all powers of seizure used in criminal investigations. However, given the many obscure search warrant powers contained across the statute book, there may be powers granted to agencies other than the police which are not included because they are not powers "conferred on a constable".

An unfamiliar and unpopular procedure

7.41 Stakeholders have indicated that court staff generally are unfamiliar with section 59 applications. One stakeholder gave the example of a case they worked on where the court office of the Crown Court refused to accept a section 59 application notice and sent it off to the Civil Justice Centre, who then returned it to the applicant.

7.42 Stakeholders have also suggested a judicial dislike of section 59 applications. *R (Panesar) v Central Criminal Court* illustrates this aversion, where the section 59 application was passed around due to the difficulty identifying a judge who was "suitable and willing" to hear the application.[620]

Delay and the overlap with judicial review

7.43 The section 59 procedure is not always quick. Although the explanatory note to section 59 raises the hope that it "will provide a quick and easy mechanism for challenging search warrant powers",[621] there are still cases of significant delay. In *Panesar*, Lord Thomas noted a delay of over two years, caused by difficulty in identifying a suitable

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618 For discussion, see Sarah Clarke, *Insider Dealing: Law and Practice* (2013) at 22.11.

619 CJPA, s 59(10)(c).

620 *R (Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), [2015] 1 WLR 2577 at [21].

621 http://www.legislation.gov.uk/ukpga/2001/16/notes/division/3/2/1/10 (last visited 29 May 2018).

judge and the general pressure of work at the Central Criminal Court. He observed that this was "extremely regrettable, indeed inexcusable".[622]

7.44 The problems of delay are substantially compounded by the overlap with judicial review. As the Crown Court may not consider the correctness of the decision to issue the original warrant, it is relatively common for both judicial review and section 59 proceedings to occur alongside each other. The overlap may become even more complex as the Crown Court's decision to order the return, or authorise the retention, of material may itself be challenged by judicial review.[623]

7.45 The effect is that there may be as many as three sets of proceedings: the judicial review of the decision to issue the warrant; the section 59 proceedings; and the judicial review of the decision taken in the section 59 proceedings.[624] Furthermore, the judicial review of the decision to issue the warrant may take place concurrently with the section 59 proceedings, or even with the judicial review of the section 59 proceedings. All these consider the same basic set of facts, but apply separate tests.

7.46 An example of this complexity is *Haralambous v St Albans Crown Court*.[625] Following a search, the occupier applied for a copy of the information, which was supplied after sensitive material had been redacted on the ground of public interest immunity. The occupier applied for judicial review. The judicial review claim was then settled on the basis that the warrants were quashed, but that return of the property would be subject to the police's application under section 59 to retain it. The Crown Court authorised the police retention of the material, reasoning that a new section 8 of PACE application would be successful on the basis of the sensitive material. In a judicial review of the Crown Court's decision, the Divisional Court, and the Supreme Court, upheld this approach.[626] As a consequence of the complexity of the issues, although the original application for a warrant was in April 2014, the issue was not finally resolved till the Supreme Court's judgment on 24 January 2018.

7.47 There are no clear ways to manage the timetable for these separate proceedings. It has been held that an application to retain material can proceed independently of any judicial review of the warrant and need not wait until all possible judicial review proceedings are exhausted.[627] Conversely, the judicial review proceedings do not need to be stayed because the result of a section 59 application may make the issue academic.[628] However, in some cases, two sets of proceedings have taken place

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622 *R (Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), [2015] 1 WLR 2577 at [21].

623 *R (Chief Constable of South Yorkshire) v Sheffield Crown Court* [2014] EWHC 81 (Admin), [2014] Criminal Law Review 678; *R (HS) v South Cheshire Magistrates' Court* [2015] EWHC 3415 (Admin), [2016] 4 WLR 74; *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357.

624 See *R (Panesar) v Central Criminal Court* [2014] EWHC 2821 (Admin), [2014] EWCA Civ 1613, [2015] 1 WLR 2577.

625 *R (Haralambous) v Crown Court at St Albans* [2016] EWHC 916 (Admin), [2016] 1 WLR 3073; *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357.

626 For a criticism of the High Court's decision, and more generally on the interplay between judicial review proceedings challenging warrants and applications under CJPA, s 59 see Rupert Bowers, "Open season, in closed session" [2016] *Criminal Bar Quarterly* 11.

627 *R (HS) v South Cheshire Magistrates' Court* [2015] EWHC 3415 (Admin), [2016] 4 WLR 74.

628 *C v Nottingham and Newark Magistrates' Court* [2013] EWHC 3790 (Admin), [2014] ACD 55.

concurrently. For example, in *R (Singh) v South Cheshire Magistrates' Court*;[629] eventually the judicial review of the section 59 proceedings was heard together with the remaining issues in the judicial review of the original warrant.[630]

Inability to retain unused material

7.48 One stakeholder noted that there is also the problem that only evidential material can be retained in section 59 cases – not unused material which the prosecutor has a duty to retain under the Criminal Procedure and Investigations Act 1996 Code of Practice. In all likelihood there will be an obligation to return unused material if a warrant has been quashed.

Can retained material be inspected?

7.49 One stakeholder observed that there is a lack of clarity surrounding the meaning of the investigator's "duty to secure" seized material pending a section 59 application under sections 60 and 61 of CJPA 2001. It has been argued that the duty to secure seized material prohibits investigators from examining the material for the purpose of the section 59 application without the prior permission of the Court. This would, in practice, create real difficulties for investigators to exercise powers under Part 2 of CJPA.

7.50 The case law has to date largely ignored sections 60 and 61. This will need to be addressed if and when reconfiguring current section 59 and the new procedure discussed below. It was argued by stakeholders that, for the purpose of a section 59 application, the seized material should be capable of being inspected and used by both parties and the judge.

Can unlawfully seized or retained material be used in evidence?

7.51 A further question is whether unlawfully seized or retained material, or unlawfully made copies of such material, would be admissible in evidence in any subsequent criminal proceedings.

7.52 Following the report of the Philips Royal Commission, the Government introduced an important power to exclude evidence. This power is set out in section 78 of PACE, which gives a judge a power to exclude otherwise admissible evidence where admitting it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.[631] The power is often described as a discretion. In one sense, however, it is not truly discretionary, as if the judge concludes that the evidence would unfairly prejudice the proceedings he or she is obliged to exclude it.[632] The test requires an assessment of the impact of the admission of the evidence on the overall fairness of the proceedings.[633]

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629 *R (Singh) v South Cheshire Magistrates' Court* [2015] EWHC 4147 (Admin).

630 *R (HS) v South Cheshire Magistrates' Court* [2016] 4 WLR 74.

631 H Malek and others, *Phipson on Evidence* (19th ed 2017) paras 39-10 and following.

632 *Chalkley* [1998] QB 848, [1998] 2 All ER 155; *Phipson on Evidence* (19th ed 2017) para 39-13 to 39-17.

633 *Archbold: Criminal Pleading, Evidence and Practice* (2018) para 15-580; *Blackstone's Criminal Practice* (2018) para F2.7. see also *R v Khan* [2013] EWCA Crim 2230.

7.53 In the absence of bad faith or a significant and substantial breach of a code of practice, it remains rare for the courts to exclude the evidence based solely on the fact that it stems from an unlawful search.[634] The courts have made clear that the decision to exclude evidence is not to be made as a means of disciplining the police or as an attempt to deter certain investigative conduct.[635] The courts are more prepared to exclude evidence which is unreliable in some way, but evidence found after a search is likely to be reliable, even if there was some defect in the way that search was conducted.

7.54 That is not to say that evidence will never be excluded when it stems from the conduct of an unlawful search[636] but rather that section 78 applications are decided on the individual facts of a case and do not lend themselves to hard rules or strict adherence to case law. Indeed, it is not clear whether evidence retained after a section 59 application becomes "lawfully obtained" because its retention has been authorised by a court. It is not an issue we consider in this consultation paper as it more properly involves the law of evidence and, as we have seen, the evidence could still be admitted even if unlawfully obtained.

Costs regime

7.55 Under the present law, and unlike the position in judicial review, there is no *inter partes* (between the parties) cost regime for section 59 applications, which means that a party cannot recover legal fees incurred in the course of litigation against the other party.[637] This follows from the Divisional Court decision in *Chaudhary*.[638]

7.56 Section 59 proceedings amount to a "criminal cause or matter" for the purposes of section 18 of the Senior Courts Act 1981 and section 1 of the Administration of Justice Act 1960.[639] It may therefore be that section 19 of the Prosecution of Offences Act 1985 provides a limited jurisdiction to make a claim for costs against another party to those proceedings as section 59 proceedings are "criminal proceedings" for its purposes, but this is yet to be tested to our knowledge.

7.57 Stakeholders have indicated that, if there is to be reform in this area, it is vital that an *inter partes* costs regime is created for section 59 proceedings. It has been argued that if a costs regime is introduced then that potential liability would deter hopeless applications in the same way it deters hopeless applications in any other sort of litigation. Equally, it would encourage the authorities not to make lax applications in the first place.

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634 *Khan* [1997] AC 558, [1996] 3 All ER 289; reviewed by ECtHR in *Khan v United Kingdom* (2001) 31 EHRR 45 (App No 35394/97).

635 See *M Zander on PACE* (7th ed 2015) paras 8-33 and following.

636 For example, in *R (RSPCA) v Colchester Magistrates' Court* [2015] EWHC 1418 (Admin), [2015] ACD 104, it was held that a district judge properly exercised his discretion under section 78 to exclude evidence obtained by officers of the local authority and the RSPCA acting under an incorrect warrant power.

637 Parts 44–47 of the Civil Procedure Rules deal with the main provisions relating to costs and the way in which the court will award and assess costs.

638 *R (Chaudhary) v Bristol Crown Court* [2015] EWHC 723 (Admin), [2016] 1 WLR 631.

639 *R (Panesar) v Central Criminal Court* [2014] EWCA Civ 1613, [2015] 1 WLR 2577 at [20] per Burnett LJ.

REFORM

A proposed new procedure

7.58 The current means of challenging search warrants, especially when used in combination, are far too complex. The combination of judicial review and section 59 proceedings results in long delays and disproportionate costs. The current system enables well-resourced claimants to bring tactical cases to delay the criminal justice process, while making it difficult for others to challenge unlawful behaviour. There is an urgent need to streamline the procedures so that the same court can consider all the issues in the case.

7.59 Below we set out provisional proposals to introduce a new procedure, broadly based on section 59 of CJPA. Our aim is to enable the Crown Court to have a comprehensive power of judicial oversight of search warrants, looking both at whether the warrant was correctly issued and the search properly conducted. This power would be exercised alongside the Crown Court's power to authorise an investigator to retain material.

7.60 We envisage a new procedure to challenge the issue or execution of a search warrant relating to a criminal investigation (and therefore to which section 15(1) of PACE applies as defined in Consultation Question 3), which would work as follows:

(1) Anyone with a relevant interest in property which has been seized or produced[640] under a warrant or order to which section 15(1) applies can apply to a judge of the Crown Court for either:

(a) the warrant to be set aside (resulting in the return of material seized or produced); or

(b) an order for the return of material seized or produced, without setting aside the warrant.

(2) The grounds for setting aside a warrant and ordering the return of the material seized or produced would be that:

(a) the applicant for the warrant did not provide the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled; or

(b) the provisions of section 15 of PACE were not followed.

(3) The grounds for ordering the return of material seized or produced, without setting aside the warrant, would be that:

(a) the materials were unlawfully seized (for example because they were legally privileged, or because they were special procedure or excluded material and the warrant did not confer power to seize such materials); or

[640] For example, in compliance with a requirement to produce materials in visible and legible form under PACE, s 19(4) or 20.

(b) the provisions of section 16 of PACE were not followed.

(4) The warrant would be left in being and the investigator would be allowed to retain the materials if, in response to an application for either of these types of order, the investigator satisfied the Crown Court judge to the civil standard of proof that:

(a) the conditions for issuing a warrant are fulfilled, so far as they concern the subject matter of the investigation and the nature and relevance of the materials in question; and

(b) it is in the interests of justice for material to be retained (having regard to a non-exhaustive list of factors).

(5) The Crown Court judge would have the power to:

(a) set aside the warrant;

(b) order the return of seized or produced material;

(c) authorise the retention of seized or produced material;

(d) give directions as to the examination, retention, separation or return of the whole or any part of the seized property;

(e) order the return or destruction of copies; and

(f) order for costs between the parties.

7.61 Before we look in more detail at the elements of this procedure, we discuss the relationship envisaged between the new procedure, section 59 of CJPA 2001 and judicial review.

Relationship with the existing procedures

Section 59 of CJPA 2001

7.62 Section 59 applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure.[641] It does not require a search warrant to have been executed, nor does it require any preceding power of entry. Further, our proposed new procedure concerns sections 15 and 16 of PACE, and therefore only search warrants relating to a criminal investigation. For these reasons, it is impractical to replace section 59 with a new provision, as this would impact powers of entry beyond those which are pursuant to a search warrant that relates to a criminal investigation.

7.63 We therefore envisage a new section which contains exclusive jurisdiction for material obtained pursuant to a warrant to which section 15(1) of PACE applies (as defined at paragraph 3.54 above). It may then be necessary to avoid duplication between the new procedure and the procedure under section 59, though it may be necessary to retain the section 59 procedure for cases where the warrant or its execution are not being

641 CJPA, s 51(1).

challenged.[642] In creating the new procedure, it will be important to ensure that it does not detract from useful aspects of the existing procedures under section 59, or the "seize and sift" powers under sections 50 and 51.

7.64 Although we envisage a new section, some aspects of the new procedure we suggest could also be transposed into section 59, such as cost orders between the parties. We therefore invite consultees' views at the end of this chapter on whether any aspects of the proposed new procedure are of general utility such that they ought to be replicated in the present section 59.

Judicial review

7.65 The grounds for the proposed challenge procedure do not replicate the broad tests applied in judicial review, which typically considers issues such as whether the authority took into account irrelevant factors or failed to take into account relevant factors. The tests for judicial review are broadly defined, involve significant elements of moral evaluation and have evolved considerably over the years. Tests of this kind introduce uncertainty (and cost) in the proceedings, and are ill-suited to a busy Crown Court. Instead, our intention is to replace the uncertainty of judicial review tests with clear statutory check lists. Further, the new procedure would be confined to procedural irregularities relating to sections 15 and 16 of PACE; it would not extend to questions such as whether the access conditions or other statutory criteria were met. Judicial review would therefore remain for these sorts of claims.

7.66 The new procedure would also move away from the language of judicial review, where a warrant, or the decision to issue it, is typically described as was "ultra vires",[643] "void", "voidable", "bad" or "unlawful". The terminology has varied over the years: see Chapter 4 of *De Smith's Judicial Review*.[644] This language can be confusing and may mislead people to think that, even before the judicial review took place, the warrant was invalid and any entry under it was an act of trespass. As we have seen, this is not necessarily the case. Therefore, the Crown Court will not quash the warrant in the same sense that the High Court does on judicial review; the warrant will simply be set aside. The effect of the order will not be retrospective: this will make it clear that the occupier is not entitled to damages for trespass.

7.67 The proposed new procedure would be equally available whether the warrant is improperly issued[645] or improperly executed,[646] and its main focus would be on the return or retention of the materials taken. Especially in cases of a search being improperly carried out, it will be preferable to judicial review, as the issue of quashing the warrant does not arise.

7.68 As the new procedure does not apply the judicial review test, it would not be a complete replacement for judicial review. Judicial review will still be available where the normal conditions for judicial review are satisfied, for example if the decision maker exceeded

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642 Para 7.99 below.

643 Meaning beyond the power of the court to grant or make.

644 *De Smith* (above), paras 4-054 and following.

645 In breach of PACE, s 15.

646 In breach of PACE, s 16.

their powers, acted unfairly or took into account irrelevant factors.[647] This would continue to allow the Administrative Court to develop the law of search warrants in line with these broad tests.

7.69 While we envisage that in many cases the new procedure will be used in preference to judicial review, we do not propose that judicial review should be excluded in cases where the new procedure is available. Judicial review will therefore remain available as a means of challenging a warrant for those who so choose. For example, those who wish their rights to be vindicated by declaratory relief should remain able to do so. Further, we envisage the potential for judicial review to absorb claims under the new procedure so that the High Court can make determinations both in respect of judicial review and our new procedure.

Application to set aside warrant or order return of material

7.70 Like section 59 in its current form, the new procedure would enable a person with a relevant interest in the seized property to apply to the Crown Court. This could involve either a challenge to the way the warrant was applied for or issued or a challenge to the way it was executed.

7.71 We propose retaining the existing broad definition of a "a person with a relevant interest" in seized property in section 59(11) of CJPA, which covers:

(a) the person from whom it was seized;

(b) any person with an interest in the property; or

(c) any person, not falling within paragraph (a) or (b), who had custody or control of the property immediately before the seizure.

7.72 We considered whether a search could be challenged before property has been seized. Should it be possible to challenge a search while it is taking place, so that the search is suspended until the challenge is resolved? This occurs in the context of civil search orders, where the respondent may ask the supervising solicitor to delay starting the search in order to seek legal advice on whether to ask the court to vary or discharge the order.[648]

7.73 In our view, it would be impracticable for an application to be made during the search. As a Crown Court judge would not necessarily be available immediately, the search would be halted on the sole initiative of the occupier, until a hearing could be arranged, maybe weeks later. This would be an incentive for the occupier to bring such a challenge in every case, therefore slowing the investigation process immensely. Further, it is possible to obtain out of hours emergency injunctions during the execution of a warrant. Therefore, for the purposes of the new procedure, the power to challenge a warrant should only arise once a seizure has been made.

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647 For these grounds, see *De Smith's Judicial Review* chapters 6 to 14.

648 See para 6.70 above.

7.74 We have also considered whether, as a way to exclude unmeritorious claims, there ought to be a permission filter. As in the Administrative Court,[649] applicants would be required to obtain permission to proceed to a full hearing. This filter can be made more stringent by requiring the application for permission to be made in writing and for the respondent to have the opportunity to reply in writing before a decision is made on the papers; and if the decision is adverse, denying the applicant an oral hearing. If such a system is implemented, there may have to be an expedited procedure for cases of genuine emergency. We invite consultees' views on these matters.

Powers subject to challenge

7.75 Under section 59, the section applies "where material had been seized in exercise, or purported exercise, of a relevant power of seizure".[650] The relevant powers of seizure are those conferred by section 50 and 51; those specified in Parts 1 and 2 of Schedule 1; and any power of seizure conferred on a constable by or under any enactment, including an enactment passed after CJPA.

7.76 As noted above, however, this creates a gap in relation to material obtained in response to production orders or production notices, such as under section 2(3) of the Criminal Justice Act 1987. Further, given the many obscure search warrant powers across the statute book, there may be powers granted to agencies other than the police which are not included in section 59(10)(c).

7.77 Our provisional view is that the new procedure should apply where material has been obtained in exercise, or purported exercise, of a relevant power of seizure or production. Those relevant powers could then be specified under a schedule, as is the case under current section 59. We invite consultees' views on which powers to require the production of material ought to be included.

Grounds of challenge

7.78 Under the proposed challenge procedure, the grounds for setting aside a warrant would be that:

(1) the applicant did not provide the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled; or

(2) the provisions of section 15 of PACE were not followed.[651]

If the Crown Court judge is satisfied to the civil standard of proof that either of these grounds are met, he or she would set aside the warrant and order the return of the materials;

7.79 The grounds for ordering the return of material seized or produced, without setting aside the warrant, would be that:

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649 The Administrative Court, which considers applications for judicial review, is part of the Queen's Bench Division of the High Court of England and Wales.

650 CJPA, s 59(1).

651 We provisionally propose enshrining the duty of candour in section 15 of PACE in Chapter 4. These grounds of challenge could therefore be streamlined.

(1) the materials were unlawfully seized (for example because they were legally privileged, or because they were special procedure or excluded material and the warrant did not confer power to seize such materials); or

(2) the provisions of section 16 of PACE were not followed.

If the Crown Court judge is satisfied that either of these grounds is met, he or she would order the return of the materials.

7.80 We considered whether to include another ground of challenge, namely that the conditions for issuing a warrant were not in fact fulfilled. However, we do not advise that this ground should be included. If it were, the new procedure would in effect be an appeal, in which every issue before the issuing court would be reconsidered, together with any further evidence provided by the investigator or the occupier. It would be particularly undesirable to allow a full debate of whether there were reasonable grounds to believe or suspect that an offence has been committed, as this would turn the proceedings into something like a criminal trial.

7.81 Instead, the new procedure focuses on whether the investigator followed the correct process in applying for the warrant and therefore should have the benefit of it.

Allowing retention of material

7.82 As we have seen, investigators have a right to apply to retain material under section 59(6) of CJPA. The purpose of this power is to avoid the circularity of having to return the materials and then apply for a fresh warrant. However, stakeholders expressed concern that it can be used to bypass the safeguards in sections 15 and 16 of PACE: after seizing material in breach of those provisions the investigator can freely concede that the material was unlawfully taken and still apply to retain it. This does not do enough to encourage good practice.[652]

7.83 Given the importance of section 59(6) to the criminal justice process, we consider that it is important to retain a possibility of retention along these lines. However, we are not convinced that the current test of whether it is immediately appropriate to issue the warrant is the correct one. As we explore below, in some ways the test is too narrow: to meet all the grounds for immediately issuing a warrant, the court is obliged to make some difficult assumptions. In other ways, it is too wide, in that it applies irrespective of the degree of fault shown by the investigator. We seek views on reformulating this test.

Limb 1: the conditions for issuing a warrant are satisfied

7.84 As present, the test for allowing the investigator to retain the material is that (if the property were returned) it would immediately become appropriate to issue a warrant to seize the property.[653]

7.85 This is a difficult test to apply. To consider whether the grounds for a warrant under section 8 of PACE would (hypothetically speaking) be satisfied, the Crown Court is required to make a series of assumptions. To satisfy section 8(1)(b), material must be

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652 This was in effect the position in *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110; see Michael Zander, "This absolutely will not do" (2015) 179 *Criminal Law and Justice Weekly* 19.

653 CJPA, s 59(7)(a). See para 7.35 above.

"on premises": depending on the terms of the warrant, these can be either identified premises or premises which are under the control of the person in question. Therefore, the court must assume that if the material were returned it would not be destroyed immediately but placed on such premises. Then, to satisfy the access conditions in section 8(3), the court must assume that the owner would deny entry or attempt to frustrate the purpose of the search. Although courts are prepared to make these assumptions, they require a belief in both the defendant's co-operation and non-co-operation, which may be difficult to reconcile.

7.86 We provisionally propose to simplify this test. There should be no need to show grounds for believing that relevant material is on the premises. This is counterfactual: everyone is aware that the material is in the possession of the investigator. Nor should there be any requirement to meet the accessibility conditions (meaning the conditions that show that access could not be obtained without a warrant). Instead, it should be that on the facts now known, there would be grounds to justify the issue of a warrant under which the same materials could have been taken. Normally these will be the existence of reasonable grounds for believing that an offence has been committed (or that the reason for investigation exists) and that the material in question is relevant evidence. This test should depend on the state of knowledge of the investigator at the time of the Crown Court hearing.

Limb 2: it is in the interests of justice to retain the material

7.87 One criticism of the current test for retaining material is that it gives little incentive for good practice in applying for search warrants. In theory, an investigator could obtain a warrant on flimsy or suppressed evidence, and then use the results of the invalid search to justify why a new warrant would be appropriate.

7.88 Stakeholders have made differing suggestions as to what the test ought to be. For example, retention might be disallowed if the investigator was clearly at fault, grossly incompetent or acted in bad faith, or if there was no good reason why the conditions were not met. Conversely, retention would be allowed if the identified flaws were only minor or technical. Whilst these are all relevant factors, the range of possible scenarios points towards adopting a broader test in order to weigh these competing factors.

7.89 For these reasons, we provisionally propose that test should be whether the court is satisfied that it is in the interests of justice for it to be retained. The test should further state that, in deciding whether it would be in the interests of justice, the court must have regard to the following factors (and to any others it considers relevant). For example, the non-exhaustive factors listed could include:

(1) whether the investigator was clearly at fault, grossly incompetent or acted in bad faith;

(2) whether the investigator failed to provide good reason why the conditions were not met;

(3) whether the investigator failed to comply with section 52 of CJPA where powers under sections 50 or 51 were used; and

(4) whether any flaws were minor or technical.

We invite consultees' views on the adoption of this test and the non-exhaustive factors which ought to be considered by the court.

Powers of the court

7.90 We invite consultees' views on the following proposed powers of the court, namely the power to:

(1) set aside the warrant;

(2) order the return of seized or produced material;

(3) authorise the retention of seized or produced material;

(4) give directions as to the examination, retention, separation or return of the whole or any part of the seized property;

(5) order the return or destruction of copies; and

(6) order for costs between the parties.

Set aside the warrant, order return or authorise retention

7.91 As explained above, if grounds for challenging a warrant under the new procedure are established to the satisfaction of the court, the normal order will be that the warrant should be set aside and any materials taken in the search should be returned. If it is the conduct of the search under the warrant that is successfully challenged, the order will be that the materials should be returned.

7.92 In either case, this would be subject to one exception. If the investigator satisfies the court that grounds for a new warrant would exist and that it is in the interests of justice to retain the materials, as outlined above, the order to return the materials will not be made.

7.93 We accordingly see no need for the investigator to make a formal application to be allowed to retain the materials, or for the court to make an order to that effect. The investigator need only rely on these factors as grounds for resisting the occupier's application for return of the materials. If the court agrees, it will simply make no order.

7.94 The position may be less simple where the occupier, instead of applying to set the warrant aside under the new procedure, applies to have it quashed on judicial review. If the High Court specifically orders the return of the materials, this must be final: the investigator cannot apply to retain them, either under the existing section 59(6) or under the new procedure. The question is whether the investigator should be able to apply for retention if the High Court quashes the warrant but makes no other order.

7.95 To allow an application to the Crown Court to be made in these circumstances, by either the occupier or the investigator, would multiply proceedings in just the way that the new procedure is designed to avoid. To avoid this, we consider that, whenever judicial review of a search warrant is granted, the High Court should have all the powers of the Crown Court under section 59 or the new procedure, and should make any necessary order for the return or retention of the materials as part of its judgment in the judicial review proceedings. Once more, it will be for the occupier to apply for an order for return, and

for the investigator to resist this on the grounds discussed above: there will be no application by the investigator giving rise to a separate set of proceedings.

7.96 If the investigator wishes to oppose an application for return of the materials on these grounds, notice should be given as soon as possible, to avoid the need for time and resources to be spent in determining whether the grounds for return exist. We consider that rules of court should prescribe that, following an application for setting aside the warrant and/or ordering the return of the materials, the investigator has a limited period within which to give notice opposing the application on the grounds that the conditions for a warrant exist and retention would be in the interests of justice. The court will then consider both issues together: whether the warrant or search was defective, and whether retention should nevertheless be allowed in the interests of justice. We consider that notice given by the investigator in this context ought to be regarded as a defence rather than a counterclaim; the idea that these are different claims each with its own kind of order contributes to the complicated state of section 59 proceedings.

7.97 In litigation under existing provisions, whether judicial review proceedings or under section 59, it is typically the case that the only real issue at stake is whether the seized material should be returned or whether it can be retained. Generally, this will be the position under the proposed new procedure as well, subject to two qualifications.

(1) some search warrants relate to multiple premises, or allow more than one visit to the same premises. Here, a successful challenge to the search warrant following the first visit will mean that no further visits may be made;[654] and

(2) below we ask consultees whether there should be a limited power to provide damages in some circumstances.

7.98 In some cases, the breach of safeguards will relate not to the issue of the warrant but to the way in which the warrant was executed, in breach of section 16 of PACE. Here the court will not have the power to set aside the warrant, but will have the same power to order return of the material (which is also subject to the investigator's right to apply to retain it).

Give wider directions relating to the material

7.99 The existing section 59 jurisdiction is not confined to cases in which a warrant is challenged. There are cases where there may need to be an order about the materials even if the warrant is challenged unsuccessfully, or not challenged at all. For example:

(1) section 22 of PACE, and Code B of PACE, state that anything seized may be retained only for as long as necessary; for example, for use at a trial for an offence, or to facilitate an investigation or identify the owner;[655] there are similar provisions in the Home Office Code of Practice;

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654 We have seen no example of this situation in any reported case. This is probably because multiple visits are likely to be concentrated within a period of a few days or weeks, while judicial review proceedings may take anything up to a year until the final decision.

655 Code B of PACE, para 7.14.

(2) under those codes, property should not be retained if a copy or image would be sufficient;[656]

(3) the material may be outside the scope of the warrant, for example it may be legally privileged, special procedure or excluded material, or it may not be relevant to the investigation;

(4) there may be third parties, other than the investigator and the occupier of the premises, who claim the materials;

(5) ownership of the material may be disputed, and there may be a need to make arrangements for its safekeeping while the dispute is resolved; or

(6) there may be a mixture of materials that may and may not be seized, and arrangements must be made for sifting them.

7.100 Most of these cases are provided for by section 59 of CJPA. In any revision of the legislation, it will be important to ensure that all the existing powers in that section continue to be available. Care should also be taken to ensure that the procedures under sections 50 and following of CJPA are not frustrated or made more difficult.

Order the return or destruction of copies

7.101 A further question is whether, if the police or other investigators are ordered to return materials, they should be allowed to keep copies. Outside of CJPA, it appears that the court will be hesitant to order the destruction of copies as relief under judicial review.[657] In *Cummins,* Lord Justice Leveson noted that there is no authority to order the destruction of copies of documents unlawfully seized. Rather, it is for the trial judge to decide in any subsequent prosecution under section 78 of PACE whether these copies ought to be admitted in evidence.[658] In the context of powers under section 59 of CJPA, the Crown Court does have the power to order the destruction of copies.[659]

7.102 This raises the question of whether the Crown Court should have the power to order that copies be destroyed. In our view, two situations may be distinguished:

(1) if the return of the materials was ordered on the ground that the materials were exempt and should never have been seized in the first place, it would make sense also to order that all copies of the material should be either handed over or destroyed;

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656 Code B of PACE, para 7.15.

657 *R (Cook) v Serious Organised Crime Agency* [2010] EWHC 2119 (Admin), [2011] 1 WLR 144 at [18] to [21] and [27]; *R (Cummins) v Manchester Crown Court* [2010] EWHC 2111 (Admin), [2010] Lloyd's Rep FC 551 at [13]; *R (Anand) v Revenue and Customs Commissioners* [2012] EWHC 2989 (Admin), [2013] CP Rep 2 at [35] to [37]; *R (Newcastle United Football Club) v Revenue and Customs Commissioners* [2017] EWHC 2402 (Admin), [2017] 4 WLR 187 at [104].

658 *R (Cummins) v Manchester Crown Court* [2010] EWHC 2111 (Admin), [2010] Lloyd's Rep FC 551 at [13]

659 *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin), [2015] ACD 110 at [136]. *R (Kouyoumjian) v Hammersmith Magistrates' Court* [2014] EWHC 4028 (Admin), [2015] ACD 27 at [8] and [42].

(2) if, however the return of the materials was ordered on the ground that they had been retained for too long or that they should have been copied rather than seized, then any copies made should be able to be retained and used.

7.103 We provisionally propose that the Crown Court should have the power to order that copies of returned documents should be destroyed. We seek views on this issue.

7.104 We also propose an amendment to the Criminal Procedure and Investigations Act 1996 Code of Practice to state the duty to retain material does not apply where an order has been made for the return or destruction of the material and/or copies.

Order costs

7.105 We provisionally propose that there ought to be an *inter partes* cost regime for applications under the new procedure, which means that a party can recover costs incurred on legal fees in the course of litigation against the other party. We are persuaded by the argument that a cost regime would deter unmeritorious applications, encourage the authorities not to make lax applications in the first place, or resist meritorious challenges.

7.106 Under our provisional proposals the new procedure would be separate from the existing section 59. However, a similar rule about costs could be implemented in relation to section 59 proceedings by amendment to the Criminal Procedure Rules by virtue of section 82(5) of the Deregulation Act 2015, as mentioned at paragraph 7.28 above.

Award compensation

7.107 As we have seen, claims for compensation for unlawful searches are difficult to bring. The costs of such actions may be disproportionate to the small amount at stake. This raises the question of whether the Crown Court should have the power to award limited compensation, either for damage to property or for breach of privacy, or whether it is more appropriate for compensation to be awarded by civil courts in actions for interference with goods, as at present.

7.108 It is not unknown for criminal courts to award compensation. Following a criminal conviction, the prosecution may apply for a compensation order under section 130 of Powers of Criminal Courts (Sentencing) Act 2000. The compensation order can cover "personal injury, loss or damage". For example, the prosecution may seek compensation in respect of unrecovered property. Section 130(4) states that the order:

> shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor.

7.109 However, the courts tend to interpret their powers restrictively: if a claim for compensation is challenged by the defendant, the courts must hear evidence to determine the extent of the loss.[660] The delay and extra expense required to resolve the

[660] See *R v Vivian* [1979] 1 WLR 291 and *R v Horsham Justices, ex parte Richards* [1985] 2 All ER 1114.

matter can discourage prosecutors from raising the point. Studies have highlighted the relatively low use made of compensation orders within the criminal justice system.[661]

7.110 The advantage of permitting the Crown Court to make a compensation award would be that it would resolve the issue at comparatively low cost alongside the other issues in the case. One disadvantage is that it might involve the Crown Court in decisions about the amount of loss which are better suited to civil courts. Another is that it might encourage an unduly large number of applications under the new procedure. The power to award compensation also risks eliding judicial review and our proposed new procedure. For this reason, we do not consider that the Crown Court should be empowered to make compensation awards. We invite consultees' views.

Legal aid funding

7.111 Stakeholders have pointed out that legal aid should also be made available for those without means, otherwise any new procedure would run the risk of remaining imbalanced as discussed above.

7.112 Criminal legal aid may be granted for proceedings before any court in favour of any individual accused or convicted of a criminal offence. Criminal legal aid also extends to other proceedings, which include those set out in section 14 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and certain 'prescribed proceedings' listed in Regulation 9 of the Criminal Legal Aid (General) Regulations 2013/9.

7.113 We agree that legal aid funding ought to be available for the new procedure. This would require the new procedure to be specified in Regulation 9 of the Criminal Legal Aid (General) Regulations 2013 (SI 2013 No 9).

Arguments for and against introducing a new procedure

7.114 We have outlined a proposed new procedure to allow the Crown Court to set aside procedurally defective search warrants. The advantages of introducing such a procedure would be that:

(1) it would be substantially quicker than judicial review, and would therefore cause fewer delays in criminal investigations;

(2) by replacing judicial review in many cases, it would relieve pressure on the workload of the High Court;[662]

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661 For example, Representative Actions and Restorative Justice: A report for the Department for Business, Enterprise and Regulatory Reform. University of Lincoln (2008). This is a long-standing issue: see C Flood-Page and A Mackie, "Sentencing practice, an examination of decisions in magistrates' courts and the Crown Court in the mid-1990s" (1998) Home Office.

662 In the 2015 judicial attitudes survey 47 percent of High Court judges had experienced difficulties with the level of case workload in the preceding 12 months. Civil justice statistics indicate that there were 4,195 applications for permission to apply for judicial review in 2017. See https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2017 (last visited 29 May 2018)

(3) by bringing together challenges to the warrant with applications for the return or retention of materials, it would enable both issues to be resolved at once and reduce the need for multiple proceedings;

(4) the available grounds of application would be clearly stated in statute and would not depend on judicial review concepts such as the warrant being invalid or unlawful;

(5) the court would be able to reconsider questions of fact and evidence, such as whether public interest immunity should be allowed;

(6) a wider range of remedies could be provided, other than the quashing of the warrant; and

(7) the hearing would be substantially cheaper, so that the possibility of challenging a warrant would not be confined to wealthy claimants.

7.115 The main disadvantage is that a cheaper and more accessible procedure might encourage more applications and unduly burden the Crown Court. That is, it would not simply divert applications from the High Court to the Crown Court but also increase the overall number of applications. However, as the new procedure will only be available in cases where materials were taken, and particularly if no power to award compensation is introduced, we consider that the number of these additional applications is unlikely to be great.

7.116 The most important question is whether these additional applications are likely to be without merit. It is one thing to argue that the high cost of judicial review is a desirable deterrent to unmeritorious claims. It is quite another to say that even justified claims should be priced out of existence to reduce pressure on the court system. It is clearly unfair that at present search warrants are only realistically likely to be challenged by wealthy individuals and companies in cases of high complexity involving large sums, and that errors in the general run of criminal cases go unchallenged and uncorrected.

7.117 Andrew Bird of 5 St Andrew's Hill argued that the Crown Court administration would probably be unable to cope with a new procedure. Additionally, in his experience, under the current law, it is usually hoped that a High Court judge will be allocated to deal with a section 59 application. Further, Rupert Bowers QC of Doughty Street Chambers pointed out that Crown Court judges are often unfamiliar with the concepts involved and that claimants will always go to judicial review if they can. This, if accurate, is as much an objection to the existing section 59 procedure as it would be to the proposed new procedure. The only questions which a Crown Court judge may be required to determine would be whether:

(1) the investigator provided the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled;

(2) the materials were unlawfully seized by the investigator; and

(3) sections 15 and 16 of PACE were complied with.

These are relatively simple questions of fact.

7.118 Another issue is the narrowness of the jurisdiction that is created under the new procedure, which is confined to the grounds set out above in paragraph 7.117. First, currently, many claims involving search warrants will require consideration of several issues together, for example challenges to the jurisdiction to issue the warrant (whether the statutory criteria are met), the procedural provisions of sections 15 and 16 and associated powers of seizure.[663] Under the new procedure, only some of these issues could be considered. Secondly, it is often difficult to unravel a procedural challenge on the ground of a failure in the duty of candour from a substantive challenge on the grounds that the statutory criteria were not met: it is because of the failure to disclose information that the issuing authority was not in a position to be satisfied of those criteria. As noted, however, the intention behind this provisional proposal is not to oust judicial review. Further, we envisage the potential for judicial review to absorb claims under the new procedure.

7.119 There is a further issue concerning the likely use of the new procedure. We noted at paragraph 7.67 above that the new procedure is well-adapted to cases where the real complaint is that the warrant was improperly executed. We are informed that this gives rise to a very limited number of challenges because the relief a claimant stands to obtain will be so limited. We consult below on whether the Crown Court ought to be empowered to award damages under the new procedure, which would make it more attractive.

7.120 Another disadvantage is that judicial review might only be pushed back a step. In existing law, proceedings under section 59 are themselves subject to judicial review, and the review of these proceedings may occur together with review of the original warrant. This could conceivably occur in connection with the new procedure. However, we consider that in most cases the permitted grounds of challenge under the new procedure will be wide enough to avoid the need for judicial review.

7.121 Below we ask general questions about whether a new procedure allowing the Crown Court to consider challenges to warrants would be desirable. We then ask for comments on our detailed provisional proposals, as set out below. To reiterate, we are concerned here with points of policy, rather than potential drafting.

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663 For example, *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [27]. One of the seven grounds of challenge were that the warrants failed to embody the safeguards set out in section 15(6)(b) of PACE. This ground, however, expanded to cover a more general complaint that the warrants did not satisfy the pre-conditions of section 8 of PACE.

Consultation Question 37

We provisionally propose that the Crown Court be able to review the issue and execution of search warrants relating to a criminal investigation, to examine:

(1) whether the procedure for applying for or issuing the warrant was defective; and/or

(2) whether the search was properly conducted (for example, whether items seized were within the powers of seizure).

Do consultees agree?

Consultation Question 38

We provisionally propose the following new procedure:

Anyone with a relevant interest in property which has been seized or produced in response to a search warrant to which section 15(1) of the Police and Criminal Evidence Act 1984 applies (as defined in Consultation Question 3) should be able to apply to a judge of the Crown Court for either:

(1) the warrant to be set aside (resulting in the return of material seized or produced); or

(2) the return of material seized or produced, without setting aside the warrant.

The grounds on which the Court must be satisfied before setting aside a warrant and ordering the return of the material are that:

(1) the applicant for the warrant did not provide the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled; or

(2) the provisions of section 15 of the Police and Criminal Evidence Act 1984 were not followed.

The grounds on which the Court must be satisfied before ordering the return of material seized or obtained by production, without setting aside the warrant, are that:

(1) the materials were unlawfully seized (for example because they were legally privileged, or because they were special procedure or excluded material and the warrant did not confer power to seize such materials); or

(2) the provisions of section 16 were not followed.

However, neither of these orders would be made if the investigator satisfied the Crown Court judge to the civil standard of proof that:

(1) the conditions for issuing a warrant are fulfilled, so far as they concern the subject matter of the investigation and the nature and relevance of the materials in question; and

(2) it is in the interests of justice for material to be retained (having regard to a non-exhaustive list of factors).

In an application under the new procedure, the Crown Court judge would have the power to:

(1) set aside the warrant;

(2) order the return of seized or produced material;

(3) authorise the retention of seized or produced material;

(4) give directions as to the examination, retention, separation or return of the whole or any part of the seized property;

(5) order the return or destruction of copies of material; and

(6) order for costs between parties.

The High Court when granting judicial review of the issue or execution of a search warrant should have all the powers and duties of the Crown Court in relation to the return or retention of materials, as described in the previous proposals.

The Criminal Procedure and Investigations Act 1996 Code of Practice ought to be amended to state that the duty on prosecutors to retain material does not apply where an order has been made for the return or destruction of the material and/or copies.

Legal aid funding ought to be available for the proposed new procedure.

Do consultees agree that there should be such a procedure?

Do consultees agree with the detail of the procedure described above?

Consultation Question 39

We invite consultees' views on whether the proposed new procedure set out in Consultation Question 38 ought to include:

(1) a permission filter whereby an applicant must obtain permission to proceed to a full hearing; and

(2) a power for the Crown Court judge to award damages.

Consultation Question 40

We invite consultees' views on whether there are any aspects of the proposed new procedure set out in Consultation Question 39 that ought to be transposed into section 59 of the Criminal Justice and Police Act 2001. In particular, should a judge hearing an application under section 59 have the power to order for costs between parties?

Chapter 8: Sensitive information and public interest immunity

INTRODUCTION

8.1 This chapter discusses the procedure for dealing with sensitive information and public interest immunity. Briefly, this procedure consists of a two-stage process:

(1) when applying for a search warrant, the investigator may identify certain material or part of the material as sensitive in the application form and request that the material identified should not be disclosed to the occupier; and

(2) when an occupier requests a copy of the information sworn in support of the warrant, the issuing authority may be asked to determine a public interest immunity claim made by the investigator. This involves the issuing authority considering whether the material identified as sensitive in the application form ought to be disclosed or whether the public interest requires that it be kept confidential. The investigator may then be issued with a certificate of public interest immunity.

8.2 In what follows below, we discuss:

(1) how sensitive information is presented to the issuing authority;

(2) in what circumstances the issuing authority needs to determine the issue of public interest immunity; and

(3) at what stage of the process this determination is made.

We invite views on whether the system outlined is satisfactory or whether clarification or reform is needed.

8.3 By sensitive material, we mean any information relied on in support of the application for a warrant which the applicant identifies as confidential, in the belief that there would be a real risk of serious prejudice to an important public interest were it to be disclosed.[664] In other words, "sensitive material" is shorthand for material which the applicant regards as sensitive and wishes to protect from disclosure. Whether it should in fact be protected is another issue, to be determined by the court.

8.4 In a search warrants setting, where it is claimed that the public interest demands that some of the material relied upon should not be disclosed to the occupier, the issue must be determined by the judge, magistrate or tribunal to whom the application for a warrant is made (the "issuing authority"). It involves a balancing exercise by the issuing authority: the public interest in withholding information must outweigh the public interest in the administration of justice that persons affected by the proceedings (in this case

[664] *R v H and C* [2004] UKHL 3, [2004] 2 AC 134 at [36].

the occupier) should have the fullest possible access to all relevant material.[665] In addition to the Information, public interest immunity may attach to (1) additional notes recorded during the hearing; (2) the issuing authority's reasons for issuing the warrant; and (3) any transcript of the hearing.[666] Typically, public interest immunity is raised, if at all, by the investigator by way of objection to an application by the occupier for access to the information sworn in support of a warrant.

8.5 An issuing authority may be persuaded to issue a search warrant on the basis of sensitive material even though some, or even all, of this material may at the later stage of a claim for disclosure have to be withheld from the applicant on public interest grounds.[667]

8.6 Stakeholders have drawn our attention to two issues in respect of sensitive material. First, the way in which sensitive information is presented to the issuing authority and subsequently stored. Secondly, the appropriate stage at which the investigator ought to request that the issuing authority make a determination on public interest immunity.

8.7 In this chapter, we provide a brief outline of the current law relating to sensitive information and public interest immunity. We invite consultees' views on whether procedural reform to the way in which sensitive material and public interest immunity are dealt with by the courts in search warrant cases is desirable.

CURRENT LAW

What material should be treated as sensitive?

8.8 As explained above, sensitive material means material which the applicant believes to be of such a nature as to pose a real risk of serious prejudice to an important public interest were it to be disclosed.[668] Whether information amounts to sensitive material is fact-dependent. The Criminal Procedure and Investigations Act 1996 Code of Practice provides a non-exhaustive list of examples of when material may be deemed sensitive, which includes:

(1) material relating to national security;

(2) material received from the intelligence and security agencies;

(3) material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods;

(4) material relating to the identity or activities of informants, or undercover police officers, or witnesses, or other persons supplying information to the police who may be in danger if their identities are revealed; and

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665 *Al Rawi v Security Services* [2012] 1 AC 531 at [145]; *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [40].

666 *R (Austen) v Chief Constable of Wiltshire Police and South East Wiltshire Magistrates' Court* [2011] EWHC 3386 (Admin) at [49]; *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [8].

667 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [22] and [37].

668 *R v H and C* [2004] UKHL 3, [2004] 2 AC 134 at [36].

(5) material revealing, either directly or indirectly, techniques and methods relied upon by a police officer in the course of a criminal investigation, for example covert surveillance techniques, or other methods of detecting crime.[669]

8.9 As the identification of material as sensitive is made by the applicant prior to the application for a warrant, agencies have their own procedures by which they grade material as sensitive.

Whether sensitive material should be provided to the issuing authority?

8.10 As discussed in Chapter 4, when applying for a search warrant, the applicant owes a duty of full and frank disclosure to ensure that the issuing authority is presented with a clear picture of what lies behind the application.[670] This is also necessary so that the issuing authority can satisfy itself that there are reasonable grounds for believing that particular statutory conditions required for the issue of a search warrant exist.[671]

8.11 Sensitive material, such as the source of the information, must therefore be disclosed to the issuing authority in order for the issuing authority to satisfy itself that the statutory conditions are met and for the applicant to comply with the duty of candour. The one exception is that an applicant need not disclose the name of an informant to the issuing authority.[672] The credibility of an informant, however, may be considered by the issuing authority when deciding whether to issue a search warrant, including his or her knowledge of the occupier and how recently the information has been provided.

How should sensitive material be provided to the issuing authority?

8.12 The Criminal Procedure Rules, rule 47.26(4), prescribes the way in which sensitive material ought to be presented to the issuing authority. It provides that where the application includes information that the applicant thinks should not be supplied under rule 5.7 (which provides a right for the occupier to request disclosure of the information) to a person affected by a warrant, the applicant may (a) set out that information in a separate document, marked accordingly; and (b) in that document, explain why the applicant thinks that that information ought not to be supplied to anyone other than the court. A similar procedure is prescribed by rule 47.39 in respect of applications under section 59(6) of the Criminal Justice and Police Act 2001 for the retention of seized material.

8.13 The Supreme Court in *Haralambous*, commenting on rule 47.26(4), stated:

> It is no doubt sensible practice for applicant officers to adopt, where practicable and where time permits, the permissive rule 47.26(4) procedure and to identify information

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669 CPIA 1996 Code of Practice, para 6.15 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf (last visited 29 May 2018).

670 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634; *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219; *R (Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [25].

671 For example, PACE, s 8(1).

672 Code B of PACE, para 3A.

which they contend ought not to be supplied to anyone but the court. That may reduce the risk of accidental disclosure, and no doubt a magistrate considering an application would, where this is done, bear in mind that there is information which a person affected might never be able to test.[673]

When should an investigator make a claim for public interest immunity?

8.14 One stakeholder pointed out that there is inconsistent case law as to which stage an application for a public interest immunity certification ought to be made. The Divisional Court in *Golfrate* stated that if the applicant wishes to redact any part of the Information or any part of the transcript of the hearing before the issuing authority, an immediate application must be made to the court on proper grounds supported by evidence so that the court can consider whether the redactions should be permitted on public interest immunity or other grounds.[674]

8.15 The Divisional Court in *Bangs*, on the other hand, suggested that a procedure similar to that prescribed by the then Criminal Procedure Rules, rule 22.3,[675] ought to be followed, whereby the redacted/"gisted" copy of the information should be provided to the occupier.[676] The issuing authority should then consider representations in accordance with the Criminal Procedure Rules, rule 15.3(7).[677] *Golfrate* therefore envisages an application for public interest immunity being made as soon as the information is filed with its sensitive schedule, rather than waiting for the occupier to apply for sight of the documents. *Bangs*, on the other hand, envisages that a public interest immunity hearing will only be triggered if there is a request by the occupier for the underlying information.

8.16 The procedure in *Bangs* has now effectively been codified in the Criminal Procedure Rules, by the introduction of rule 5.7(6) to (9). This rule sets out the procedure to be followed where a person affected by a search warrant wishes to see the underlying application.

8.17 Rule 5.7(6)(a) provides that an occupier must serve a request for the underlying Information on both the issuing authority and the applicant who applied for the warrant. Under rule 5.7(6)(b), the applicant then has 14 days to object to the occupier's application: whether on public interest immunity grounds or for any other reasons. This notice must be served on both the court and person requesting the information and, if the applicant wants a hearing, explain why one is needed. Rule 5.7(7) provides that the notice of objection must explain which information the applicant objects to disclosing and the grounds of the objection. Rule 5.7(8) provides that the notice of objection must mark the material to which the objection relates to show that this material is only for the court and give an explanation of why it has been withheld (for example on public interest immunity grounds).

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673 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [27].

674 *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [17].

675 Now rule 15.3(3)(b).

676 *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [31].

677 *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [31].

8.18 Rule 5.7(9) sets out the closed material procedure[678] and the suggested sequence in which representations are heard. The Supreme Court in *Haralambous* confirmed that a closed material procedure must be capable of being operated:

(1) by the Crown Court, when put in the shoes of a hypothetical magistrates' court during an application under section 59 of the Criminal Justice and Police Act 2001,[679] and

(2) by necessity, in any subsequent judicial review.[680]

8.19 A claim for public interest immunity therefore does not arise for determination until:

(1) the occupier has made a request for disclosure of the information on which the application for a warrant is based; and

(2) the investigator has given notice of objection to disclosure, on the ground that it would be contrary to the public interest.

8.20 The Supreme Court in *R (Haralambous)* made this clear:

> There is no suggestion, or I think likelihood, that [rule 47.26(4)] intended the constable or magistrate at this early stage, when speed is often of the essence, to try to form a definitive view as to what the public interest might ultimately prove to require. That is an exercise which in accordance with the rules falls to be undertaken at a later stage by a magistrate under the procedure in *Bangs* and/or a Crown Court under section 59 of CJPA.[681]

8.21 The Information sworn in support of the application is therefore not disclosed as a matter of course to the occupier. This is unlike the search warrant, the disclosure of which is required under section 16 of PACE. For this reason, in most instances, the information will not be disclosed by the investigator unless the occupier requests it.

8.22 The National Crime Agency, however, has a system in place whereby disclosure officers are instructed that both the warrant and the application made in support should be listed for disclosure unless they contain sensitive information which needs to be protected. In such a case, only the sensitive part of the application should be listed separately on a protected form, while the non-sensitive information remains to be disclosed. The occupier would still be able to apply for full disclosure pursuant to the Criminal Procedure Rules, rule 5.7(6), when the information has been disclosed in this way.

8.23 The Chancery Division recently considered the proper procedure to be followed for the hearing of applications to vary or discharge search warrants issued under section 28 of

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678 Closed material procedure involves an application to the court for permission not to disclose material otherwise than to particular persons. Such hearings are considered in the absence of every other party to the proceedings and every other party's legal representative.

679 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [41].

680 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [59].

681 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [27].

the Competition Act 1998.[682] These warrants are governed by a Practice Direction to the Civil Procedure Rules, rather than the Criminal Procedure Rules. In the absence of guidance in the Practice Direction, Mr Justice Marcus Smith set out the correct procedure to be followed concerning sensitive information that attracted public interest immunity.[683] It was considered that the process of asserting and adjudicating upon claims of public interest immunity should be incorporated into the ex parte application for a section 28 warrant, and that an inter partes challenge ought to proceed on the basis of the evidence that is not excluded.[684] The Supreme Court decision in *Haralambous* indicates that this approach is not correct.[685]

8.24 The accidental disclosure of material by an investigator does not preclude a claim for public interest immunity or subsequent orders, such as the return and destruction, in relation to that material.[686]

What level of information ought to be provided to an occupier where a valid claim of public interest immunity is made?

8.25 The starting principle is that open justice should prevail to the maximum extent possible.[687] Therefore, an occupier has the right to see the information on which a search warrant is based,[688] including evidence given on oath.[689] The rationale for this principle is that judicial control could not operate effectively unless those affected are able to take meaningful advice, and if so advised, to seek relief from the court.[690]

8.26 The right to information is qualified, however, where public interest immunity applies.[691] In such cases, some or all of the information may not be available to someone who later challenges a search warrant.[692] Therefore, in exceptional cases, no disclosure at all might be justified.[693] Further, there is no irreducible minimum of disclosure: an occupier

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682 *Competition and Markets Authority v Concordia International Rx (UK) Ltd* [2017] EWHC 2911 (Ch), [2018] Bus LR 367.

683 *Competition and Markets Authority v Concordia International Rx (UK) Ltd* [2017] EWHC 2911 (Ch), [2018] Bus LR 367 at [69] to [70].

684 *Competition and Markets Authority v Concordia International Rx (UK) Ltd* [2017] EWHC 2911 (Ch), [2018] Bus LR 367 at [69] to [70].

685 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [24] and [59].

686 *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [33] and [40].

687 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [61].

688 *R (Cronin) v Sheffield Justices* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 per Lord Woolf CJ.

689 *R (Austen) v Chief Constable of Wiltshire* [2011] EWHC 3385 (Admin).

690 *R (Energy Financing Team Ltd)* v *Bow Street Magistrates' Court* [2005] EWHC 1626 (Admin), [2006] 1 WLR 1316 at [24(10)] per Kennedy LJ.

691 *(Cronin) v Sheffield Justices* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752 at [29] per Lord Woolf CJ; *R (Austen) v Chief Constable of Wiltshire* [2011] EWHC 3385 (Admin) at [49] per Ouseley J.

692 *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [25] to [26], [33] and [35] per Beatson LJ.

693 *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219 at [79] per David J.

need not be provided with a gist or with sufficient material to support the conclusion that the statutory conditions were met.[694]

8.27 Where a successful public interest immunity claim is made, the applicant need only ensure that any derogation from the rule of full disclosure is the minimum necessary to protect the public interest in question.[695] Further, the "gisted" Information must not mislead and should accurately reflect that part of the material in the document which it is possible to disclose.[696]

REFORM

The way in which sensitive information is provided to the court

8.28 Stakeholders commented whether appending the sensitive information to the application as a separate document was the most suitable way for the material to be presented to the issuing authority.

8.29 For cases in which sensitive material is involved we have instead considered a system where two sets of Information are prepared and handed to the issuing authority.

8.30 The first Information would include all the material behind the application, including the sensitive material, thereby satisfying the principle of full and frank disclosure and the duty of candour. It would be on the basis of this information that the issuing authority would consider whether it is satisfied that the statutory criteria are fulfilled. The second Information would then contain only that information which the applicant does not regard as sensitive and is willing to show the occupier. The issuing authority would then be in a position to determine the issue of public interest immunity, instead of waiting for an application for disclosure to be made: in effect, the principle in *Golfrate* would be preferred to that in *Bangs*, discussed at paragraph 8.15 above.

8.31 Investigators may prefer delivering sensitive information to the issuing authority by hand, given its sensitivity and the fact that urgent applications may be made outside of court hours to magistrates without access to secure devices. It was observed that it would be undesirable to have sensitive material, potentially concerning even matters of national security, stored at magistrates' courts. Under the above procedure, the sensitive Information, once endorsed, could then be returned to the investigator for storage after the hearing.

8.32 One potential advantage of this procedure is that the second Information would, in effect, be a ready-prepared "gisted" or redacted document, which will be ready for disclosure following a request for a copy of the information sworn in support of the application. This might save the delay caused by the need to prepare a redacted version following the occupier's application for sight of the information and the issuing authority's determination of the issue of public interest immunity. We have considered here the remarks of Mr Justice Marcus Smith, albeit in a different context, who

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694 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [65].

695 *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [42].

696 *Commissioner of Police of the Metropolis* v *Bangs* [2014] EWHC 546 (Admin), (2014) 178 JP 158 at [43].

suggested that identification of protected material at an early stage would facilitate a speedy challenge to a warrant.[697]

8.33 Against these arguments, it may be said that, as not every occupier will request a copy of the information, it would be an onerous and unnecessary task for the court to determine, in advance of such a request, what can and cannot be disclosed. This is particularly so where the Divisional Court have emphasised that a decision to claim public interest immunity should be taken by a chief constable.[698] Legal teams would also have to be more regularly instructed. Together, this may delay a procedure which the Supreme Court has recognised is designed to operate with speed.[699] This disadvantage would also exist under any system where the information is required to be supplied to the occupier as a matter of course.

8.34 Secondly, the officer making the application may not be aware of all the background behind the sensitive material or be in a position to make submissions concerning what information ought not to be disclosed on the ground of public interest immunity. As against this, it could be argued that a such a system would encourage investigative agencies to ensure that applicants are fully conversant with the investigation.

8.35 Thirdly, as noted by the Supreme Court in *Haralambous*, it seems unlikely that the intention of the scheme under the Criminal Procedure Rules, rule 47.26(4), was that the investigator or magistrate hearing an application should, at this early stage, when speed is often of the essence, try to form a definitive view as to what the public interest might ultimately prove to require.[700]

8.36 Fourthly, the issuing authority may decide, on hearing the occupier's application for disclosure, that only some of the material identified as sensitive is in fact covered by public interest immunity, so a further redacted version would need to be prepared. In particular, as one stakeholder pointed out, information which was deemed sensitive when an application was made may no longer be sensitive when the warrant is challenged. The Divisional Court in *Haralambous* recognised that what is disclosable in the public interest can vary over time.[701]

8.37 Fifthly, it is unclear how such a system would interact with the Criminal Procedure Rules, rule 5.7. The procedure in rule 5.7(6) to (9) envisages the magistrates' court reviewing the decision of an investigator to withhold information either in full or in part. Should public interest immunity be determined by the court during the application stage, and the occupier later apply for disclosure, the procedure in rule 5.7 would require a magistrates' court to decide the issue of public interest immunity all over again. In effect,

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697 *Competition and Markets Authority v Concordia International Rx (UK) Ltd* [2017] EWHC 2911 (Ch), [2018] Bus LR 367 at [70].

698 *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin), [2014] 2 Cr App R 12 at [7] to [18].

699 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [15]. Discussed in *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [13].

700 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [27].

701 *R (Haralambous) v Crown Court at St Albans* [2016] EWHC 916 (Admin), [2016] 1 WLR 3073 at [40].

the court would be reviewing its own decision, rather than that of the investigator as envisaged in the Rules.

8.38 More generally, there is an argument that the procedure by which sensitive material and public interest immunity is dealt with is working well. The National Crime Agency has indicated that the Criminal Procedure Rules cover most eventualities. We are also aware that the Criminal Procedure Rule Committee do not regard the rules as requiring further amendment following the Supreme Court decision in *Haralambous*.

8.39 We seek views nonetheless on whether the current procedure for dealing with sensitive information can be improved.

Consultation Question 41

We invite consultees' views on whether the current procedure for dealing with sensitive information and public interest immunity in relation to search warrants requires reform.

Chapter 9: Material exempted from search and seizure

INTRODUCTION

9.1 In this chapter, we discuss materials that are exempted from search and seizure under a warrant. We use the term "exempted material" to refer collectively to material subject to legal privilege, excluded material and special procedure material.[702] We address the following issues:

(1) legally privileged material – the use of independent lawyers and cases with large volumes of legally privileged material;

(2) excluded material – the protection afforded to medical records and confidential journalistic material and their availability under the second set of access conditions under Schedule 1 to PACE;

(3) special procedure material – the definition of special procedure material (confidential business records and non-confidential journalistic material) and its availability under the first set of access conditions under Schedule 1 to PACE; and

(4) the protection of exempted material where seizure is not under a warrant.

9.2 We consider that the treatment of exempted material should be rationalised to render the law more accessible. We also propose extending the protection afforded to protected categories of material, including journalistic material and medical records. At the same time, we propose updating the law by placing the use of independent lawyers on statutory footing and introducing a new mechanism to prevent claims of privilege being used as a delaying tactic, particularly in large-scale investigations. Our aim is to ensure that investigative agencies can tackle the evolving nature of crime whilst maintaining robust and effective safeguards.

LEGAL PRIVILEGE

Current law

9.3 Privilege can, broadly speaking, be divided into four headings:

(1) legal professional privilege (comprising legal advice privilege[703] and litigation privilege[704]);

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[702] An overview of the law concerning exempted materials can be found in Chapter 2. See also the table at para 2.54 above.

[703] *Three Rivers DC v Bank of England (Disclosure) (No 4)* [2004] UKHL 38, [2005] 1 AC 610.

[704] *SFO v ENRC* [2017] EWHC 1017 (QB), [2017] 1 WLR 4205.

(2) common interest privilege;

(3) without prejudice privilege; and

(4) privilege against self-incrimination.

9.4 Section 10 of PACE sets out its own definition of what items are subject to legal privilege for the purpose of search powers under PACE. This covers communications made in connection with the giving of legal advice or in contemplation, and for the purpose, of legal proceedings between:

(1) a professional legal adviser and his or her client; and

(2) a professional legal adviser and any third party representing his or her client.

Items held with the intention of furthering a criminal purpose do not attract legal privilege under both PACE[705] and the common law.[706]

9.5 A search warrant cannot be issued under PACE or other provisions where the material to be searched for consists of or includes items subject to legal privilege. A warrant is therefore defective, and may be quashed, if the court was not informed that there were facts making it likely that there was privileged material on the premises.[707] Additionally, legally privileged material cannot be seized under warrant or search powers under sections 18, 19, 20 and 32 of PACE, or obtained by a production order under Schedule 1 to PACE. Section 19(6) of PACE provides that:

> No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege.

9.6 For these reasons, legally privileged material attracts the strongest protection of all categories of exempted material. The European Court of Human Rights has repeatedly emphasised the importance of legal privilege in the context of search warrants.[708]

9.7 Legally privileged material may be seized under the "seize and sift" powers contained in section 50 and following of the Criminal Justice and Police Act 2001 ("CJPA"). However, this is only for the purpose of sorting through the material at a later stage because it is not reasonably practicable, during the search, to determine which category

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705 PACE, s 10(2). See *R v Central Criminal Court ex parte Francis and Francis* [1989] AC 346

706 *JSC BTA Bank v Ablyazov (No 13*) [2014] EWHC 2788 (Comm), [2014] 2 CLC 263 at [68] to [93]. This is often referred to as the crime-fraud exception or iniquity exception.

707 *R (Sharer) v City of London Magistrates' Court* [2016] EWHC 1412 (Admin), (2017) 181 JP 48; *R (B) v Huddersfield Magistrates' Court* [2014] EWHC 1089 (Admin), [2015] 1 WLR 4737.

708 *Aleksanyan v Russia* (2011) 52 EHRR 18 (App no 46468/06) at [214], citing *Elci v Turkey* (2003) (App nos 23145/93 and 25091/94) at [669]; the ECtHR emphasised the importance of having clear protections for privileged information set down in law. *Sallinen v Finland* (2007) 44 EHRR 18; *Wieser v Austria* (2008) 46 EHRR 54; see also M Colvin and J Cooper, *Human Rights in the Investigation and Prosecution of Crime* (2009) p 146.

the material falls into or to separate the material into what may and may not be seized. We discuss the use of seize and sift powers in Chapter 10 at paragraph 10.78 below.

9.8 We consider that legally privileged material should remain exempt from seizure under a search warrant, as at present. This should continue to be the position whether or not the material is relevant to the subject of the investigation. We consider the operation of legal privilege below in relation to (1) instructing independent lawyers and (2) cases involving large volumes of material.

Instructing independent lawyers

9.9 Investigators routinely instruct independent lawyers to advise them in relation to material where legal privilege may exist or has been claimed. Independent lawyers may be instructed to assist an investigating agency either at the time of the execution of a warrant or, more commonly, at a later date, such as where material has been seized for later sifting under section 50 CJPA.

9.10 Although the process of instructing independent lawyers has been considered with approval by the courts,[709] there is no authority for it in statute. Guidance as to an independent lawyer's role and remit has been issued by the Bar Council.[710] The Attorney General's Supplementary Guidelines on Digitally Stored Material 2011 also provide guidance, stating that where material has been identified as potentially containing items subject to legal privilege, it requires inspection by lawyers independent of the prosecuting/investigating authority.[711]

Legal privilege claims in cases with large volumes of material

9.11 Practitioners report considerable difficulties in the conduct of searches where claims for legal privilege may be made. First, we were informed that financial institutions being investigated are sometimes reluctant to claim privilege even when they legally could, perhaps because of experience in the United States, where the law and practice of legal privilege are substantially different.[712]

9.12 Secondly, investigators with whom we have spoken have also expressed concern that the actual or alleged presence of *any* privileged material, for example on a mobile phone or a computer drive, requires the cumbersome procedure for identifying and separating privileged material to be put in motion. This is the case even though the material may

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709 *R v Middlesex Guildhall Crown Court ex parte Tamosius & Partners* [2000] 1 WLR 453, *R (Rawlinson & Hunter Trustees & Others) v Central Criminal Court, the Director of the Serious Fraud Office* [2013] 1 WLR 1634 and *R (McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), [2016] 1 WLR 1308.

710 Available at http://www.barcouncil.org.uk/media/436952/lpp-independent_counsel_in_relation_to_seized_material.pdf; http://www.barcouncil.org.uk/media/205850/ppc_ic_lpp_guidance__2_.pdf. (last visited 29 May 2018).

711 Available as an annex to the 2013 Guidelines on Disclosure at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16239/Attorney_General_s_guidelines_on_disclosure_2011.pdf (last visited 29 May 2018).

712 Privilege in the United States (attorney-client privilege and work product protection) is wider than in England and Wales and may vary over time and according to locations and context. A privileged document under English law may not be privileged in the United States. See Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd ed 2013) para 16.65-71.

be entirely irrelevant to the offence investigated. For example, a mobile phone or computer hard drive could contain old legal documents relating to divorce proceedings or a personal injury claim, which are of no possible interest to the searcher. It was suggested in such instances that there would then be no risk of prejudice to the person being investigated or his or her clients.

9.13 Increasingly, there are cases where it is not reasonably practicable, during the search, to determine which category the material falls into or to separate the material into what may and may not be seized. In these cases, there are powers of "seize and sift" under sections 50 and 51 of the Criminal Justice and Police Act 2001. These allow the seizure of both non-privileged and privileged material, for sorting at a later stage. We discuss these powers at paragraph 10.78 below.

9.14 Where these procedures are to be used, it is common for independent lawyers to be instructed to be present at the sift, rather than at the original search.[713] Alternatively, there may be a first sift at which the potentially privileged material is isolated, using search terms provided by the owners of the material, and a further sift of that material, with independent lawyers only present at the last sift. This last approach has been held to be permissible provided that there are arrangements ensuring as far as possible that the investigator's staff do not have sight of privileged material.[714]

9.15 There are important practical reasons for retaining this flexibility. In some cases, there will be no reasonable grounds to believe the presence of legally privileged material on the premises when the warrant was issued, and therefore no reason to arrange for the presence of independent lawyers at the original search. In these cases, the issue of privilege, and therefore the need for independent lawyers, arises for the first time either when material that may be privileged is found during the search or when material is seized in bulk and the owner of the material claims that some of it is privileged.

Reform

Instructing independent lawyers

9.16 Several stakeholders have argued that the practice of instructing independent lawyers ought to be put on a legislative footing. Given the optional use of independent lawyers, we consider that there is a strong argument to introduce a legislative framework, rather than have the boundaries drawn out by judicial review challenges. For example, for civil search orders, the use of supervising solicitors is governed by the Civil Procedure Rules, Practice Direction 25A.[715]

9.17 Another question concerns the substance of any proposed legislative framework, including whether the use of independent lawyers ought to be mandatory and if so in what instances. We recognise that practice varies amongst investigative agencies and the particular facts of each case. Any legislative framework would need to account for

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713 *R (Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2013] 1 WLR 1634.

714 *R (McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), [2016] 1 WLR 1308.

715 See James Pyke, *A-Z of Civil Litigation* (2nd ed 2013).

the various ways in which independent lawyers may be instructed. We invite consultees' views on what the statutory rules in relation to independent lawyers should be.

Consultation Question 42

We provisionally propose that the current procedures for instructing independent lawyers (independent counsel) or other experts to resolve issues of legal privilege ought to be enshrined in secondary legislation. Do consultees agree?

If so, we welcome consultees' views on the content of those rules, including whether the use of independent lawyers ought to be mandatory either:

(1) when a claim to legal privilege is made; or

(2) when no claim to legal privilege is made but there are other reasons for believing that legally privileged material may be present at the premises or form part of the material that has been seized.

Legal privilege claims in cases with large volumes of material

9.18 We recognise the difficulties for investigators posed by large quantities of material, which consists of or includes legally privileged material that is irrelevant to an investigation. As mentioned above, we consider that legally privileged material should remain exempt from seizure under a search warrant, as at present. The importance of legal professional privilege is clear and ought not to be eroded.[716] We also consider that, for several reasons, it would be undesirable to modify the protection for privileged material so as to exclude material not relevant to the investigation, not least that it would not reduce the need for sifting procedures.

9.19 From discussions with stakeholders, we acknowledge that there could be cases where it is clear that the only privileged material is entirely irrelevant to the investigation and incapable of being prejudicial. In these cases, and others, legal privilege may be claimed only as a delaying tactic to frustrate the investigation. At present, it is sufficient for the occupier to claim that there is *some* legally privileged material, without further specification. This will then delay the examination of the *whole* of the seized material, or material sought to be seized, under a search warrant or sections 50 and 51 of CJPA as it must then be sifted by independent counsel.

9.20 To enable the swift segregation, return and deletion of legally privileged material, and examination of non-privileged material, we consider that a person claiming legal privilege in respect of material seized following the execution of a search warrant should be required to make all reasonable efforts to assist the investigators in identifying what is legally privileged. For example, a person claiming legal privilege during the search or following seizure could be required, so far as possible without disclosing sensitive information:

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716 *R v Derby Magistrates' Court ex parte B* [1996] AC 487, 507 per Lord Taylor of Gosforth CJ; *Bolkiah v KPMG* [1998] UKHL 52, [1999] 2 AC 222, 236 per Lord Millett. See also para 9.6 above.

(1) to state the grounds on which privilege is claimed;

(2) to identify the material for which privilege is claimed; and

(3) to indicate where and how that material may be found and how it should be separated from the non-privileged material.

9.21 A suggestion to this effect has been advanced by HMRC. They propose that, where a claim of legal privilege is made, the investigator should be able to apply to the Crown Court for an "unless order". These orders specify that unless a person performs a specified act, a consequence will follow. Unless orders arise in a wide range of contexts; the earliest cited case is *Hadkinson v Hadkinson*, where Lord Justice Denning, as he then was, held that such orders may be justified where a party impedes the course of justice and there is no other effective means of securing compliance.[717]

9.22 At first sight, unless orders appear to be rather draconian. The operation of unless orders and human rights implications has been considered in a number of cases.[718] These cases indicate that unless orders are convention compliant, however, they remain an order of last resort.[719] First, the obstructive party's conduct must justify the order.[720] Additionally, the party should have the opportunity to apply for an extension of time where genuine difficulty with compliance with an unless order emerges.[721] The sanction attached to the order must also pursue a legitimate aim and be proportionate.[722] Further, being a civil order, unless orders do not engage criminal due process rights under Article 6(2) and (3) ECHR. Consequently, there is no infringement of any right to silence where information is required under an unless order.[723]

9.23 In light of these cases, we consider that a requirement to make all reasonable efforts to assist the investigators in identifying what is privileged could be constructed in such as way so as to be human rights compliant.

9.24 We invite consultees' views on a scheme along the following lines:

(1) where a claim that material seized, or sought to be seized, contains legally privileged material, a person making a claim that part of the material is legally privileged would be required to make all reasonable efforts to assist the investigators in identifying that which is legally privileged;

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717 *Hadkinson v Hadkinson* [1952] P 285, 298 per Denning LJ.

718 *Stolzenberg v CIBC Mellon Trust Co Ltd [2004] EWCA Civ 827, (*2004) 148 SJLB 824; MA v MI [2004] EWHC 1158 (Fam), [2004] 2 FLR 932; JSC BTA Bank v Ablyazov (No 8) [2012] EWCA Civ 1411, [2013] 1 WLR 1331; JSC BTA Bank v Ablyazov [2014] EWHC 2788 (Comm), [2014] 2 CLC 263; and *Eaglesham v Ministry of Defence* [2016] EWHC 3011 (QB).

719 *MA v MI* [2004] EWHC 1158 (Fam), [2004] 2 FLR 932 at [57].

720 *MA v MI* [2004] EWHC 1158 (Fam), [2004] 2 FLR 932 at [58].

721 *Eaglesham v Ministry of Defence* [2016] EWHC 3011 (QB) at [4].

722 *Stolzenberg v CIBC Mellon Trust Co Ltd [2004] EWCA Civ 827, (*2004) 148 SJLB 824 at [161]. See also JSC BTA Bank v Ablyazov (No 8) [2012] EWCA Civ 1411, [2013] 1 WLR 1331 at [172].

723 Although privilege against self-incrimination might be: see JSC BTA Bank v Ablyazov [2014] EWHC 2788 (Comm), [2014] 2 CLC 263 at [110].

(2) where the claim is particularised, seize and sift procedures can be used if on the premises, material isolated and reviewed by independent counsel. Undisputed material can then be examined by investigators;

(3) where the investigator considers that the claim of legal privilege is unparticularised, unrealistically wide or made in bad faith, he or she would be able to apply to the Crown Court for an unless order;

(4) the court would then be able to order, if sufficiently justified, that the person claiming privilege must, within a period of time specified in the order, make all reasonable efforts to assist the investigators in identifying what is legally privileged. The terms of the order should be fair, necessary and proportionate. the party should have the opportunity to apply for an extension of time where genuine difficulty with compliance emerges;

(5) if the order is not complied with within the specified time, any documents for which it is not known whether they are legally privileged may be examined by the investigator and any privileged documents isolated as and when encountered.[724] In essence, the claim for legal privilege will be treated as if it were never raised, however, privilege would in no circumstances be treated as waived; and

(6) where the person claiming privilege responds to the order by specifying an unrealistically wide set of documents as privileged, and this response is obviously absurd or made in bad faith, the person could be held to be in contempt of court or ordered to pay the costs of the application. This however would only cover the costs of the court proceedings and not the increased cost of the sifting process incurred because of the over-wide claim to privilege. One possibility would be to introduce a wider power to award costs, including the costs of the sift itself.

[724] This is sometimes proposed by the Serious Fraud Office as a voluntary arrangement, as in *R (McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), [2016] 1 WLR 1308.

Consultation Question 43

To enable the swift segregation, return and deletion of legally privileged material, and examination of non-privileged material, we provisionally propose that a person claiming legal privilege in respect of material seized following the execution of a search warrant should be required to make all reasonable efforts to assist the investigators in identifying what is legally privileged.

Do consultees agree?

If so, we invite consultees' views on whether:

(1) this should take the form of a procedure in which a judge of the Crown Court makes an order requiring details for the identification of materials for which privilege is claimed within a specified time; and

(2) the Crown Court judge should have the power to order the person claiming privilege to pay the costs of the application and of the sifting procedure if the claim to privilege is clearly unfounded or the identification details supplied are too wide and not made in good faith.

EXCLUDED MATERIAL

Current law

9.25 Excluded material, as set out in section 11 of PACE, covers the following categories of material held in confidence:

(1) personal records;[725]

(2) human tissue or fluid; and

(3) journalistic material.[726]

Other legislative provisions enacted post-PACE may provide their own definitions of excluded material for the purpose of particular search warrants.[727]

9.26 As with legal privilege, communications in furtherance of criminal conduct and other forms of iniquity are not protected by section of 11 PACE as such conduct "precludes

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[725] Defined in PACE, s 12: Personal records means documents and other records identifying a person and relating to his or her physical or mental health, spiritual counselling or assistance or professional counselling or assistance for personal welfare. See also *R v Cardiff Crown Court ex parte Kellam, The Times* 3 May 1993.

[726] Defined in PACE, s 13: only confidential journalistic material is excluded material. Non-confidential journalistic material is special procedure material. An application for a production order under PACE, sch 1, para 4 that relates to material that consists of or includes journalistic material (confidential or non-confidential) must be made *inter partes*. See also *R v Leicester Crown Court ex parte DPP* [1987] 1 WLR 1371.

[727] For example, Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (2017 No 692), reg 72(7).

the existence of confidentiality in the communication".[728] Therefore, where a search warrant is sought in respect of iniquitous material there will be neither confidentiality nor privilege attached, irrespective of whether the material includes personal records or journalistic material.

9.27 The availability of excluded material is dependent on the person who applies for the search warrant and the provision under which the search warrant is sought. Search warrants under section 8 of PACE may not be issued in respect of excluded material.[729] Nor may excluded material be seized in the course of a search.[730] An exception to these exemptions is provided by the seize and sift powers under CJPA, discussed in Chapter 10 at paragraph 10.78 below.

9.28 Section 9(2) of PACE provides that any statute passed before PACE providing for search warrants to be issued to constables for the purposes of a criminal investigation will cease to have effect in relation to excluded and special procedure material.[731] One example of search warrant power authorising the search for excluded material in respect of confidential journalistic material pre-PACE is section 9(1) of the Official Secrets Act 1911.[732] Another example would be if the excluded material was stolen and therefore searched for under section 26(1) of the Theft Act 1968.[733] A yet further example of which we have been informed is where a Schedule 1 warrant was issued to obtain dental records alleged to have been created fraudulently, which would previously have been obtained using the Forgery and Counterfeiting Act 1981.[734]

9.29 Unlike legally privileged material, excluded material may be obtained in some circumstances. Schedule 1 to PACE provide a procedure for obtaining excluded material in very limited circumstances, known as the "second set of access conditions".[735] Only a constable may apply under Schedule 1 to PACE,[736] and those to whom the power to apply has been extended.[737] Access to this material must be

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728 *R v Norman* [2016] EWCA Crim 1564, [2017] 4 WLR 16 at [39] per Lord Thomas of Cwmgiedd CJ.

729 PACE, s 8(1)(d).

730 PACE, s 8(2).

731 PACE, s 9(2) has been described as not "absolutely free from ambiguity": *R v Manchester Stipendiary Magistrate ex parte Granada Television Ltd* [2001] 1 AC 300, 310 per Lord Hope of Craighead.

732 See Ruth Costigan, "Fleet Street blues: police seizure of journalists' material" (1996) 4 *Criminal Law Review* 231, 233.

733 *M Zander on PACE* (7th ed 2015) para 2-28.

734 In such a case, arguably the dental records in such a case would not fall within the category of excluded material: see *R v Norman* [2016] EWCA Crim 1564, [2017] 4 WLR 16 at [39] per Lord Thomas of Cwmgiedd CJ.

735 PACE, sch 1, para 3. See the table at para 2.54 above.

736 PACE, s 9(1).

737 Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 (SI 2018 No 400), sch 1, para 1; Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017 (SI 2017 No 520), sch 1, para 2; Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015 (SI 2015 No 1783), sch 1, para 1; and Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013 (SI 2013 No 1542), sch 1(1), para 1.

authorised by a Circuit judge or a District Judge (Magistrates' Courts);[738] normally by means of a production order or, if a production order is not practicable for various reasons, by means of a search warrant.

9.30 The second set of access conditions is fulfilled if three conditions are met:

(1) there are reasonable grounds for believing that indictable offence has been committed and that there is excluded material on the premises;

(2) but for section 9(2) of PACE, a search of such premises for the material could have authorised by the issue of a warrant to a constable;[739] and

(3) the issue of such a warrant would have been appropriate.[740]

9.31 A search warrant for excluded material can only be issued if both the second set of access conditions is met and either:

(1) a production order has been made and not complied with;[741] or

(2) any of the four further conditions are met.[742]

9.32 A similar procedure for applying for a search warrant for excluded material in respect of terrorist investigations can be found in paragraph 11 of Schedule 5 to the Terrorism Act 2000.

9.33 The present legislative framework for excluded material under PACE is anomalous:

(1) If the investigation is being conducted by a police constable or someone with equivalent powers, the following rules apply.

(a) If the investigation is under a statute passed before PACE, no search warrant for that material may be issued under that statute, because of section 9(2) of PACE.[743] The material may however be applied for through the special procedure under the second set of access conditions, provided that, before 1984, the material would have been available under the pre-PACE statute.

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738 District judges were given this power in 2005: PACE, sch 1, para 17, inserted by Courts Act 2003, sch 4, para 6(2).

739 This prevents excluded material being obtained under a section 8 of PACE warrant.

740 PACE, sch 1, para 3.

741 PACE, sch 1, para 12.

742 PACE, sch 1, para 14: See also the table at para 2.54 above and discussion in Chapter 11.

743 Material in the possession of a person who acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office and which relates to a matter in relation to which Her Majesty's Revenue and Customs have functions, is neither excluded material nor special procedure material for the purposes of any enactment such as is mentioned in subsection 9(2) of PACE. See Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015 (SI 2015 No 1783), art 6.

(b) If the investigation is under PACE itself, no search warrant can be issued for the material, because of section 8(1)(d) of PACE. Nor is the special procedure available in respect of excluded material due to the second set of access conditions under paragraph 3(b) of Schedule 1 to PACE. In consequence the material cannot be obtained at all.

(c) If the investigation is under a statute passed later than PACE, a warrant under that statute can be issued for that material, unless that statute contains an express exception for excluded material.[744] If it does, the material cannot be obtained at all.

(2) If the investigation is being conducted by any other kind of investigator, the material can be obtained by an ordinary warrant, unless there are other exclusions in the statute applying to the investigation.

Reform

9.34 We consider that the existing distinctions, based on the date of enactment of the statutory power under which the material is sought and the identity of the person seeking the material, are arbitrary and ought not to be perpetuated. There should be a uniform level of protection for all cases. We consider below what that level of protection should be, first for medical records (and human tissue and fluids) and then for confidential journalistic material.

9.35 Any general rule of this kind will not of course prevent Parliament from introducing future powers in which different rules apply. However, the position can be made uniform as concerns existing types of search warrants, and when future powers are introduced it should be considered whether there are good reasons for departing from it.

Medical records

9.36 One stakeholder suggested greater protection ought to exist for medical records; that is, they should be treated in the same way as legally privileged material rather than being excluded material as at present. It was suggested that greater reliance is placed on medical ethics, applying the General Medical Council Guidance on Confidentiality, rather than the law, to protect medical records.

9.37 As explained at paragraph 9.33 above, the present legislative framework for excluded material, including medical and counselling records, is anomalous. We consider that the situation should be simplified by the introduction of a uniform scheme for the treatment of medical and counselling records. That is, the rule should be the same whether the investigation is being carried out by a police officer or not, and whether it is under PACE or under a statute passed before or after PACE.

9.38 We consider that medical records ought to have a greater level of protection, for a number of reasons. First, medical records are absolutely exempted from search and seize under section 8 of PACE. This is the broadest search warrant power, used in the investigation of the most serious crimes. It seems strange that, in investigations of more

[744] Copyright, Designs and Patents Act 1988, s 297B(2); and Trade Marks Act 1994, s 92A(2).

minor offences, and investigations other than for the purposes of prosecution, a lower level of protection applies.

9.39 Secondly, according to the CPS, the procedure for obtaining medical records under Schedule 1 to PACE has, so far as they know, only been used once since it was introduced.[745] This indicates that, as concerns powers introduced before 1984, the need to compel disclosure of medical records has not been felt. Lord Justice McCowan, quashing a search warrant under the second set of access conditions in respect of medical records, observed that there was no enactment which would have authorised the issue of a warrant to a constable to seize the material in question.[746] A similar conclusion was reached by Lord Justice Farquharson in respect of dental records.[747]

9.40 Thirdly, we are not aware of any case where medical records have been sought or obtained under search warrant powers introduced after 1984 in which no exemption for excluded materials exists. Most of these powers concern financial investigations and similar specialised fields in which medical records are unlikely to be relevant. It is conceivable that a person under investigation for financial misconduct would reveal some of the relevant facts to a doctor or therapist while under treatment for stress or depression. In our view it would be extremely undesirable that the doctor or therapist should be required to disclose case notes from which these facts might emerge.

9.41 Fourthly, the New Zealand Law Commission, in its 2007 report on search and surveillance powers, pointed out that, in New Zealand law, section 59 of the Evidence Act 2006 provides absolute protection in criminal proceedings for communications between patients and medical professionals for the purpose of treatment for drug dependency or any other condition or behaviour that may manifest themselves in criminal conduct. By analogy with that, they considered that the same protection should apply to the operation of enforcement powers.[748]

9.42 At the same time, there are instances where medical records would be relevant to an investigation. One possible exception to the proposed rule might be in investigations specifically concerned with medical malpractice, where medical records may well be of central importance to the case.[749]

9.43 It could also be argued that in certain cases, for example in the investigation of a suspected sexual offence or an offence of intentionally or recklessly transmitting a

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745 We were informed that a search warrant under Schedule 1 was issued to obtain dental records alleged to have been created fraudulently, which would previously have been obtained using the Forgery and Counterfeiting Act 1981.

746 *R v Central Criminal Court ex parte Brown*, *The Times* 7 September 1992.

747 *R v Singleton* [1995] 1 Cr App R 431, 438.

748 New Zealand Law Commission, Search and Surveillance Powers, Report 97 (June 2007) para 12.8. The position is somewhat different in England and Wales where doctor-patient privilege is binding on medical practitioners under a code of ethics but is not contained in statute. A court may compel the disclosure of this information where appropriate.

749 In existing law these records can be required to be disclosed to the investigating committee of the professional body even without the patients' consent: *General Dental Council v Rimmer* [2010] EWHC 1049 (Admin); *Re General Dental Council's Application* [2011] EWHC 3011 (Admin), [2012] ACD 11. The view was expressed in the latter case that, arguably, in ordinary circumstances the patients should be informed that disclosure would be required.

sexual infection,[750] the health status of a suspect (and of that suspect's partners) may be essential to the investigation or even be an ingredient of the offence. Since the offences under sections 18 and 20 of the Offences Against the Person Act 1861 and most sexual offences are indictable, any search warrant in these investigations is likely to be issued under section 8 of PACE, where medical records are excluded in existing law and the second set of access conditions is not available. We therefore seek consultees' views on whether the current law constitutes an undesirable fetter on the investigation of these offences.

9.44 Another question is whether the views of patients should be taken into account when a search warrant is applied for and the medical records are not those of the suspects.[751] In investigations of medical malpractice they may be happy to have their details disclosed. The law recognises that an individual has an interest in the confidentiality of medical records relating to him or her. There is no absolute right to object to their disclosure, but the individual has a right to be informed of the application in advance and to make representations before any order is made. This right follows from the overriding objective of the Criminal Procedure Rules and the need for procedural fairness in the light of Article 8 of the European Convention on Human Rights (Schedule 1 to the Human Rights Act 1998).[752]

9.45 If such records are to be made available in any circumstances (for example in a medical malpractice investigation), it is therefore arguable that while there is no need to give prior notice of an application to the occupier under Schedule 1 to PACE, a judge considering an application for a production order or warrant should take account of the views of the patients concerned. However, we see serious logistical difficulties about this. Until the records are seen, the investigator will not know who the patients are. Asking the occupier to identify the patients so that they can be contacted will alert the occupier to the fact that an application is likely to be made, and therefore removes the possibility of making an application without notice to the occupier.

9.46 The one exception we can think of is where the patient himself or herself has initiated the complaint. In such cases the views of the patient on whether the records should be kept confidential could be taken into account.

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750 Offences Against the Person Act 1861, ss 18 and 20: see our report on Reform of Offences against the Person (2015) Law Com No 361, Chapter 6.

751 *R v Singleton* [1995] 1 Cr App R 431, 439.

752 *R (B) v Stafford Combined Court* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524, cited in *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), [2014] ACD 124.

Consultation Question 44

We provisionally propose that:

(1) there should be a uniform rule for the availability of search warrants in respect of medical and counselling records, irrespective of the particular power under which the warrant is sought and the identity of the person applying for or executing the warrant;

(2) that rule should provide that medical and counselling records are excluded from the scope of search warrants in all cases, whatever the statutory source of the power to issue a search warrant; and

(3) there should be a tightly circumscribed exceptions to this exclusion in the case of investigations where medical and counselling records are central to the issues investigated.

Do consultees agree?

We invite consultees' views on whether:

(1) if medical records are to remain within the scope of search warrants, then in those instances where the patient is not the suspect, they should have the right to be informed and make representations before a warrant is issued or a production order is made; and

(2) a similar uniform rule ought to exist in respect of human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence under section 11(1)(b) of the Police and Criminal Evidence Act 1984.

Journalistic material

9.47 As with medical records, we consider that there should be a single rule for all cases. The arguments about what that rule should be are also the same as for medical records. Most warrants for the investigation of serious crime are issued under section 8 of PACE, where these materials are absolutely excluded from search, production and seizure. It therefore makes sense that the standard for less serious or more specialised investigations should be raised to match that in PACE, rather than for the protection under PACE to be diluted to match those exceptional cases where the warrant is issued under a power enacted before PACE. And again, we are unable to see why the standard in financial and similar investigations under powers enacted after PACE should be different.

9.48 There are several arguments for greater protection of journalistic material, first and foremost being the importance of the freedom of the press.[753] Any limitation imposed

[753] See Ruth Costigan, "Fleet Street blues: police seizure of journalists' material" (1996) 4 *Criminal Law Review* 231, 239.

on the protection afforded to journalistic material risks a "chilling effect"[754] and is considered to warrant the highest level of scrutiny in the view of the European Court of Human Rights.[755] The ECtHR has repeatedly emphasised that the protection of journalistic sources is one of the cornerstones of freedom of the press.[756] The importance of the protection is further recognised in domestic legislation in section 10 of the Contempt of Court Act 1981 and section 12 of the Human Rights Act 1998.

9.49 The New Zealand Law Commission in its 2007 report assessed the degree of protection that should be afforded to journalistic material in the course of the execution of search powers. In arriving at its conclusions, the Commission considered its previous policy position in its 1999 report on the Law of Evidence,[757] which highlighted the importance of protecting the identity of journalists' confidential sources in order to uphold the public interest in press freedom. The Commission took the view that there is no rationale for disapplying this protection when it arises during the exercise of search powers.[758]

9.50 The Divisional Court has also emphasised that production orders, and by extension search warrants, for journalistic material must be based on compelling reasons otherwise "investigative journalism will be discouraged, perhaps stifled".[759]

9.51 Article 10 of the ECHR also plays an important role. The Divisional Court observed in *Malik* that: (1) the court should attach considerable weight to the nature of the right interfered with when an application is made against a journalist; (2) the proportionality of any proposed order should be measured and justified against that weight; and (3) a person who applies for an order should provide a clear and compelling case in justification of it.[760]

9.52 In light of *Malik*, we do not consider that Schedule 5 to the Terrorism Act 2005 ought not to be amended, which would involve interrupting a carefully crafted statutory regime.

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754 *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, per Lord Woolf CJ at [61].

755 *Goodwin v United Kingdom* (1996) 22 EHRR 123.

756 *Roemen and Schmit v Luxembourg* (2003) (App No 51772/99) at [46]; *Saint-Paul Luxembourg SA v Luxembourg* (2012) at [49].

757 New Zealand Law Commission: *Evidence: Evidence Code and Commentary* (NZLC R55, Vol 2, Wellington, 1999).

758 New Zealand Law Commission, *Search and Surveillance Powers* (2007) Report 97, p 388.

759 *R v Central Criminal Court ex parte Bright* [2001] 1 WLR 662, 681. For discussion see H Davis, *Human Rights and Civil Liberties* (2003) p 124.

760 *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] 4 All ER 403 at [48].

Consultation Question 45

We provisionally propose that:

(1) there should be a uniform rule for the availability of search warrants in respect of confidential journalistic material, irrespective of the particular power under which the warrant is sought and the identity of the person applying for or executing the warrant; and

(2) that rule should provide that confidential journalistic material should be excluded from the scope of search warrants in all cases, whatever the statutory source of the power to issue a search warrant.

(3) The statutory regime under Schedule 5 to the Terrorism Act 2005 ought not to be amended.

Do consultees agree?

We invite consultees' views on whether there should be any exceptions to this exclusion and, if so, what those exceptions should be.

Second set of access conditions under Schedule 1 to PACE

9.53 If both medical records and confidential journalistic material are made exempt from disclosure in all circumstances, as we provisionally propose above, the second set of access conditions under Schedule 1 to PACE could be abolished without replacement, as it mainly exists for the purpose of obtaining these kinds of material.

9.54 According to one stakeholder, the second set of access conditions is never used in their experience and it could be abolished without loss.

9.55 It is theoretically possible to obtain special procedure material under the second set of access conditions, but we are not aware of this ever having happened. There would only be a need for it if:

(1) were it not for the exclusion of special procedure material in section 9(2) of PACE, it could have been obtained under a warrant issued to police under a pre-1984 Act; and

(2) the public interest test in the first set of access conditions was not satisfied.

9.56 In addition to its scarce use, stakeholders report that they find the second set of access conditions under Schedule 1 to PACE extremely hard to navigate. There are complaints that:

(1) it is hard for the reader to distinguish the conditions for a production order from the conditions for a warrant, and continual cross-reference is needed between the two; and

(2) there is too much overlap between the conditions in cases where a production order has been made and not complied with and cases where it has been thought impracticable to make a production order.

9.57 We consider that the second set of access conditions was introduced only for the sake of caution, in order to preserve any possibility of obtaining these records which *might* have existed. In our view, it is not entirely clear that the second set of access conditions are necessary, particularly in light of our provisional proposals above. We invite views as to whether the second set of access conditions ought to be abolished.

Consultation Question 46

We invite consultees' views as to whether the second set of access conditions under Schedule 1 to the Police and Criminal Evidence Act 1984 ought to be abolished.

SPECIAL PROCEDURE MATERIAL

Current law

9.58 The legislative framework dealing with special procedure material, such as confidential business records and non-confidential journalistic materials, is equally complex. Issues have been raised about both the definition of special procedure material and the way in which it is treated.

9.59 Special procedure material includes confidential information created or held for business or official purposes, other than legally privileged or excluded material.[761] This covers, for example, account details kept by banks. It also includes journalistic material other than that received in confidence. As with legal privilege and excluded material, where a search warrant is sought in respect of iniquitous material there will be neither confidentiality nor privilege attached.

9.60 Similarly to excluded material, warrants under section 8 of PACE and several other search powers may not be issued in respect of special procedure material. Nor may special procedure material be seized in the course of a search. Further, section 9(2) of PACE provides that any statute passed before PACE providing for search warrants to be issued to constables for the purposes of a criminal investigation will cease to have effect in relation to excluded and special procedure material.

9.61 As with excluded material, special procedure material may be obtained in some circumstances, unlike the absolute exemption afforded to legally privileged material. Section 9 of and Schedule 1 to PACE provide a procedure for obtaining special procedure material, which is less onerous that obtaining excluded material. This must be authorised by a Circuit judge or a District Judge (Magistrates' Courts);[762] normally

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761 PACE, s 14.

762 District judges were given this power in 2005: PACE, sch 1, para 17, inserted by Courts Act 2003, sch 4, para 6(2).

by means of a production order or, if a production order is not practicable for various reasons,[763] by means of a search warrant.

9.62 A production order in respect of special procedure material may be made if the "first set of access conditions" (or "second set of access conditions") is satisfied.[764] That is, if:

(1) there are reasonable grounds for believing that an indictable offence has been committed;

(2) there are reasonable grounds for believing that relevant evidence, constituting special procedure material but not including excluded material or legally privileged material, is on the premises;

(3) the judge considers that it is in the public interest to produce it or have access to it;[765] and

(4) other methods of obtaining the material have been tried without success, or have not been tried because it appeared that they were bound to fail.

9.63 A warrant in respect of such material may only be issued if the above conditions are satisfied and it would not be practicable to make a production order for various reasons set out in the Schedule.

9.64 Once more, all these arrangements only apply in the case of investigations conducted by the police or someone with equivalent powers. In any other investigation, the material can be obtained by an ordinary warrant, unless there are other exclusions in the particular statute applying to the investigation.

9.65 It should be noted that many of the powers introduced later than PACE, for example those concerned with competition and financial services, themselves provide for a production order procedure and are very similar to the special procedure under the first set of access conditions.[766] This is not unexpected, as in most of these cases the person against whom the production order or warrant is sought is in business (for example as a bank or an accountant) and the records in question will fall into the category of confidential business records. The main difference is that most of these powers are not authorised by a Circuit judge or District Judge (Magistrates' Courts).

Reform

Definition of special procedure material

9.66 As concerns the definition of special procedure material, stakeholders have raised two concerns.

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763 See the table at para 2.54 above and discussion in Chapter 11.

764 See *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647 at [33] to [36].

765 *R v Northampton Crown Court ex parte DPP* (1991) 93 Cr App R 376, 381; *R v Central Criminal Court ex parte Bright* [2001] 1 WLR 662, 679; *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [82]. See also *M Zander on PACE* (7th ed 2015) para 2-16 and following.

766 For example, Proceeds of Crime Act 2002, s 345.

9.67 The first is that the test is sometimes hard to apply. One stakeholder pointed out that, where a search of business premises will see invoices seized that contain the name and address of customers, it is not entirely clear whether this should be regarded as special procedure material or not.

9.68 The second concerns material that is held with the intention of furthering a criminal purpose. This kind of material is at present excluded from the definition of legally privileged material,[767] and there is an argument that it should also be excluded from the definitions of excluded and special material. However, there is some danger of circularity. Until the material has been accessed and the investigation has occurred, one cannot know from that material whether it was held for such a purpose or not.

9.69 We invite consultees' views on revising the definitions of special procedure material.

Consultation Question 47

We invite consultees' views on whether there are particular difficulties in practice in searches which relate to special procedure material and in particular whether greater clarity needs to be introduced in defining searches for special procedure material held with the intention of furthering a criminal purpose.

Availability of special procedure material

9.70 As with excluded material, we consider that there is no need to have different rules for the availability of special procedure material depending on whether or not the investigation is being conducted by the police.

9.71 We consider that the exclusion in section 9(2) of PACE, and corresponding exclusions in other statutes, should apply only if the search warrant relates to a criminal investigation. Similarly, the procedure for obtaining special procedure material under Schedule 1 to PACE should apply whenever that exclusion exists.

9.72 The arguments are similar to those in our provisional proposal in Chapter 3 to revise the scope of sections 15 and 16 of PACE to cover criminal investigations not carried out by the police. Police no longer have anything like a monopoly on the investigation of crime, and where other officials are performing similar functions they should be subject to the same safeguards as the police. If it is not appropriate to entrust the police with the power to obtain these special categories of material by an ordinary warrant, still less is it appropriate to entrust civilian investigators with that power. The need to protect the confidentiality of information concerning defendants held by other persons and bodies is the same in both cases.

9.73 One exception to this should be made in the case of search warrant powers concerned with financial services and other specialised fields, even when they relate to a criminal investigation. These powers are framed very differently from the powers in PACE, and generally envisage the making of a production order or information requirement rather

[767] PACE, s 10(2).

than a warrant, though a warrant can be issued if a production order has not been complied with or it is impracticable to make one.

9.74 The procedure in these cases is very similar to that under Schedule 1 to PACE, and there is therefore no need to exclude special procedure materials from the scope of these powers and require them to be sought under Schedule 1 instead.

Consultation Question 48

We invite consultees' views on whether:

(1) the exemption of confidential business records from search warrant powers under section 9(2) of the Police and Criminal Evidence Act 1984 ought to apply to all criminal investigations, irrespective of whether the investigation is carried out by the police;

(2) the special procedure for applying for production orders and search warrants in respect of confidential business records and non-confidential journalistic material under Schedule 1 of the Police and Criminal Evidence Act 1984 ought to be available in all cases in which those records are exempted from the power to issue a search warrant under (1) above; and

(3) there ought to be an exception to (1) above in the case of search powers for the purposes of specialist investigation where production orders, information requirements or similar procedures are available.

THE PROTECTION OF EXEMPTED MATERIAL IN CASES OF SEIZURE NOT UNDER WARRANT

Current law

9.75 Under PACE, if exempted materials are found in the course of a search, they may not be seized under section 8(2) of PACE. This follows from the fact that the power of seizure only extends to "anything for which a search has been authorised under subsection (1) above". Exempted material is treated in a similar way under most other search warrant provisions.

9.76 According to Colvin and Cooper, the special protection afforded to exempted material ensures that PACE is compliant with the ECHR, since each category of exempted material falls within a right guaranteed within the ECHR.[768] As a result, if the law fails adequately to protect this material, a breach of ECHR rights may be established.

9.77 The position of exempted material is different for seizures not under a warrant. For example:

[768] M Colvin and J Cooper, *Human Rights in the Investigation and Prosecution of Crime* (2009) pp 138.

(1) The power of seizure under sections 18 and 32 of PACE, concerning the search of premises of a person who is under arrest, excludes legally privileged material. There is no exclusion for special procedure and excluded material;

(2) The same is true of the powers under sections 19 and 20, which give a constable who is lawfully on any premises power to seize anything which he or she has reasonable grounds for believing to be evidence of an offence or obtained in consequence of the commission of an offence, and to be in danger of loss or destruction.

Reform

9.78 It could be argued that the position under these powers should be brought into line with that under a warrant, and that excluded and special procedure material should be exempt from seizure. Otherwise, the exemption in section 8 of PACE is largely ineffective, because:

(1) this difference increases the incentive to arrest a suspect in order to search the premises, rather than apply for a search warrant; and

(2) even if the investigator is present on the premises to execute a warrant, section 19 can always be used to circumvent the exemption in section 8, as (especially in the case of electronic material) the investigator can always claim that there is a danger of its loss, alteration or destruction.

9.79 In particular, it is strongly arguable that excluded material at least (medical and counselling records and confidential journalistic material) should be put in the same position as legally privileged material. Under our provisional proposals below, both these categories of record should be protected from search and seizure, and the "second set of access conditions", under which at present they can be obtained in limited circumstances, should be abolished. It would make sense for them also to be protected against seizure following arrest.

9.80 On the other hand, it could be argued that both cases where a suspect is arrested and cases where there is a genuine fear of destruction of the material are in a sense emergencies, where the main concern is to search as widely as possible and secure all possibly relevant material against destruction.

Consultation Question 49

We invite consultees' views on whether excluded and special procedure material ought to be exempted from seizure under sections 18, 19, 20 and 32 of the Police and Criminal Evidence Act 1984.

Chapter 10: Electronic material

INTRODUCTION

10.1 In this chapter we consider the ways in which the law has been applied and adapted to cater for searches on premises for material stored in electronic form, and whether further reform is necessary.

10.2 Over the last few decades it has become common for business records and practically all other types of information to be kept in electronic form rather than on paper. We have seen cases involving searches under warrant where in the range of 50 terabytes[769] of data have been seized from a large number of devices, equating to over 200 million individual documents. In addition to the volume of material, the data seized may contain material irrelevant to the investigation, sensitive personal data and material exempted from search and seizure. Privacy International has recently encapsulated the phenomenon of the quantity of data that is now stored on electronic devices, stating:

> You could search a person, and their entire home and never find as much information as you can from searching their [smart] phone.[770]

10.3 A further dimension to this change in the volume of material stored, and the manner in which it is stored, relates to jurisdiction. In recent times, it has become common for information to be stored on remote servers through 'cloud' accounts, rather than in the memory of a device kept on premises. The legal regime governing search warrants was originally devised to allow searches for physical objects kept on premises. The storage of information in electronic form raises particular problems for those executing search warrants, especially if it is held on a server remote from the premises being searched. As noted by Professor Richard Stone:

> Offences from child pornography to fraud are likely to depend on evidence derived from computers, or web-based files. This raises particular challenges for those seeking access to such material, in that seizure of it is less straightforward than it is in relation to physical evidence… As well as the intangible nature of the evidence, there may also be problems of control and ownership, which will only increase with the use of web-based storage systems ('the cloud', etc).[771]

10.4 Stakeholders have suggested that the law governing search warrants is not fit for purpose in an age of electronic information and remote storage. For example, Andrew Bird of 5 St Andrew's Hill indicated that he would go so far as to call for a complete rewrite of PACE. Investigative authorities have also informed us that the digital environment is of particular importance and that they would welcome clarity on how far

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769 A terabyte is 1024 gigabytes. Storing one terabyte of data would require about 1428 CDs.

770 Privacy International, *Digital stop and search* (March 2018). Available at https://privacyinternational.org/sites/default/files/2018-03/Digital%20Stop%20and%20Search%20Report.pdf (last visited 29 May 2018).

771 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 1.74.

legislation allows investigators to deal with electronic information, particularly where it is stored remotely.

10.5 In this chapter we examine the following statutory regimes relevant to authorising or conducting searches of premises for electronic material under a search warrant:

(1) section 8 of PACE and other search warrant provisions;

(2) Part 2 of the Criminal Justice and Police Act 2001 ("CJPA"); and

(3) associated powers of seizure in sections 19(4) and 20(1) of PACE.[772]

10.6 These statutory regimes create four routes for obtaining material following a search of premises under warrant:

(1) under the authority of the warrant:

(a) **route 1** – specifying on the face of the warrant the entire electronic device itself as the material to be searched for and seized; and

(b) **route 2** – specifying on the face of the warrant the electronic information contained on the device as the material to be searched for and seized.

(2) **route 3** – seizure powers under sections 50 and 51 of CJPA; and

(3) **route 4** – production powers under sections 19(4) and 20(1) of PACE.

10.7 Seizure, or production, under each power raises distinct issues and challenges of interpretation and application. In this chapter, we discuss:

(1) the forms in which electronic material may exist and how they can be categorised in the context of search powers;

(2) the advantages and disadvantages that flow from the two different ways in which search warrants may be drafted, namely:

(a) search warrants specifying electronic devices as the material to be searched for and seized; and

(b) search warrants specifying electronic material as the material to be searched for and seized.

(3) the following shortcomings in respect of Part 2 of CJPA:

(a) the inapplicability of the seizure powers where devices are specified on the face of the warrant;

(b) the limited reach of the statutory safeguards in CJPA; and

[772] For our terms of reference and scope of the review, see paras 1.4 and 1.6 above.

(c) the inability of CJPA to deal with complex investigations involving electronic material because of the ambiguity of the statutory language.

(4) the following interpretive challenges surrounding the ancillary powers of seizure in sections 19(4) and 20(1) of PACE:

(a) the fact that these are powers of production rather than search;

(b) the lack of clarity surrounding the consequences of non-compliance; and

(c) the lack of clarity surrounding the meaning of the word "accessible".

(5) the following specific issues raised by the search for, and seizure and production of, material accessible from the premises but held abroad:

(a) the concept of jurisdiction in international law;

(b) the circumstances in which the Cybercrime Convention[773] may be relevant to remote search and seizure of information; and

(c) recent state practice concerning extraterritorial enforcement powers; and

(d) challenges under the current statutory regimes relating to search warrants.

10.8 While our present review is limited to the provisions mentioned at paragraph 10.5 above, we acknowledge that there are 176 separate search warrant powers across 138 separate pieces of legislation, which are listed in Appendix 1. We understand that emerging issues in respect of electronic material likely arise in the context of other powers, for example under the Criminal Justice Act 1987 relating to investigations led by the Serious Fraud Office. When considering the consultation questions below, we welcome views on issues in respect of electronic material relating to other search warrant provisions.

10.9 Before we discuss the routes of seizure set out at paragraph 10.6 above, we begin by briefly setting out the various forms of electronic material that may be the subject of a search warrant and how they may be categorised.

UNDERSTANDING ELECTRONIC MATERIAL

10.10 In this section we describe:

(1) the forms in which electronic material may exist; and

(2) the ways in which electronic material may be categorised in order to provide a conceptual apparatus when assessing search warrant powers.

The different forms of electronic material

10.11 Computers can turn unintelligible data into useful information for individuals and investigators. Word documents, photos, videos, emails text messages and voicemail

[773] Council of Europe, Convention on Cybercrime, 23 November 2001, ETS No 185.

messages are all examples of electronic information that are routinely sought through search powers. Electronic information might be held in one or more ways including, for example:

(1) on the hard drive or memory of a computer, mobile phone or other internet enabled device on the premises that are subject to the search;

(2) on removable media, for example, disk-based storage devices, memory cards, and thumb drives;

(3) in remote data centres and servers which may be controlled by a service provider, but accessible to an account holder or other person with relevant passwords (part of the phenomenon of 'cloud' computing);

(4) in the records of internet service providers, mobile phone companies, content delivery networks etc; or

(5) by hosting providers for website content.

10.12 Not all electronic data capable of being accessed by an expert investigator will be readily visible to a non-expert user of the relevant device. Examples of "hidden data" include:

(1) information remaining on a computer system after document deletion. Files are not completely deleted until overwritten by other files. In some cases, there are four or five levels of storage within a device, with the result that however comprehensively a user attempts to delete files, they can be restored by forensic analysis;

(2) data created when a software program, such as a word processing package, makes periodic back-up files of an open file to facilitate retrieval of the document when there is a computer malfunction; and

(3) information on file designation, creation, and edit dates, purported authorship and edit history.

Sometimes trace data, revealing passwords or metadata concerning communications from the device, may be detectable from broadband routers and other equipment on the premises.

Categorising electronic material

10.13 In the light of the above distinctions, four main categories of electronic material may be distinguished:

(1) **electronic devices** – an electronic device, as a physical object, may be the subject of search and seizure. This includes a computer, laptop, mobile phone, hard drive, sim card and other objects that store information in electronic form;

(2) **intangible material stored locally in electronic form** – this covers data accessible from the device, such as document files, or photos or videos stored by applications with libraries for organising such data;

(3) **intangible material stored remotely in electronic form** – this could, for example, cover the search of a remote resource, such as a file storage website, that may be accessible from a 'live' internet connected device on the premises; and

(4) **intangible material stored remotely in electronic form outside the jurisdiction** – this covers the same material identified in (3) above, however, it is held outside the jurisdiction.

10.14 To assist with formulating final recommendations, we would welcome examples from consultees of the types of electronic devices and material that investigators seek under search warrants. Whilst we are familiar with the more generic material – laptops, computers, phones, sim cards – we would be interested to hear about emerging forms of electronic material investigators may to wish search for and seize under warrant.

Consultation Question 50

We invite consultees to share examples of the types of electronic material that investigators seek under a search warrant. We are particularly interested in any examples of search warrants granted in relation to intangible material stored remotely in electronic form.

SEARCH WARRANT PROVISIONS

10.15 Three key features of a search warrant application under section 8 PACE are that there must be reasonable grounds for believing that the material in question:

(1) is likely to be relevant evidence;[774]

(2) is on the premises;[775] and

(3) does not consist of or include exempted material.[776]

10.16 In practice, search warrants are often drafted in relation to devices or particular categories of information. For example, search warrants may be drafted either in relation to:

(1) all devices which contain information of a particular description; or

(2) categories of electronic information held on devices on the premises.

10.17 Below we will consider the challenges that are emerging in satisfying the statutory criteria in the context of search and seizure of electronic devices and information. There are different challenges depending on whether the material sought is:

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774 PACE, s 8(1)(b).

775 PACE, s 8(1)(c).

776 PACE, s 8(1)(d).

(1) specified in the warrant as simply an electronic device, or

(2) specified in the warrant as specific electronic information stored on a device.

Search warrants specifying electronic devices as material and relevant evidence

10.18 Search warrants specifying electronic devices are commonplace. In such cases, a distinction may be drawn between the device specified on the face of the warrant and the underlying target material on the device. The target material, instead, may be spelled out on the search warrant application before the issuing authority, rather than on the face of the search warrant. The case of *Fitzgerald v Preston Crown Court* is a recent example where search warrants were drafted so as to specify electronic devices as the "material" subject to search and seizure.[777] The search warrants in the case authorised the officer to search for:

> Any electronic storage devices, including but not exclusively mobile phones, computers, lap tops, iPads and any other digital or electronic storage devices.[778]

10.19 There have been a number of legal challenges to search warrants that specify electronic devices. These have been unsuccessful, however, as the courts' conceptual approach to electronic devices is that each of them is a single item rather than a container of separate items, like a filing cabinet with paper documents. We refer to this approach as the *single item theory*. In essence, the Divisional Court has confirmed that electronic devices can:

(1) properly be the subject of a search warrant under section 8 or Schedule 1 to PACE; and

(2) satisfy the specificity requirement under section 15(6)(b) of PACE when the entire device is specified on the search warrant as the material to be searched for and seized.[779]

10.20 The courts have been clear that "material" for the purposes of section 8 is a concept which will be construed widely. In *R (Faisaltex Ltd) v Preston Crown Court*, the court held that the term "material" in section 8(1) of PACE could extend to a computer or hard disk.[780] The device as a whole could be specified in the warrant and the court considered this to be a single item rather than a container of a number of things. Therefore, a warrant can legitimately authorise the seizure of a computer or hard disk or mobile phone even though it may contain vast quantities of irrelevant material.[781]

10.21 Similar issues were considered in *R* (*on the application of Cabot Global Ltd) v Barkingside Magistrates' Court*. In this case, the court was concerned with whether search warrants issued under section 8 of PACE were compliant with section 15(6)(b)

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777 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin).

778 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin), at [5].

779 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [36].

780 *R (Faisaltex Ltd) v Preston Crown Court* [2008] EWHC 2832 (Admin), [2009] 1 WLR 1687 at [79].

781 See also *R (H) v Inland Revenue Commissioners* [2002] EWHC 2164 (Admin), [2002] STC 1354 at [37]; *R (on the application of Glenn & Co (Essex) Ltd) v HMRC* [2010] EWHC 1469 (Admin), [2011] 1 WLR 1964, [32].

of PACE, which requires the warrant to identify, so far as is practicable, the articles or persons sought.[782] The claimants submitted that the warrants ought to have specified the material sought *within* the computers and electronic devices; then the police, having identified this information, would have powers under either section 20 of PACE or section 50 of the Criminal Justice and Police Act 2001 to remove them in legible form. The claimants in this case were unsuccessful. Mr Justice Fulford, as he then was, relied on *Faisaltex* to hold that a warrant may authorise the seizure of a computer on which relevant evidence is to be found, regardless of what other material is present. He also held that the whole computer constitutes "material" and "relevant evidence" for this purpose, saying:

> "Material" has been accorded a broad meaning within the statute, given it is not distinguished from other expressions used in the 1984 Act such as "articles" and "anything". Therefore, the word "material" in section 8 is capable of covering a computer and its hard disk, which the court held to be a single item or thing, not a container of a number of things. As a result, a warrant could properly authorise seizure of the whole computer or hard disk even though they might contain irrelevant material....
>
> If there are reasonable grounds to believe that there was incriminating material on the computer, tablet, smart telephone or similar device, then it may constitute relevant evidence, thereby properly forming the subject of an order under section 8 of the Police and Criminal Evidence Act 1984. The fact that there may also be material that is irrelevant does not make the computer any less "material" which is likely to be of substantial value to the investigation, as well as likely to be relevant evidence.[783]

10.22 The Divisional Court in *Hargreaves v Brecknock and Radnorshire Magistrates' Court* applied the single item theory to hold that the power to seize a "document" also included the power to seize an electronic device.[784] This line of authority was most recently approved by the Divisional Court in *R (A) v Central Criminal Court*.[785] Therefore, the courts have now consistently held that a computer or hard-disk is not a 'container' like a filing cabinet and must be regarded as a single object or thing for the purposes of a warrant application.[786] The Divisional Court in *R (A) v Central Criminal Court* also held that:

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782 *R* (*Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin), [2015] 2 Cr App R 26.

783 *R* (*Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin), [2015] 2 Cr App R 26 at [34] and [38].

784 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [37].

785 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [36].

786 *R (H) v Inland Revenue Commissioners* [2002] EWHC 2164 (Admin), [2002] STC 1354 at [37]; *R (Faisaltex Ltd) v Preston Crown Court* [2008] EWHC 2832 (Admin), [2009] 1 WLR 1687 at [79]; *R (on the application of Glenn & Co (Essex) Ltd) v HMRC* [2010] EWHC 1469 (Admin), [2011] 1 WLR 1964, at [32]; *R* (*Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin), [2015] 2 Cr App R 26 at [34]; *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [36].

> The better place for the explanation and description of the contents or classes of contents sought is the application for the warrant before the judge, where the applicant is in any event under a duty to give appropriate disclosure.[787]

10.23 As discussed in Chapter 4 at paragraph 4.43 above, where a search warrant is applied for, the applicant is under a duty to make full and frank disclosure. It is during this stage that the issuing authority should be satisfied that the statutory criteria for issuing the search warrant are met.

10.24 We discuss the advantages and disadvantages of search warrants being drafted in these terms below. In summary:

(1) the courts have routinely and consistently held that an electronic device is a single item and as such can properly be the subject of a search warrant. This approach carries with it the following advantages:

(a) search warrants in respect of electronic devices are clear on their face and therefore capable of simple and practical execution;

(b) specifying the electronic device itself rather than the contents may, on one view, be less intrusive;

(c) seizure and retention of an entire device assists with proving provenance and continuity of evidence where a challenged is mounted.

(2) against this, some stakeholders have raised the following concerns regarding this approach:

(a) the single item theory, by which a device is conceptualised as a single item rather than a container, is said to be incoherent;

(b) the seizure of whole devices may not be necessary or proportionate where only a fraction of the material on the device is target material that is sought;

(c) the seizure of whole devices may lead to the seizure of irrelevant, personal and exempted material; and

(d) the seizure of whole devices may circumvent the need for, and protections under, powers of seizure under Part 2 of CJPA.

Advantages

We explain the advantages to specifying electronic devices on the face of the search warrant as the material to be search for and seized below.

Clear, simple and capable of practical execution

10.25 The Divisional Court in *R (A) v Central Criminal Court* observed:

[787] *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

> Given its constitutional and practical importance, it is imperative that a warrant is capable of simple and practical execution (the *Energy Financing* case) and is clear on its face.[788]

10.26 Where a search warrant specifies the device to be searched for and seized, this allows investigators and occupiers to know exactly what material is subject to search and seizure. Consequently, the search warrant is less prone to misunderstanding when executed on the premises. Specifying devices also avoids difficulties where time or technical capability prevents investigators from individually accessing the contents of several devices on the premises.

10.27 This advantage extends to section 21(1) of PACE, which requires the seizing officer to provide a record of what he or she seized. Applying the single item theory, the seizure of devices means that the duty is to provide a record of the devices seized, not to list the contents of devices seized. In cases where terabytes of data has be seized, this could be particularly cumbersome and potentially unworkable.

Less intrusive

10.28 The Divisional Court in *R (A) v Central Criminal Court* also observed:

> Having regard to the realities of a search, seeking specified *items*, *things* or *articles* rather than a list of electronic *contents* is potentially much quicker, more practical and less intrusive.[789]

10.29 If the device is specified on the face of the warrant, the search on the premises may be swift and therefore less obtrusive on the day.

Proof of provenance

10.30 The Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material state:

> Where material is retained for evidential purposes there will be a strong argument that the whole thing (or an authenticated image or copy) should be retained for the purpose of proving provenance and continuity.[790]

10.31 It may therefore be necessary to seize and retain an entire device in order that provenance and continuity of evidence can be established if it is, at any point in time, challenged. As discussed at paragraph 10.45 below, there may also be challenges for investigators imaging devices on the premises.

Disadvantages

10.32 Some stakeholders have drawn to our attention several issues in respect of searching for and seizing electronic devices.

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788 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

789 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

790 Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material (2013) para 26A.

Single item theory is arguably incoherent

10.33 We explained the single item theory at paragraphs 10.19 to 10.22 above. A number of stakeholders have raised concerns regarding the single item theory. First, the analogy between an electronic device and a single item fails to appreciate the volume of information that can be stored on a device. In *Riley v California*, the United States Supreme Court considered whether a search of all data on a mobile phone was "materially indistinguishable" from searches of physical items like wallets and purses. Chief Justice Roberts opined that any comparison between a mobile phone and an ordinary container like a wallet was:

> Like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.[791]

10.34 The single item theory does avoid the potentially misleading analogy of an electronic device and a filing cabinet. The analogy with a single item is nonetheless problematic. A computer can clearly "contain" material in the form of intangible information, and normally it is only such information that is of interest to investigators.

10.35 As discussed at paragraph 10.16 above, search warrants are sometimes drafted in respect of categories of information contained on, or accessible from, a device. It is arguably illogical to hold, on the one hand, that search warrants can be granted in relation to particular categories of intangible information while, on the other hand, adhering to a single item theory in relation to search warrants for the device itself. This suggests that electronic devices are accepted as being both divisible and indivisible by the courts.

10.36 Electronic devices are clearly unique phenomena and drawing analogies between other objects, be it a filing cabinet[792] or a single item, risks distortion. This reflects a deeper concern that the statutory criteria of the search warrant provisions cannot be adequately transposed to electronic material.

10.37 Secondly, there is inconsistent case law on this single item theory. The Divisional Court in *Hargreaves v Brecknock and Radnorshire Magistrates' Court* did in fact describe a computer in parenthesis as "the electronic equivalent of a filing cabinet".[793] This suggests that the underlying logic of the single item theory is far from watertight.

10.38 Thirdly, treating the device as a single item also appears difficult to reconcile with previous case law relating to the specificity requirements of PACE. Section 15(6)(b) states that a warrant "shall identify, as far as is practicable, the articles … to be sought", while section 16(8) requires that a search under a warrant "may only be a search to the extent required for the purposes for which the warrant was issued." In *Bramley*,[794] this

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791 *Riley v California* 134 S. Ct. 2473, 2488 (2014).

792 See para 10.71 below.

793 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [37].

794 *R v Chesterfield Justices and another ex parte Bramley* [2000] QB 576.

legislative scheme was interpreted to mean that an officer did not have power under a PACE search warrant to seize material for the purpose of subsequent sifting. Both Lord Justice Kennedy and Mr Justice Turner thought that while there may well be circumstances where subsequent sifting may be necessary and desirable (for example, where there are difficulties completing a search within a reasonable period),[795] both were also concerned that without explicit statutory authority, seizures for the purposes of sifting could fall foul of Article 8 ECHR.[796]

10.39 As Mrs Justice Carr more recently stated in *Superior Import / Export Ltd*:

> An officer is only empowered to seize material within the scope of the warrant (or within s. 19 PACE) and not authorised to seize material for the purpose of subsequent sifting.[797]

10.40 Fourthly, the approach the courts have adopted arguably creates an incoherence between the way the specificity requirements in PACE operate in relation to physical files and electronic information. For example, in a case where the application relates to the anticipated search of a filing cabinet on premises, the search will only be permitted to the extent required for the purposes for which the warrant was issued, and so only relevant files can be taken by those executing the warrant. It is arguable that this should be the same for searches for electronic information on electronic devices on premises. Two points may be raised against this. First, even in the case of the filing cabinet, section 50 of CJPA may allow everything taken if the statutory criteria are met. Secondly, acknowledgment of the material difference between physical containers and electronic devices may also require acceptance that the two cannot be treated identically in the context of search and seizure. Accordingly, it may be argued that the search for, and seizure of, entire devices is necessary as in practice they cannot always be searched for and seized in same way as the documents in a filing cabinet.

Seizing entire device may not be necessary or proportionate

10.41 By specifying the electronic device(s) as the relevant material within the warrant, rather than the electronic information contained therein, the courts regard the specificity requirement under section 15(6)(b) of PACE as met. In doing so, the courts are seeking to strike an appropriate balance between the competing objectives of ensuring the effective investigation and prosecution of crime and the protection of the right to privacy.

10.42 The volume of information about a person that can be stored even on a small device like a mobile phone can be staggering: hours of videos and thousands of photos recorded by the individual and/or friends; emails and social media communications; website browsing history; location data; contact and address information. This is only some of the information that can be acquired from a forensic analysis of such devices. This raises profound questions about the compatibility of the search warrant regime with the right to privacy, and in particular, whether due consideration is being given to the necessity and proportionality of search powers. By treating the electronic device as the

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795 *R v Chesterfield Justices and another ex parte Bramley* [2000] QB 576 at 586 and 590.

796 *R v Chesterfield Justices and another ex parte Bramley* [2000] QB 576 at 587 and 591.

797 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [39].

"material" for the purposes of the warrant application, a potentially vast amount of information that is acknowledged by everyone to be irrelevant to the investigation may be seized.[798]

10.43 A number of stakeholders have all raised such concerns regarding device seizures. Jessica Parker, Partner at Corker Binning, observed how the electronic material contained on these devices can "give unfettered access to someone's life". It can also cause huge inconvenience for those subject to device seizures. It was pointed out that, in today's world, a family home has all sorts of internet enabled electronic devices, which are capable of storing data. These devices may be used by one or more family members. It may cause considerable distress or inconvenience for a person to be without an electronic device for a period of time. For example, a child's education may be affected by the seizure of a device which they use for their studies. Likewise, the operation of a business could effectively be paralysed if all associated devices are seized pursuant to a search warrant.

10.44 The issuing authority may only have reasonable grounds for believing that a specific subset of information contained on the device is of substantial value to its investigation and relevant evidence of the offence (satisfying section 8(1)(b) and (c) of PACE). In such cases, it is questionable whether a search for, and seizure of, the entire device is necessary and proportionate in the circumstances as sensitive aspects of the person's life may be seized alongside the target material.[799] This is particularly the case where it would technically be possible to image or clone the relevant information, rather than seize the device. It is therefore questionable whether the search for, and seizure of, an entire device would be "less intrusive" than a specific search of its electronic contents.[800]

10.45 That being said, the targeted search of specified material believed to be on electronic devices on the premises would assume the existence of several conditions, namely that:

(1) the investigator is able to specify the material on the device in such a way that potentially relevant material is not excluded;

(2) the material on the device can be accessed because either:

(a) the owner consents to the material being extracted from the device; or

(b) the device is not locked or encrypted.

(3) the investigator enters the premises with the necessary expertise and equipment to extract the material;

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798 See (*Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin), [2015] 2 Cr App R 26 at [38].

799 See Adam Gershowitz, "The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches" (2016) 69(3) *Vanderbilt Law Review* 585.

800 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

(4) the number of electronic devices that may contain relevant material on the premises is such that the investigator has the time to target search each individual device; and

(5) the electronic device is not otherwise needed for the purpose of proving provenance and continuity of evidence.

Likely seizure of irrelevant, personal and exempted material

10.46 Under section 8(1)(d) of PACE, material cannot be the subject of a search warrant unless there are reasonable grounds for believing that it does not consist of or include legally privileged, special procedure or excluded material. If excluded or special procedure material is sought, this can be done pursuant to the warrant procedure in section 9 and paragraph 12 of Schedule 1 to PACE, which is before a Circuit judge or District Judge (Magistrates' Courts). However, as has been discussed in Chapter 9, neither sections 8 nor 9 of PACE authorise the search for, or seizure of, legally privileged material. Section 19(6) of PACE states clearly that:

> No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act) is to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege.

10.47 This suggests that the position under PACE regarding exempted material is as follows: where there are reasonable grounds for believing that the material sought consists of or includes excluded or special procedure material, then a section 9 and schedule 1 warrant, rather than a section 8 warrant, should be sought; but where there are reasonable grounds for believing that an item is subject to legal privilege, it cannot be sought under either section 8 or section 9.

10.48 In practice the legislation is not interpreted this way. Even where it is "likely" that exempted material such as legally privileged material may be found on a device, that does not prevent the search and seizure of electronic devices under warrant.[801] In such circumstances, it must simply be stated in the warrant application that such exempted material may be found, and the warrant should be specifically worded so as to exclude any such material from that which may be seized. Even implied exclusions may suffice.[802] In other words, where electronic devices are sought under warrant, and even where it is likely that the device contains mixed exempted and permitted material, seizure can still occur. The result is that, for example, a computer that is *likely* to contain special procedure or excluded material can be seized under a section 8 search warrant approved by a magistrate, rather than a section 9 and Schedule 1 search warrant approved by Circuit judge or District Judge (Magistrates' Courts).[803] Additionally, a

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801 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [44].

802 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [46] & [60].

803 See *R (Superior Import / Export Limited) v The Commissioners for Her Majesty's Revenue and Customs* [2017] EWHC 3172 (Admin) at [40] and [44].

computer that is *likely* to contain legally privileged material can be seized under either warrant procedure.[804]

10.49 This interpretative challenge stems from the single item theory. If the power of seizure under sections 8 or 9 of PACE is in relation to a single item, such as a computer that is likely to contain exempted material, then the warrant inevitably also extends to material for which there are no reasonable grounds for believing that it does not consist of or include items subject to legal privilege. As will be outlined at paragraph 10.92 below, the additional powers of seizure under CJPA may not assist here; section 50 of CJPA 2001 does not apply if the electronic device itself, as a single item, has been specified in the warrant (and no material on the device is specifically excluded in the terms of the warrant[805]). This is because there is no difficulty determining for the purpose of section 50(1)(c) or 50(2)(a) of CJPA whether the investigator is entitled to seize it.

10.50 This also creates difficulties for the constable who is seizing the device. As noted, section 19(6) of PACE states that a constable cannot seize an item if he or she has reasonable grounds for believing it to be subject to legal privilege. In the case of a warrant for a computer as a device, the single item theory creates problems. It may be likely, or even known, by a constable that a device he or she is seeking to seize will contain legally privileged material. Seizure in such circumstances appears to exceed seizure powers and section 50(4) of CJPA 2001 does not assist (or disapply[806]) section 19(6) PACE; if Part 2 CJPA 2001 is not engaged due to the specification of the devices as the relevant material under, for example, section 8 of PACE, then section 50(4) does not apply at all.

10.51 These interpretations of the warrant procedures are likely to create greater difficulty in future practice where devices with ever greater volumes of material are being seized. It has been assumed in some cases that distinctions between the nature of digital files and physical files are unimportant where courts are considering the likelihood of exempted material on premises. In *Sharer*, for example, it was said that:

> There is no greater reason in this case to think that computer devices would contain legally privileged material or special procedure material than ordinary physical files such as may be found at Mr Sharer's premises, be they residential or business premises.[807]

10.52 This will become an increasingly difficult proposition to maintain. Digital information is quite a different phenomenon. Terabytes of data might be seized under warrant. Whereas the physical devices would fill a black refuse bag, the information stored on the devices could fill several warehouses if all of the files contained on them were printed. In a case like *Superior Import,* where electronic devices pertaining to 237

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804 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [43].

805 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [43].

806 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [54].

807 *R (Sharer) v City of London Magistrates' Court* [2016] EWHC 1412 (Admin), (2017) 181 JP 48 at [30].

individuals and organisations were to be searched and seized,[808] the assumption, that electronic devices are unlikely to contain exempted material, is difficult to maintain.

10.53 Moreover, such outcomes appear difficult to square with the warrant application procedures and safeguards contained in PACE, and inconsistent with what was said by Lord Justice Gross in *Gittins*:

> If on its true construction a warrant extends to material for which there are not reasonable grounds for believing that it does not consist of or include items subject to LPP then the warrant will be quashed, at least unless the offending passages can be severed. Such a warrant cannot be saved by precautions governing its execution on the day, such as, for example, the engagement of independent counsel.[809]

10.54 It may be argued that the courts have been prepared to strain the statutory language in order to maintain the treatment of electronic devices as single items, and to facilitate their search and seizure pursuant to warrant powers. This begs the question whether the statutory criteria in section 8 of PACE ought to be amended to align with practice so that search warrants can be issued where the material consists of or includes exempted material but can be excluded from the scope of the warrant. Alternatively, it may be said that clearer procedures ought to be produced to avoid these interpretative challenges.

Application of the CJPA

10.55 It has been assumed by the courts that where the device specified in the warrant is seized, the subsequent search and sifting of material on the device will be done pursuant to the procedures and safeguards contained in Part 2 of the Criminal Justice and Police Act 2001. In particular, detailed procedures concerning the examination and return of material are set out in section 53 to 58 of CJPA. However, as will be outlined at paragraph 10.91 and following below, where the devices are specified as the relevant material on warrants and no material is exempted, this regime does not necessarily apply because:

(1) it is reasonably practicable to determine, for the purpose of section 50(1)(c) of CJPA, whether the investigator is entitled to seize the entire device (as opposed to the investigator determining whether he or she is entitled to seize the information on the device); and

(2) an electronic device is not "comprised in something else" for the purpose of section 50(2)(a) of CJPA.

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808 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [44].

809 *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219 at [36].

Consultation Question 51

We invite consultees' views on the operation of the search warrants regime where warrants are drafted in terms of "devices" rather than specifying electronic information on devices.

In particular, we invite views on whether:

(1) exempted material is adequately protected where search warrants are drafted to authorise the search for, and seizure of, electronic devices as distinct from specified electronic information; and

(2) the single item theory, which treats electronic devices as a single item, works effectively and fairly in practice.

Search warrants specifying electronic information as material and relevant evidence

10.56 As discussed at paragraph 10.16 above, another way in which a search warrant may be drafted is to authorise a search for specific information stored on the device. We have had sight of a search warrant drafted in the following terms:

> All records, details, notes and files held whether on computer or otherwise ...
>
> All files and correspondence whether by email, letter or otherwise … between customers and/or clients and ...
>
> Any material recorded on servers accessible from the subject premises.

10.57 This is, as noted, the common alternative approach to drafting a search warrant; the information, rather than the device itself, is specified as the subject of the search. We discuss the advantages and disadvantages of search warrants being drafted in these terms below. In summary:

(1) Specifying the electronic information sought on the face of the warrant may avoid some of the difficulties discussed in the section above, namely:

(a) it is easier to see that such a warrant is compatible with the plain language of the statutory criteria for the grant of a search warrant;

(b) search warrants specifying the electronic information sought provide greater detail to the occupier of what material is of relevance; and

(c) the regime in Part 2 of CJPA will more clearly apply as the seizable material will be mixed with other material.

(2) Against this, there are disadvantages with search warrants drafted in these terms:

(a) specifying information contained on a device is difficult to reconcile with the single item theory endorsed by the courts;

(b) there are a number of operational pitfalls that may arise where the information is specified;

(c) it is unclear whether such warrants allow the search of devices on the premises; and

(d) there may be difficulties in establishing reasonable grounds for believing that the material is on the premises.

Advantages

10.58 We discuss below the advantages of drafting search warrants to specify the material contained on electronic devices.

Less problematic for application criteria

10.59 It is arguable that specifying the electronic information sought on the face of the warrant more satisfactorily satisfies the statutory criteria for the grant of a search warrant. If particular electronic information on computers on the premises are sought (rather than the devices on the premises), it is clearer to show, for example, that there are reasonable grounds for believing that the target material:

(1) is itself of substantial value;[810]

(2) is relevant evidence;[811] and

(3) does not consist of or include exempted material.[812]

Greater detail provided to occupier

10.60 The Divisional Court, although not ultimately swayed, has nonetheless acknowledged the attractiveness of search warrants specifying a list of the contents of devices sought.[813] Stakeholders have argued that the treatment of electronic devices as a single item sets at nought the specificity requirements of section 15(6)(b), which requires the search warrant to identify, so far as is practicable, the articles or persons to be sought.

Part 2 of CJPA more readily applies

10.61 We discuss in detail the regime in Part 2 of the CJPA 2001 at paragraph 10.91 and following below. As mentioned briefly at paragraph 10.55 above, where electronic devices are specified as the relevant material on the face of a search warrant, and no material on the device is excluded on the face of the warrant,[814] section 50 of CJPA does not apply as it is reasonably practicable to determine, for the purpose of section 50(1)(c) and 50(2)(a) of CJPA, whether the investigator is entitled to seize the entire device. Therefore, by specifying the information stored on the device, the search warrant will be more likely to be compatible with the underlying logic of Part 2 of CJPA,

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810 PACE, s 8(1)(b).

811 PACE, s 8(1)(c).

812 PACE, s 8(1)(d).

813 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

814 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [43].

which acknowledges electronic devices as containing both relevant and irrelevant material.

10.62 As we will see below, the application of the CJPA may mean that search and seizure is less intrusive and less likely to generate the problems concerning the right to privacy. For example, where the search and sift regime in Part 2 of CJPA applies there are greater safeguards and obligations concerning the return of property.

Disadvantages

10.63 We set out the disadvantages to search warrants specifying information contained on devices below.

Incompatible with single item theory

10.64 The approach of specifying the material contained on devices is difficult to reconcile with the single item theory, as it implicitly acknowledges that it is possible to identify material contained within the physical device that can be subject to search and seizure. On that basis it is illogical to suggest that the device is a single item and not a container.

10.65 Some draw the analogy with filing cabinets as noted above, but that does not really assist in determining the coherence of the courts' approach. If the material stored on the device is specified on the warrant that treats the electronic device as akin to a filing cabinet, recognising that it contains information. However, in the case of a real filing cabinet, the physical items remain distinct from the cabinet itself. By contrast, the data on electronic devices is intangible and so cannot be seized in the literal sense absent of seizure the device. Electronic information may, however, be copied. One solution to this conceptual conundrum may be, as a convenient fiction, explicitly to treat data on devices as tangible items.

Operational pitfalls

10.66 As noted briefly at paragraph 10.45 above, specifying information contained on the device may create a number of operational hurdles. First, as observed recently by the Supreme Court, the statutory search warrants scheme is designed to be operated speedily at an early stage in a police investigation.[815] As well as being time consuming, even if the investigator went to considerable lengths to specify the precise information, some categories could be missed, or there may be confusion on the day about the precise ambit of the search terms. This reasoning underpins the Divisional Court's most recent rejection of producing a list of the contents of devices rather than identifying the devices themselves.[816] The Court considered that the better place for the explanation and description of the contents or classes of contents sought is not the face of the warrant but the application for the search warrant before the judge, where the applicant is under a duty to give appropriate disclosure.[817]

10.67 Secondly, the assumption that electronic devices themselves will be able to be interrogated on the premises is not always correct. The material on the device is often

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815 *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [15]. Discussed in *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [13].

816 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

817 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [47].

inaccessible on the premises because the device is either locked or encrypted and the investigator does not have the necessary tools on-site to access the material. Additionally, the number of electronic devices that may contain relevant material on the premises may be such that the investigator does not have the time to target search each individual device. Furthermore, the electronic device itself may be needed for the purpose of proving provenance and continuity of evidence.

Unclear whether devices can be searched

10.68 On one view, if a search warrant explicitly authorises a search for material held on the device, there is power under sections 8 and 9 of PACE to search the device and therefore a power to seize (by copying or imaging) information so found, as well as a power to compel production of this information, under section 19(4) or 20(1) of PACE. On a contrary view, the search of electronic information on devices would exceed the search "of premises" as it would involve operating the device and therefore cannot take place, irrespective of whether information on a device is specified on the face of the search warrant.

10.69 Section 8(1) of PACE and paragraph 12 of Schedule 1 to PACE provide that officers are empowered "to enter and search the premises". There is an argument that this power does not extend to entry "to search the computers" on those premises. Therefore, search warrants could only be granted to search for and seize the physical devices themselves. Seizure powers relate only to physical objects and if intangible information is sought then the only avenues for this (under PACE) are the powers contained in sections 19(4) and 20(1) PACE.

10.70 Support for this distinction can be drawn from the contents of search warrants issued under Schedule 15 to the Data Protection Act 2018, which authorise investigators to:

(1) enter the premises;

(2) search the premises; and

(3) inspect, examine, operate and test any equipment found on the premises which is used or intended to be used for the processing of personal data.

The distinction between the search of premises and the operation of equipment gives further support to the view that searching the contents of an electronic device goes beyond searching the premises. Turning back to whether search warrants under PACE allow the search of devices, another reason against reading in such a power is the presumption against interference with a person's property or other economic interests.[818]

10.71 This interpretation may be perceived to create another disjunction between physical files and electronic files. Constables do of course open physical containers when they search premises for material under warrant, and it could be argued that they ought to have power to search a physical device like a computer or mobile phone in the execution of a warrant. That being said, physical containers and electronic devices are

[818] See O Jones, *Bennion on Statutory Interpretation* (6th ed 2013); *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffman; *R (Sainsburys Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437 at [9] per Lord Collins.

not analogous: opening containers on premises is still searching the premises because it is searching the "place". To "search" a computer, the investigator is not searching the premises but rather operating the computer.

10.72 In conclusion, it is unclear whether a search warrant under PACE, drafted appropriately, would allow the search of devices. If, hypothetically speaking, the answer was yes, it is also unclear whether the power to search devices would extend to material accessible from the device held on remote servers. We consider that this position ought to be clarified.

Whether material is "on the premises"

10.73 Another problem that may arise where the search warrant specifies material rather than electronic devices is whether the electronic material stored on a device is "on the premises" for the purpose of section 8(1)(b) of PACE. Some academics argue that the information itself is an abstraction without a location and warn of the danger of thinking of an electronic document as an object "somewhere there" on a computer in the same way as a hard copy book is in a library.[819] They observe that in this respect the electronic document as a single entity is in fact nowhere: it does not exist independently from the process that recreates it every time a user opens it on a screen.[820]

10.74 We do not agree that, for the purposes of section 8 and Schedule 1 to PACE at least, electronic information contained on a device is without a location. An electronic file will be made up of binary numbers and these numbers will be recorded by hardware inside computers in varying forms depending on the type of storage involved. In practice therefore the "relevant material" conditions in PACE for issuing a warrant are met, whether the materials to be searched for are defined as "a device which has relevant electronic information stored on it" or as "electronic information stored on a device". In the latter scenario, if relevant electronic information is found and copied or imaged then it is arguably the copy which is seized under section 8(2) or paragraph 13 of Schedule 1 to PACE. Section 63 of CJPA resolves this uncertainty in the context of the seize and sift provisions by providing that copies are to be treated as seizure of the original property.

10.75 Turning back to the PACE requirement that relevant material is "on the premises", there could be a situation where investigators are only interested in electronic information that is stored remotely. For example, if a suspect is known to be controlling or storing illicit material on a server abroad, it could be questioned whether a search for that material may properly meet the requirement of being "on the premises". A problem therefore emerges irrespective of which approach is adopted in the search warrant (single device or specified information) is where an investigator wishes to search for and seize remote material:

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819 B Schafer and S Mason, in S Mason and D Seng, *The Characteristics of Electronic Evidence* (4th ed 2017) para 2.10.

820 See also New Zealand Judge David Harvey, "Here's the thing: the cyber search provisions of the Search and Surveillance Act 2012" (2013) 10 *Digital Evidence and Electronic Signature Law* 39.

(1) a search warrant to search for and seize devices will not apply to electronic information that may be encountered on the premises through a live connection; and

(2) a search warrant to search for and seize information stored remotely from a device would not constitute information "on the premises".

10.76 In practice, however, these issues may not be too troublesome for investigators for two main reasons. First, sections 19 and 20 of PACE may allow access to the material, which we discuss at paragraph 10.103 and following below. Secondly, if the material was uploaded from – or has been viewed on – a device on the premises, the device may contain traces of its existence, or interactions with it in the form of search histories, metadata, and forms of temporary storage. These traces may in themselves be relevant evidence, as they are part of the chain of evidence leading to the desired materials, and if there are reasonable grounds for believing such evidence to be on the premises, the conditions for the grant of a warrant will be met. In practical terms therefore a warrant cast in terms either for the search for the device or a search of the device for the relevant material would provide sufficient powers to secure the relevant information.

10.77 The broader question of whether the power of search, pursuant to warrant, can be conducted "on" the foreign servers themselves from premises searched in the UK will be addressed below in paragraphs 10.131 and following.

Consultation Question 52

We invite consultees' views on the operation of the search warrants regime where warrants are drafted in terms of "information" rather than specifying devices.

In particular, we are interested to hear of experiences where searches under warrant for information stored in electronic form have created difficulties.

PART 2 OF THE CRIMINAL JUSTICE AND POLICE ACT 2001

10.78 During a search of premises under warrant, relevant material may be indeterminable or mixed with other material. For example, a computer hard drive may contain a vast amount of information which is irrelevant to the investigation, inadmissible, or exempted. Another example is documents in a foreign language that investigators are unable to translate and understand on the premises.

10.79 Part 2 of CJPA was enacted following the decision in *Bramley*,[821] in part to address this problem of indeterminable and mixed material being encountered by those executing search warrants. It provides a supplementary power of seizure. Part 2 of CJPA therefore creates a third route to the seizure of electronic devices.

10.80 In this section, we begin by providing an overview of the main provisions of Part 2 of CJPA, the full text of which can be found in Appendix 2 to this consultation paper. We

821 *R v Chesterfield Justices ex parte Bramley* [2000] QB 576.

then examine difficulties in the interpretation and application of the provisions and draw out our conclusions.

10.81 Section 59 of CJPA, which governs applications for the return of material seized, is discussed in detail in Chapter 7 at paragraph 7.27 and following above.

Overview of the provisions

10.82 Sections 50 and 51 of CJPA provide an additional power of seizure from the premises where it is not reasonably practicable to determine on the premises whether the object is, or contains, material which the investigator is entitled to seize. Section 50 of CJPA provides a power of seizure in relation to anything found on premises, whereas section 51 of CJPA provides a power of seizure where an investigator carries out a lawful search of a person.[822] Both sections provide two alternative routes of seizure – subsections (1) and (2) respectively – which have their own statutory conditions before they are engaged. These powers are known as "seize and sift".[823] These powers apply to searches under a variety of search powers and are not confined either to searches by police or to searches under a warrant.[824] They are an additional tool for investigators rather than a mandatory procedure.[825]

10.83 Section 52 of CJPA requires an investigator to give an occupier or other persons a notice specifying what has been seized, on what grounds, how to apply for its return and attend the initial examination. The Divisional Court has held that non-compliance with the safeguards under section 52 of CJPA does not necessarily render a seizure under section 50 unlawful. It was a matter to be taken into account on an application under section 59, in judicial review proceedings or under section 78 of PACE to exclude evidence at trial.[826]

10.84 Section 53 of CJPA sets out how, off-site, the initial examination of the property seized under sections 50 and 51 of CJPA should take place and what can be retained. The starting point under section 53(2) of CJPA is that an initial examination of the property must be carried out as soon as reasonably practicable, only to the extent necessary and in isolation of material seized under any other powers of seizure.[827] Anything found on that initial examination must be separated and returned, unless the seized property falls under one of the three categories under section 53(3). The categories of property that may be retained following the initial examination of seized property, broadly speaking, are where:

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822 Section 51 of CJPA may conceivably be exercised during a search under warrant where the search warrant authorises the search of persons found on the premises. For example, Misuse of Drugs Act 1971, s 23(3).

823 R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 4.121 and following; *M Zander on PACE* (7th ed 2015) para 2-61 and following.

824 The powers of seizure contained in Parts 2 and 3 of PACE are listed in both Part 1 and Part 2 of Schedule 1 to CJPA, so both section 50 and section 51 of CJPA apply to all searches under PACE, whether under warrant or otherwise.

825 *R* (*Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin), [2015] 2 Cr App R 26 at [43] per Fulford LJ.

826 *R (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin), [2013] 1 WLR 220 at [52].

827 Criminal Justice and Police Act 2001, s 53(2)(a), (b) and (d).

(1) the seized property is property for which the person seizing it had power to search when seizure was made (for example, the seized property falls within the scope of the search warrant);

(2) the seized property is property the retention of which is authorised under section 56 of CJPA (where e.g. there was a lawful search of premises, and the property is evidence in relation to an offence, and it is necessary to retain it in order to prevent its destruction. The grounds for retention here are broadly the same as the grounds for seizure under s. 19 PACE); and

(3) the material is something which, in all the circumstances, it will not be reasonably practicable, following the examination, to separate from property falling within either of the two categories above.

10.85 Sections 52 and 53 of CJPA only apply where material has been seized under sections 50 or 51 of CJPA. Therefore, where a device is specified and subsequently seized under the authority of a search warrant, rather than under section 50 or 51 of CJPA, the safeguards do not apply. A duty to provide a premises search record nonetheless falls upon the person who executes the search warrant under section 21(1) of PACE.

10.86 Sections 54 and 55 of CJPA create an obligation to return items subject to legal privilege, excluded and special procedure material, unless e.g. its retention is authorised by s. 56 and it is not reasonably practicable to separate the exempted material.

10.87 Section 56 of CJPA, as mentioned above, provides a right of retention in situations where e.g. there is a danger of destruction of evidence. Section 57 of CJPA sets out when property obtained under relevant powers may be retained. Section 58 of CJPA sets out to whom property which is obliged to be returned under Part 2 should be returned.

10.88 Section 59 of CJPA gives anyone with a relevant interest in the seized property the right to apply to the appropriate judicial authority for its return. Sections 60 and 61 of CJPA concern the duty to secure material seized pending a section 59 application. We discussed this section in detail in Chapter 7.

10.89 Section 62 of CJPA provides that inextricably linked property should not be examined or copied or used for any purpose other than for facilitating the use in any investigation or proceedings of property to which it is inextricably linked. Section 63 of CJPA provides that almost all of Part 2 of CJPA shall apply to copies as it does to originals.

Difficulties with the provisions

10.90 We have identified the following difficulties in the interpretation and application of the CJPA regime:

(1) the power of seizure under section 50 of CJPA does not apply where a search warrant specifies electronic *devices* as the material to be searched for and seized and no material is specified to be excluded on the face of the warrant;

(2) the statutory safeguards contained in sections 52 to 58 are of limited reach; and

(3) the provisions of CJPA may be unable to deal with the complexities of modern investigations.

Lack of applicability of seizure powers

10.91 The Divisional Court in *R (A) v Central Criminal Court* held that section 50(1) of CJPA is not confined to difficulties with legally privileged material.[828] This additional power of seizure was said to dovetail with the seizure of a phone or computer, authorised by a warrant.[829] Further, a lack of the notice requirements contained in section 52 does not invalidate the exercise of the power contained in section 50.[830] In other words, the CJPA safeguards and obligations apply even if the seizing officer may not have foreseen their use.

10.92 A problem may arise where the material that is specified for search and seizure under a PACE search warrant is the *device*, rather than particular information contained therein. This arguably precludes the application of Part 2 under the 'plain meaning' or literal rule of statutory construction. If a warrant specifies that there may be a search of premises for a computer (the specified "material"), and a computer is found in the search, then that material may be seized pursuant to the search warrant power. The additional powers of seizure under section 50(1) and (2) of CJPA are simply not engaged:

(1) section 50(1) does not apply due to section 50(1)(c), because it *is* reasonably practicable for it to be determined on the premises whether what the officer executing the warrant has found (the computer) is something that he or she is entitled to seize. The warrant clearly states that he or she is entitled to seize it; and

(2) section 50(2) does not apply because the computer is not comprised in something else that the investigator has no power to seize.

10.93 As a result, where there is search and seizure of electronic devices pursuant to a warrant – and the devices have been specified on the face of the warrant – recourse to Part 2 of CJPA is a voluntary exercise, rather than one that is compelled by law. The safeguards under sections 52 and 53 of CJPA only apply where property is seized under sections 50 or 51 of CJPA. A number of our stakeholders recognised this practical effect of treating a computer as 'relevant material' for the purposes of warrant applications and voiced concern regarding the circumvention of the greater protections in Part 2 of CJPA. One stakeholder argued that section 50 and 51 of CJPA are used in a fraction of instances when they should be.

10.94 The powers of seizure under section 50 of CJPA may, however, apply where electronic devices are specified and the wording of the warrant clearly excludes exempted material. The Divisional Court has held that a device can properly be the subject of a warrant under PACE, even where exempted material may be found on the device, provided the wording of the warrant clearly excludes any such exempted material from

828 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [53].

829 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [54].

830 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [54].

that which can be sought or seized.[831] In such cases, section 50(1)(c)(ii) of CJPA may apply: it will not be reasonably practicable to determine on the premises the extent to which the electronic device contains something that he or she is entitled to seize.

10.95 We have considered whether a hybrid warrant could be drafted so as to specify both devices and/or electronic information on the device, and whether this would provide the option to seize either devices or copy information stored therein. However, this would undermine the single item theory, risk falling foul of the specificity requirements of PACE,[832] and still allow the seizure of the device under the authority of the search warrant, thereby circumventing the CJPA safeguards.

Limited reach of statutory safeguards

10.96 In addition to the CJPA safeguards being precluded under the single item theory, the statutory safeguards are limited in two further respects:

(1) the safeguards are limited to particular powers of seizure; and

(2) investigators are unable to reclassify material where it later emerges that it should have been seized under the CJPA regime.

Limited to powers of seizure

10.97 Recourse to the seizure powers of CJPA are limited in another respect by virtue of section 50(1)(b), which provides that the powers of seizure in CJPA can only be used where a relevant power of seizure would otherwise exist. Section 50 therefore only applies where an investigator is able to exercise one of the powers of seizure specified in Part 1 of Schedule 1 to CJPA.

10.98 As a result, the powers of seizure in CJPA are not engaged where material is otherwise produced in response to production orders or production notices. For example, section 2(3) of the Criminal Justice Act 1987 empowers the Serious Fraud Office to require the production of documents and take copies or extracts from them. A similar "here and now" notice may be issued by the Financial Conduct Authority under section 165(3) of the Financial Services and Markets Act 2000.[833] Where, for example, in response to a production requirement a lawyer's iPhone is produced, which obviously would contain privileged material, the iPhone cannot be seized under the CJPA powers. We discuss a similar problem in the context of section 59 of CJPA in Chapter 7 at paragraph 7.39 above.

Inability to reclassify material

10.99 The Law Society's Criminal Law Committee also drew our attention to the fact that if, after conducting a search, it becomes apparent that a seized item contains privileged or other exempted material, there appears to be no mechanism to re-categorise the statutory provision permitting retention. Therefore, if electronic devices are seized pursuant to a search warrant adopting the single item theory, and it later becomes

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831 *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [53].

832 *R (Superior Import / Export Ltd) v Revenue and Customs Commissioners* [2017] EWHC 3172 (Admin), [2018] Lloyd's Rep FC 115 at [70] to [73].

833 See Sarah Clarke, *Insider Dealing: Law and Practice* (2013) at 22.11.

apparent that the device contains privileged or other exempted material, sections 52 and 53 of CJPA governing the sorting of material and the return of exempted and irrelevant material do not apply.

Inability to deal with complex investigations

10.100 The Divisional Court has recently heard a judicial review case, in which judgment has not yet been handed down, concerning the proper understanding of several concepts in the CJPA regime. This includes the meaning of "seized property", "return" and "reasonably practicable" in the context of a case in which dozens of terabytes of electronic material had been seized. The need for litigation on such fundamental issues arguably illustrates that the CJPA may be inadequate to deal with the modern realities of investigations.

Conclusion on the CJPA provisions

10.101 We are interested in consultees' views on the issues discussed above. In particular, we are interested in hearing views as to whether, and if so what parts of, the CJPA regime ought to be triggered where the seizure was not made under those powers but legally privileged or other exempted material is later discovered.

10.102 The PACE warrant provisions and Part 2 CJPA 2001 seek to reconcile two important public interests: the protection of personal and property rights of individuals against infringement, and effective investigation and prosecution of criminal wrongdoing.[834] We consider that if the statutory regime in the CJPA is to apply more broadly, parts of this regime, as well as PACE, may require modification.

Consultation Question 53

We invite consultees' views on:

(1) the current operation of Part 2 of the Criminal Justice and Police Act 2001 in relation to electronic material;

(2) whether the Criminal Justice and Police Act 2001 contains adequate safeguards where there is a search and seizure of electronic devices containing large volumes of data; and

(3) how, if the current safeguards are inadequate, consultees propose the scheme should be amended.

SECTIONS 19(4) AND 20(1) OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984

10.103 In this section we discuss to what extent the production of electronic information might be authorised by ancillary powers, which may be exercised by constables lawfully on any premises, whether under a warrant or not. In Chapter 2 at paragraph 2.4 above we set out other powers to enter premises and seize material, including under sections 18

834 See *R (A) v Central Criminal Court and another* [2017] EWHC 70 (Admin), [2017] 1 WLR 3567 at [31]; *R (S) v Chief Constable of the British Transport Police* [2013] EWHC 2189 (Admin), [2014] 1 WLR 1647 at [37] to [47].

and 32 of PACE. Powers of seizure are also contained in section 19 of PACE. Our focus in this section are the powers of production relating to electronic information contained in section 19(4) and 20(1) of PACE. Those powers amount to the fourth and final route to the obtaining of electronic material that we consider in this chapter.

10.104 We begin by providing an overview of sections 19(4) and 20(1) of PACE, the full text of which can be found in Appendix 2 to this consultation paper. We then examine difficulties in the interpretation and application of the provisions and draw out our conclusions.

Overview of the provisions

10.105 Section 19(4) of PACE, as amended by CJPA,[835] provides that a constable who is lawfully on any premises:

> May require any information which is stored in any electronic form and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form if he has reasonable grounds for believing—
>
> (a) that—
>
> (i) it is evidence in relation to an offence which he is investigating or any other offence; or
>
> (ii) it has been obtained in consequence of the commission of an offence; and
>
> (b) that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed.

10.106 Section 20(1) of PACE provides that:

> Every power of seizure which is conferred by an enactment to which this section applies on a constable who has entered premises in the exercise of a power conferred by an enactment shall be construed as including a power to require any information stored in any electronic form and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form.

Section 8(2) PACE, for example, confers a power of seizure "to which this section applies", and accordingly the power under section 20(1) of PACE applies whenever a section 8 warrant is executed.

10.107 On any interpretation, these are far-reaching powers, which apply in a broad range of circumstances. For example, a constable may be lawfully on premises, but without a search warrant, and he or she will be able to compel production of information pertaining to *any* offence, irrespective of whether it is an offence he or she is investigating. Or, if a constable is on premises pursuant to a warrant, section 20(1) allows the constable to compel production of information relating to that which he or she has been authorised

[835] CJPA, sch 2(2), para 13.

to search and seize. The power in section 19(4) could also operate in this situation if, for example, evidence of another offence becomes apparent while executing the search warrant.

Difficulties with the provisions

10.108 There are three main difficulties in the interpretation and application of sections 19(4) and 20(1) of PACE:

(1) they are not powers of search;

(2) the consequences of an occupier refusing to comply with a requirement are unclear; and

(3) the meaning of the word "accessible" is ambiguous in two respects:

(a) it is unclear when material is "accessible" from the premises, and

(b) it is unclear whether these powers extend to remotely stored material, particularly if it is stored in another jurisdiction.

Not a power of search

10.109 Sections 19(4) and 20(1) of PACE provide powers of production, not powers of search.

(1) Under section 19(2) and (3), the constable may seize anything on the premises if there are reasonable grounds for believing that certain conditions are satisfied, but there is no power actively to look for articles of this kind.

(2) The same must be true under section 19(4): if the constable comes across information stored in electronic form and has grounds for believing that those conditions are satisfied, he or she may require it to be produced in visible and legible form. Again, this does not imply a power to search for such information, unless that power already exists.

(3) Finally, section 20(1) of PACE provides that any power of seizure under certain statutes also includes a power to require production of information in visible and legible form. Again, this only extends the power of seizure and not the power of search.

10.110 Lord Justice Fulford in *R (on the application of Cabot Global Ltd) v Barkingside Magistrates' Court* emphasised that these sections are concerned not with powers of search but instead with powers of seizure.[836] On a literal reading, neither section 19(4) or 20(1) allow an investigator to interrogate a device themselves; they provide powers of production in certain situations, which would seemingly always require the assistance of a person on the premises. However, we are aware of some uncertainty about this in practice, and we have been informed that some investigators may be interpreting these provisions as providing permission to search with or without the assistance of those on the premises. Since section 19, in particular, applies even in circumstances where an

[836] *R* (*Cabot Global Ltd) v Barkingside Magistrates' Court* [2015] EWHC 1458 (Admin), [2015] 2 Cr App R 26 at [41].

officer is on premises without a warrant, there is a strong argument that these provisions should be interpreted narrowly.

Consequences of non-compliance

10.111 The consequences of the occupier refusing to produce the information in a visible and legible form are unclear. The power provided for in section 19(4) of PACE is a power bestowed on the constable to require something to be done. This is distinct from a positive obligation imposed on the occupier with sanctions for non-compliance as in, for example, the Financial Services and Markets Act 2000[837] or the Terrorism Act 2000.[838]

10.112 It was suggested by one stakeholder that it was probably thought at the time of enactment that there was no need for a binding requirement, as the option of printing out the material rather than seizing the device was partly for the convenience of the occupier. It was also suggested that a typical situation envisaged was probably one where the premises of an employer are being searched for evidence of criminal activity of a rogue employee, so that the employer would in any case wish to cooperate.

10.113 It is possible that failure to comply with a valid information requirement would constitute the offence of obstructing the police in the execution of their duty. Section 89(2) of the Police Act 1996 provides that:

> Any person who resists or wilfully obstructs a constable acting in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence.

A person obstructs a police constable if they make it more difficult for the constable to carry out their duty.[839] Omission to act can constitute obstruction.[840] As discussed in Chapter 6 at paragraph 6.79 above, obstruction offences also exist in relation to Revenue and Customs officers;[841] National Crime Agency officers designated as having the powers of constables;[842] and accredited financial investigators,[843] Serious Fraud Office officers,[844] and immigration officers[845] exercising relevant powers under the Proceeds of Crime Act 2002.

The meaning of the word “accessible”

10.114 As mentioned above, the meaning of the word “accessible” is ambiguous in two respects:

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837 Financial Services and Markets Act 2000, s 131E.

838 Terrorism Act 2000, sch 7, para 18. See *Rabbani v DPP* [2018] EWHC 1156 (Admin).

839 *Hinchcliffe v Sheldon* [1955] 3 All ER 406.

840 *Rice v Connolly* [1966] 2 QB 414.

841 Commissioners for Revenue and Customs Act 2005, s 31.

842 Crime and Courts Act 2013, s 10 and sch 5, para 21.

843 Proceeds of Crime Act 2002, s 453A.

844 Proceeds of Crime Act 2002, s 453B.

845 Proceeds of Crime Act 2002, s 453C.

(1) it is unclear when material is "accessible" from the premises, and

(2) it is unclear whether these powers extend to remotely stored material, particularly if it is stored in another jurisdiction.

When is information "accessible from the premises"?

10.115 A key issue under both sections 19(4) and 20(1) of PACE concerns the meaning of "accessible". Does material which is accessible mean only material immediately accessible to the investigator, using his or her own resources, or does it include material which can only be made accessible with the help of a person on the premises? That is, does a requirement under section 19(4) or 20(1) of PACE to produce material in visible and legible form include a requirement to provide login details and passwords?

10.116 There are several possible reasons why the investigator, once on the premises, may not be able to access or read electronic information:

(1) the machine is not switched on and requires login details or a password;

(2) the machine is switched on but is protected by a screensaver which requires a password;

(3) the document, or the folder or cloud account in which it is contained, is password protected; or

(4) the document is encrypted.

10.117 We are informed that one interpretation assumed in practice by some investigators is that they are limited to looking at, and requiring copies of, items in "plain view".[846] In other words, the items must be accessible on an operating device and not protected by passwords or other barriers.[847] Accordingly, in any of the circumstances set out in the last paragraph, the information is clearly not "accessible" and there is no obligation on the occupier or other person present to provide passwords or other access details. The obligation to provide the material in visible and legible form therefore does not apply in these cases.

10.118 However, it is unclear how even this rather narrow reading of the word "accessible" will be applied in practice. If, for example, a constable searches premises and sees a computer where the suspect is logged into a social media account, would the fact that this login was in "plain view" permit the downloading of all information stored by the social media site, concerning that individual and his or her connections on the platform?[848]

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[846] A doctrine of plain view operates in US law in the context of evidence of a crime identified during the course of a search: *United States v Adjani* (2006) 452 F 3d 1140, 1150.

[847] The investigator would of course be allowed to make use of passwords recorded in paper form or in openly accessible computer files, if these are found during the search.

[848] Data protection law compels data controllers to facilitate subject requests and, as a result, social media platforms like Facebook permit the downloading of almost all information stored by them in relation to each user, and this can be done fairly quickly if one has access to the relevant account.

10.119 We have been informed that some investigators may interpret sections 19 and 20 of PACE even more broadly than this. One stakeholder commented that the power to require any information to be produced in a form in which it is visible and legible is regularly used to compel the production of passwords and that the Serious Fraud Office's power under section 2 of the Criminal Justice Act 1987 is often interpreted to similar effect. This is notwithstanding that some police forces believe that they must follow the route set out under Part III RIPA by obtaining a decryption key. He described this "blurred and confusing" overlap as ripe for reform. We consider that the position ought to be clarified.

10.120 One problem with interpreting these provisions as empowering investigators to compel the production of passwords is that such an interpretation would produce very far reaching powers, particularly in the case of section 19 of PACE, which applies whenever the constable is lawfully on the premises for any reason, whether or not under a search warrant.

10.121 On this interpretation, there could be a power to compel passwords without judicial authorisation having been given at any stage. Moreover, it could be used to access everything from online bank accounts, to email, social media, or cloud storage accounts. This would clearly raise issues under Article 6 ECHR (the right to silence and the privilege against self-incrimination), which has been litigated on a number of occasions in the context of Part III RIPA and the power to compel disclosure of keys to protected information. It would also appear to go well beyond what sections 19(4) and 20(1) were intended to achieve; they were not designed as search powers, but simply as convenient means of taking away copies of documents already found, to save the inconvenience to both parties that may be caused by seizing the entire device.

Does "accessible from the premises" extend to remotely stored material abroad?

10.122 In 1984 the cloud did not exist and it was not common for material to be held on remote servers, though in some cases (for example banks) the device on the premises was not a computer but a terminal linked to a central computer located in the headquarters of the organisation. Both in 1984 and today, the condition of being "accessible from the premises" may be satisfied whether the physical device on which the material is stored is on the premises or elsewhere.

10.123 English criminal jurisdiction is territorial, which is reflected in the principle of statutory construction that, in the absence of clear words to the contrary, a statute will not be construed as applying to foreign individuals in respect of acts done by them abroad.[849]

10.124 It is unclear whether the phrase "accessible from the premises" extends to remotely stored material in another jurisdiction. Section 27(5)(e) of the Competition Act 1998, and several other Acts, which concern the power to enter premises or seize material, adopt identical terminology. It has been argued in the context of the Competition Act 1998 that the phrase "accessible from the premises" appears to extend in such a way

[849] See *Air India v Wiggins* [1980] 1 WLR 815, 820 to 821 per Lord Scarman; O Jones, *Bennion on Statutory Interpretation* (6th ed 2013) p 339 and following.

so as to avoid the complexity of establishing jurisdiction and enforcing warrants elsewhere.[850]

10.125 On the other hand, it has been questioned whether the phrase "accessible from the premises" in section 20 of PACE is sufficiently clear to displace the presumption against extraterritoriality.[851] Professor Ian Walden suggested that section 20(1) of PACE seems insufficient to govern the complex realities of modern network forensics, where law enforcement may, or may not, be aware of the actual location of the remote data. We have been informed by stakeholders that these powers have been used to access material based on a server in a different country.

10.126 We discuss issues concerning the searching and seizing remote material abroad in more detail in the final section at paragraph 10.131 below.

Conclusion on sections 19(4) and 20(1) of PACE

10.127 At paragraph 10.72 above, we considered the position to be unclear as to whether, if the warrant explicitly authorises a search for information held on the device, there is power under sections 8 and 9 of PACE to search the device, and therefore a power to seize (by copying or imaging) information so found.

10.128 Irrespective of this uncertainty, there is a power to compel production of electronic information under sections 19(4) or 20(1) of PACE where electronic devices are specified on the face of the warrant. In practice, however, there appears to be considerable uncertainty regarding the scope of these further production and seizure powers and whether they extend only to files that are stored locally on the device, or displayed on its screen, or whether the term "accessible" can be interpreted more broadly.

10.129 A key question of interpretation in this regard is whether sections 19(4) and 20(1) of PACE can be used to access information stored abroad but accessible from the premises. We turn to some of the possible international law ramifications in the final section below.

10.130 We acknowledge that sections 19(4) and 20(1) of PACE can be used in cases other than those where a search under warrant occurs. However, these powers are routinely used during searches under warrant and are ancillary to powers of seizure under the authority of the warrant. For these reasons, we consider it is important in this project to seek consultees' views on the operation of sections 19(4) and 20(1) of PACE and whether reform is needed.

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850 Sandra Colino, *Competition Law of the EU and UK* (2011) p 97.

851 Andrew Smith, "Do search warrants have extraterritorial effect?" (7 February 2018) Corker Binning Blog.

Consultation Question 54

We invite consultees' views on the operation of sections 19(4) and 20(1) of the Police and Criminal Evidence Act 1984 in respect of electronic information when searching premises under a search warrant. In particular, we invite consultees' views on whether reform of sections 19(4) and 20(1) of the Police and Criminal Evidence Act 1984 is needed. If so, we invite further views on:

(1) how these provisions ought to be reformed; and

(2) whether there is a need to reform these provisions beyond the context of searches of premises (which is the extent of the scope of this project).

SEARCHING AND SEIZING REMOTE MATERIAL LOCATED ABROAD

10.131 In this section we consider the novel issues which arise in relation to searching and seizing remote material located on servers abroad. This includes transborder searches, seizures and production powers.

10.132 It may be the case that in practice some searches under warrant already involve transborder searches, seizures and production notices in respect of remotely stored material. For example, we refer at paragraph 10.56 above to a search warrant which permitted the search and seizure of "any material recorded on servers accessible from the subject premises". We also refer to anecdotal evidence from stakeholders at paragraph 10.119 that powers of production are being used to access cloud-based material held in other jurisdictions. We conclude, at paragraphs 10.72 and 10.128 above respectively, that it is unclear whether the law permits these transborder investigative actions.

10.133 This scenario prompts consideration of the novel issues raised by the search and seizure of electronic information that is stored abroad. Since material stored *anywhere* in the world could be accessed from a foreign server by the click of a button, to a local device in this jurisdiction, investigators may be – whether unwittingly or otherwise – conducting transborder searches.

10.134 The legality of transborder searches engages issues beyond domestic law. Even if a search is lawful under the laws of England and Wales, it may be unlawful in the country where it occurs. Moreover, international law also regulates the circumstances when law enforcement agencies can exercise enforcement powers in the territories of other countries.

10.135 While international frameworks do exist for gathering evidence abroad, such as multilateral and bilateral Mutual Legal Assistance treaties, investigators are concerned

that these routes are often too slow and cumbersome for their investigative needs.[852] However, inroads are being made on this front.[853] Some major developments include:

(1) the European Investigation Order, which creates a single instrument for obtaining evidence in another member state, based on the principle of mutual recognition. It may therefore appear to the central authority that, in order to give effect to the European investigation order, it will be necessary to apply for a search warrant;[854]

(2) the Clarifying Lawful Overseas Use of Data (CLOUD) Act in the United States of America, which permits international sharing of data between US based service providers and foreign governments in certain circumstances and by Executive Order;[855] and

(3) a number of other proposals for enhanced and expedited sharing being considered at the European level.[856]

10.136 Notwithstanding these developments, where investigators have direct access to remote material from an electronic device on the premises, the most convenient route will naturally be to search and seize the material directly at the time.

10.137 In this section, we discuss:

(1) relevant international law and jurisdictional rules;

(2) the circumstances envisaged under the Cybercrime Convention (which the UK has ratified) for foreign searches;

(3) some recent international state practice in the context of transnational enforcement powers and remote computer searches; and

(4) challenges in relation to searching and seizing material hosted remotely abroad in the context of search warrants

10.138 This section illustrates the malleability of the concept of territoriality as applied to remote searches and the possible ramifications for investigators if search powers either explicitly or implicitly sanction remote searches.

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852 See *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [33].

853 See Cabinet Office, Summary of the Work of the Prime Minister's Special Envoy on Intelligence and Law Enforcement Data Sharing – Sir Nigel Sheinwald (2015).

854 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. See also the Criminal Justice (European Investigation Order) Regulations 2017 (SI 2017 no 730), para 38 to 41.

855 Clarifying Lawful Overseas Use of Data (CLOUD) Act (HR 4943).

856 See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for Electronic Evidence in Criminal Matters*, COM (2018) 225; European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings*, COM (2018) 226.

Jurisdiction in International law

10.139 The concept of jurisdiction has been described as "one of the most difficult words in the legal lexicon to delineate".[857] The advent of the internet has only exacerbated this challenge. Under international law, jurisdiction is generally understood to entail a three-part division between competences to regulate transnational activities:

(1) prescriptive jurisdiction – applied to criminal law, this refers to a state's authority to establish the content and scope of criminal law in relation to particular situations;

(2) adjudicative jurisdiction – applied to criminal law, this refers to the authority of a state to apply law to persons or things, in particular through the processes of its courts;[858] and

(3) enforcement jurisdiction – applied to criminal law, this refers to the authority of a state to enforce its criminal laws and compel compliance.[859]

It is the concept of enforcement jurisdiction that is of most relevance for present purposes.

10.140 Enforcement jurisdiction is said to be strictly territorial. The Permanent Court of International Justice in the *Lotus* case described enforcement jurisdiction as:

> The first and foremost restriction imposed by international law … [a State] may not exercise its power in any form in the territory of another State [failing the existence of a permissive rule to the contrary].[860]

10.141 This is a reflection of territorial sovereignty derived from principles of non-intervention and the sovereign equality of States.[861] A State cannot exercise enforcement jurisdiction outside its own territory in the absence of domestic authority, and even with this authority, the conduct may not be internationally lawful.[862] Without consent for the enforcement action, the rights and privileges of the territorial sovereign prevail.[863]

10.142 It is natural to attempt to transpose these fundamental rules of the international state system to the online world. It has been argued that enforcement activities by police in

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857 BJ George, "Extraterritorial Application of Penal Legislation" (1966) 64 *Michigan Law Review* 609.

858 See William Dodge, "Jurisdiction in the Fourth Restatement of Foreign Relations Law" (2017) 18 Yearbook of Private International Law 143, at 146.

859 See William Dodge, "Jurisdiction in the Fourth Restatement of Foreign Relations Law" (2017) 18 Yearbook of Private International Law 143, at 146; FA Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 *Recueil des Cours* 1; Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2(3) *Journal of International Criminal Justice* 735; and Michael Akehurst, "Jurisdiction in International law" (1973) 46 British Yearbook of International Law 145.

860 SS Lotus (France v Turkey), [1927] PCIL Reports, Series A No 10, at [45]; *Mackinnon v Donaldson* [1986] 1 Ch 482, 493G per Hoffman J.

861 Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed 2015).

862 FA Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 *Recueil des Cours* 1, 154.

863 FA Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 *Recueil des Cours* 1, 157; Michael Akehurst, "Jurisdiction in International law" (1973) 46 *British Yearbook of International Law* 145, 146 to 147.

relation to networks and computers located on another state's territory and outside a cooperation framework or otherwise without a prior consent would be unlawful.[864] However, there can be challenges in applying these rules to the online environment. As others have observed, investigators are not always aware and able to establish that a search extends to computer systems and data located in territories of other States.[865] Such technical investigative challenges can create substantial impediments for law enforcement and difficulties when transposing these international rules to investigations with a cyber dimension.

10.143 However, in some contexts involving transborder search or access to data, there may be no affront to sovereignty, and the non-intervention prohibition is itself limited by the 'de minimis' principle. Where, for example, production powers are used against domestic parties, concerning an exclusively domestic investigation, but the data happens to be abroad, the exercise of the power may not be of concern to the latter country, and therefore may not be problematic under international law.

10.144 One international instrument that is sometimes interpreted to permit some transnational investigative activities is the Cybercrime Convention.[866] However, it is clear that the Convention does not, in most scenarios, purport to regulate transnational searches where computer systems are searched abroad under the authority of a search warrant.

The Cybercrime Convention

10.145 The Cybercrime Convention, otherwise known as the Budapest Convention, is the most ratified international convention dealing with law enforcement activities in the digital environment. Some provisions of this instrument require State Parties to create domestic enforcement powers which allow, for example, the execution of a search warrant in order to search the computers of a suspect on premises.

10.146 Article 19 of the Convention requires State Parties to adopt measures to allow for the search and seizure of computer systems, and computer data stored therein, within their territory.[867] While Article 19(2) does envisage circumstances where searches of computers may need to extend to other computer systems, it only recognises the extension of such domestic search powers to computer systems within the same State.[868]

10.147 An alternative potential source of authority for such transnational search and seizure activities is sometimes said to be Article 32:

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[864] Katharina Ziolkowski, "General Principles of International Law as Applicable in Cyberspace" in K Ziolkowski, *Peacetime Regime for State Activities in Cyberspace* (2013).

[865] Henrik Kaspersen, *Cybercrime and Jurisdiction* (2009) para 76.

[866] Council of Europe, Convention on Cybercrime, 23 November 2001, ETS No 185.

[867] Convention on Cybercrime, Article 19(1).

[868] See also the Explanatory Report to the Cybercrime Convention, para 193.

(1) Article 32(a) allows a Party, without the authorisation of another Party, to access publicly available (open source) stored computer data, regardless of where the data is located geographically; and

(2) Article 32(b) allows a Party, without the authorisation of another Party, to access or receive, through a computer system in its territory, stored computer data located in the territory of another Party, if the Party obtains the *lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party* (emphasis added).

10.148 Article 32(a) would appear to cover rather uncontroversial law enforcement activities, where police are, for example, viewing publicly accessible webpages, which may be hosted abroad, as part of their investigative activities. It would clearly not cover the situations discussed above, where police are interrogating a device on the premises, and using passwords (whether obtained by compulsion or acquired covertly) to access computer data in other countries. This information is not "publicly available (open source)."

10.149 Article 32(b) is also a rather innocuous provision on first glance, but is the most controversial in the entire Convention. It has been described as the "most important provision on transborder access foreseen in the Convention".[869] It has been interpreted to apply to a wide variety of circumstances, such as where law enforcement agencies contact service providers in other countries for information stored abroad. The vagueness and uncertainty of its wording has been criticised in academic literature,[870] but it is at least again clear that it would not purport to regulate circumstances where police are searching a suspect's device for data stored abroad under warrant. These instances of remote searches will rarely, if ever, entail the "voluntary consent" of the suspect.

10.150 In short, the Cybercrime Convention currently cannot be relied upon to legitimise remote transnational searches of computer systems pursuant to warrant or related coercive powers. However, an additional protocol to the Convention is currently in the process of development and negotiation,[871] and it is intended that this will extend the circumstances where police can engage in such activities. As the next section outlines, it also appears that States are pursuing similar agendas domestically with attention increasingly turning to the legality of extending domestic search powers abroad.

Recent state practice concerning extraterritorial enforcement powers

10.151 Recent international practice indicates that the territoriality of enforcement jurisdiction is undergoing transformation in relation to investigations involving the internet. Almost every criminal investigation today will involve internet connected devices in some form,

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869 Council of Europe Transborder Group, *Transborder access and jurisdiction: what are the options?* (2012) para 89.

870 Micheál Ó Floinn, "It wasn't all white light before Prism: law enforcement practices in gathering data abroad and proposals for further transnational access at the Council of Europe" (2013) 29(5) *Computer Law and Security Review* 610.

871 Cybercrime Convention Committee, *Terms of Reference for the Preparation of a Draft 2nd Additional Protocol to the Budapest Convention on Cybercrime* (2017).

and relevant evidence is often stored abroad. Such investigations may be brought to an abrupt end if, for example:

(1) a relevant service provider is abroad;

(2) a suspect is controlling a remote resource that is inaccessible without their assistance; or

(3) a service provider is based or established within the jurisdiction, but the data is stored in another country.[872]

10.152 The UK government has recently adopted the view that:

> The global nature of the modern communications environment renders laws basing access to data purely on location ineffective and likely to lead to unintended and perverse outcomes. Further, for a nation's law enforcement functions to operate effectively, it requires access in limited and regulated circumstances to the electronic communications relating to those in its jurisdiction, wherever those communications are stored.[873]

10.153 States are gradually beginning to respond to these jurisdictional challenges. The UK has extended the reach of a range of enforcement powers in the Investigatory Powers Act 2016, in circumstances where foreign service providers are offering services to customers based within the United Kingdom.[874] The USA has recently passed the 'CLOUD' Act which now explicitly requires that domestic service providers must comply with search warrants regardless of where relevant data is located, provided it is within that provider's "possession, custody or control."[875] The Federal Rules of Criminal Procedure were also recently amended to permit remote access of electronic storage media, and seizure of information, whether within the district of the issuing State or otherwise, in defined situations, such as where the actual location of the device or information has been concealed through technological means.

10.154 In contrast, section 111 of New Zealand's Search and Surveillance Act 2012 seemingly permits remote access searches of material authorised by warrant. Although the actual jurisdictional ambit of these powers is uncertain and the subject of debate,[876] the New Zealand Law Commission and Ministry of Justice's 2018 report recommends the extension of these powers.[877] This included recommending that the government give

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872 See *US v Microsoft Corporation* 584 US (2018).

873 Brief of the Government of the United Kingdom of Great Britain and Northern Ireland. Available at: https://www.supremecourt.gov/DocketPDF/17/17-2/23693/20171213140104710_17-2%20-%20Government%20of%20the%20United%20Kingdom%20of%20Great%20Britain%20and%20Northern%20Ireland.pdf (last visited 29 May 2018).

874 Investigatory Powers Act 2016, s 97. See also explanatory notes to the Investigatory Powers Act 2016, para 283.

875 See §2713 of the Stored Communications Act (18 USC Chapter 121) as inserted by the Clarifying Lawful Overseas Use of Data (CLOUD) Act.

876 Chris Patterson, "Remote Searching: Trawling the Cloud" (2017) *New Zealand Criminal Law Review* 29, 36.

877 New Zealand Law Commission and Ministry of Justice *Review of the Search and Surveillance Act 2012 / Ko te Arotake i te Search and Surveillance Act 2012*, NZLC R141 (2017).

further consideration to whether provisions should be inserted into the Search and Surveillance Act 2012 to:

(1) require an enforcement officer to obtain a search warrant with Internet access authorisation before accessing the Internet during a search;

(2) allow an enforcement officer to obtain a search warrant with remote execution authorisation. This authorisation would enable a search warrant that only relates to an Internet search to be executed remotely; and

(3) enable an enforcement officer conducting a digital search pursuant to a search warrant to extend that search to internet-based data not specified in the warrant, by exercising a new warrantless power, if they have reasonable grounds to believe further statutory conditions are met.[878]

10.155 These developments illustrate that states are gradually grappling with how the concept of territoriality should be understood in the context of the networked environment and enforcement powers. Furthermore, states are delineating the circumstances where direct transnational activity is permissible.

Challenges under the current statutory regimes relating to search warrants

10.156 If a search of an electronic device following the execution of a search warrant was to entail the interrogation of data stored abroad, that would pose a number of risks for law enforcement. In particular, the search and seizure of remote material therefore raises issues in respect of:

(1) the admissibility of evidence;

(2) the commission of offences abroad in other states; and

(3) the legality of current search powers under international law.

We discuss each of these issues in turn.

10.157 First, the admissibility of evidence could be brought into question by the defence in any criminal prosecution where it is has been accessed remotely. For example, in the Scottish case of *L v HM Advocate*, the police had detained two individuals for questioning in relation to an assault, and took possession of their smartphones, accessing, amongst other things, text messages and Facebook communications.[879] One of the appellants argued that accessing the Facebook application involved accessing "virtual material",[880] which constituted an unlawful interception of

878 New Zealand Law Commission and Ministry of Justice *Review of the Search and Surveillance Act 2012 / Ko te Arotake i te Search and Surveillance Act 2012*, NZLC R141 (2017) p 220.

879 *L v HM Advocate* [2014] HCJAC 35.

880 *L v HM Advocate* [2014] HCJAC 35 at [8].

communications.[881] In the end, for various reasons, this issue was not addressed by the courts.[882]

10.158 Similar considerations arose in the recent US Supreme Court decision in *Riley v California*,[883] which also involved searches of mobile phones without a warrant. Chief Justice Roberts, who delivered the opinion of the Court, acknowledged that a further reason necessitating a warrant was that by accessing a suspect's phone and applications, the search may no longer be of data held in the device itself but involve the display of data stored remotely, and officers searching a phone's data would not typically know whether the information they are viewing was stored locally or has been pulled from the cloud.[884] If transnational searches do entail a breach of foreign law, or implicate the international law principles outlined above, it is to be expected that this will increasingly be a ground for challenge.

10.159 A second potential problem for law enforcement conducting these transnational searches is that they may unwittingly engage in computer misuse offences abroad. In such scenarios, domestic exemptions from criminal liability will not apply.[885] Professor Ian Walden notes that while section 19(4) of PACE does not have an explicit jurisdictional limitation, investigators may be in breach of unauthorised access offences in other jurisdictions if they conduct transborder searches of data.[886] The same would apply if electronic devices were searched under the authority of a warrant.

10.160 Thirdly, as demonstrated above, transborder investigations pose a risk to international relations and may potentially involve a breach of another state's sovereignty.

10.161 For these reasons, the potential ramifications of transborder search, seizure and production may be relevant to those authorising the searches of devices and data abroad and investigators executing search warrants or having recourse to other powers discussed in this chapter. For these reasons, we ask a series of consultation questions to determine the extent to which reform is required to take account of these issues.

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881 Micheál Ó Floinn and David Ormerod, "The use of social networking sites in criminal investigations" (2011) 10 *Criminal Law Review*, 766, 783 to 786. See also R v Coulson [2013] EWCA Crim 1026, [2014] 1 WLR 1119.

882 *L v HM Advocate* [2014] HCJAC 35 at [9].

883 *Riley v California* [2014] 573 US.

884 *Riley v California* [2014] 573 US, 21.

885 See Computer Misuse Act 1990, s 10.

886 Ian Walden "Computer Crime" in C Reed and J Angel, *Computer Law* (2003) para 8.7.2.

Consultation Question 55

We invite consultees' views on whether existing search warrant powers provide law enforcement agencies with sufficient powers to ensure the effective investigation of crime in the digital age. In particular, we invite views on:

(1) whether law enforcement agencies require powers of extraterritorial search, seizure and production under warrant;

(2) if so, when in practice there may be a need to engage in the extraterritorial search, seizure or production of electronic information under warrant; and

(3) whether reform to the Police and Criminal Evidence Act 1984 is required to permit any such investigative measures.

REFORMING THE LAW

10.162 It is clear that there are a number of issues with the current operation of search warrants and associated powers of seizure in the context of electronic material. Some of the emerging difficulties stem from the relevant specification of material in the warrant:

(1) if the electronic device(s) is specified on the face of the warrant, it carries clarity when executing warrants, but the single item theory generates interpretative difficulties for the provisions concerning specificity and exempted material, as well as the application of Part 2 of CJPA 2001; and

(2) if particular categories of electronic information are specified on the face of the warrant, it can obviate the interpretative challenges in (1) above, but can create practical and technical problems in the execution of the warrant.

10.163 Beyond these issues of warrant drafting, we have identified the following issues of uncertainty under the current statutory regimes:

(1) it is unclear whether a search warrant under PACE, drafted appropriately, would allow the search of devices on the premises;[887]

(2) sections 19(4) and 20(1) of PACE are unclear on:

(a) the consequences of non-compliance;[888] and

(b) when material is "accessible".[889]

(3) it is also unclear whether the current law permits:

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887 See para 10.72 above.

888 See para 10.111 above.

889 See para 10.119 above.

(a) transborder search and seizure under the authority of a search warrant under PACE;[890] and

(b) transborder production under sections 19(4) and 20(1) of PACE.[891]

10.164 Reform in this area could take many forms and, given the potential implications, will require rigorous scrutiny. An overarching principle that underpins our work is that any statutory framework must, reflecting the reality and complexities of the digital age, both facilitate the investigation of crime and safeguard the important public interest in protecting individual rights.

10.165 Investigations carried out by agencies now routinely have an international dimension, particularly when tackling serious or complex fraud, bribery and corruption. Individuals and companies being investigated may be part of a multinational group which conducts its business in multiple jurisdictions. The copying and transfer of documents between these jurisdictions occurs routinely and effortlessly. The location of electronic information may be fragmented or simply unknown. As a result, there is a risk that irrational legal distinctions about searches arise where data is stored remotely.

10.166 For these reasons, we consider that the statutory framework governing search warrants ought to be robust and clear. It should not unnecessarily hinder law enforcement investigations. To this end, we invite consultees' views on the powers law enforcement require under a search warrant to ensure the effective investigation of crime in the digital age.

10.167 Similarly, we recognise the concerns about the implications for the right to privacy due to the vast amounts of information that can now be stored on electronic devices, particularly when coupled with the powers of seizure in sections 19(4) and 20(1) of PACE, which are currently open to broad interpretation in practice. For these reasons, we consider briefly below potential reform to:

(1) the procedure for obtaining a search warrant in respect of electronic devices; and

(2) the application of the statutory safeguards under CJPA when electronic devices are seized.

Obtaining a search warrant in respect of electronic devices

10.168 The potential volume of information that can be obtained from seized devices, whether in business settings or otherwise, is staggering. It would not have been anticipated in 1984, when PACE was drafted, that the seizure of one small item like a mobile phone could give such unrestricted access into someone's life. We consider that these changed circumstances demand further considerations in the process for obtaining a search warrant.

10.169 First, we consider that there may be a need to resolve the interpretative challenges where devices are specified on the face of the warrant. As discussed above at

890 See para 10.72 above.

891 See para 10.127 above.

paragraph 10.59, this type of warrant creates difficulty in satisfying the statutory criteria, for example, in the context of exempted material.

10.170 Secondly, we consider that a broader range of considerations may need to be taken into account where electronic devices are searched for, and seized, in order to ensure the necessity and proportionality of the search is adequately considered by the issuing authority. For example, in applying for a warrant for special procedure material under the first set of access conditions, constables must satisfy a judge that other methods of obtaining the material have been tried without success or have not been tried because it appears that they are bound to fail. We consider that conditions such as these might also be appropriate whenever an investigator is applying for a search warrant which permits the seizure of electronic devices. There may be times, for example, where the information sought can be obtained by sending a request directly to a service provider under other statutory regimes.

10.171 Thirdly, we also see merit in a statutory regime which would require that investigators include protocols or schedules in warrant applications, which would outline the ways in which electronic devices are to be analysed once seized. Academic literature in the United States is divided as to the value and practicality of judges sanctioning and overseeing *ex ante* protocols and procedures for the analysis of devices.[892] We have seen evidence of this practice potentially occurring in this jurisdiction in relation to exempted material.[893] We do not at present have investigating magistrates in this jurisdiction who direct what investigators must do when evidence is seized. That being said, we are provisionally of the view that it could assist in considering the necessity and proportionality of searches of devices.

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892 See Adam Gershowitz, "The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches" (2016) 69(3) *Vanderbilt Law Review* 585; Orin Kerr, "Ex Ante Regulation of Computer Search and Seizure" (2010) 96 *Virginia Law Review* 1241.

893 *Fitzgerald v Preston Crown Court* [2018] EWHC 804 (Admin) at [74].

Consultation Question 56

We provisionally propose that additional steps should be introduced to require investigators and issuing authorities to consider the necessity and proportionality of the seizure of electronic devices. Do consultees agree?

If so, we invite consultees' views on whether:

(1) the legislative framework for applying for search warrants in relation to electronic devices ought to be clarified in order to ensure that this type of search warrant can be granted;

(2) additional criteria ought to be satisfied during the application stage and, if so, what; and

(3) investigators should have to present search protocols to the issuing authority in relation to electronic devices to be seized.

Seizure of device or only information on the device?

10.172 Several stakeholders considered that seizure of devices should not always be necessary. One stakeholder argued that extracting and imaging the relevant information on the premises[894] is a realistic option technologically speaking, and should be preferred when possible for several reasons. First, seizing the device, as opposed to the relevant material on it, can create a burden on the prosecution, as the scale of prosecution disclosure must then be increased. Secondly, there can be considerable delays in returning devices given the backlog that has accumulated for their analysis.[895] Thirdly, clients often prefer that devices are imaged or target searched *in situ* so that they can continue to use them.

10.173 One stakeholder suggested that one way in which to encourage the greater use of imaging would be to include the power to copy electronic devices subject to seizure at the premises, thereby removing the need to seize the devices. It was further suggested that this power could be included as a power given as part of the warrant.

10.174 However, stakeholders have informed us that whilst imaging devices at the premises is possible, there are several obstacles:

(1) an officer rarely knows what is in the premises until he or she arrives. It would be impractical to turn up to each and every set of premises with the necessary equipment and IT experts;

(2) it will often be impractical or even impossible to image or target search the device in the course of a search, such as where devices are password protected or encrypted.

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894 This is sometimes referred to as "interrogating the device in situ".

895 We were informed in one case that the wait to have the computer returned would be nine months.

10.175 Given the diverse circumstances where electronic devices and information are encountered in the execution of search warrants, we are reluctant to suggest that electronic devices should never be specified on the face of the warrant. We are also reluctant to mandate that imaging *in situ* is done, as opposed to seizure. However, if such practice is to continue, we provisionally consider that the statutory safeguards in CJPA ought to apply whenever an electronic device is seized. We also consider, however, that their application in every case in which electronic devices are involved may be particularly cumbersome for investigators. Additionally, the application of the CJPA safeguards should be considered through the lens of potential reform to their content, as envisaged by consultation question 53 above. Taking these points into account, we make the following provisional proposal regarding the CJPA safeguards.

Consultation Question 57

We provisionally propose that, in principle, the procedures and safeguards in the Criminal Justice and Police Act 2001 ought to apply whenever electronic devices are seized pursuant to a search warrant. Do consultees agree? If so, we invite consultees' views on which procedures and safeguards ought to apply.

Accessing password-protected or encrypted information

10.176 One common problem for investigators in the search of premises is accessing electronic material that is encrypted or password protected. This issue is partially addressed by Part III of RIPA, in that once a computer or phone has been seized a disclosure notice can be served, with the permission of a Circuit Judge, requiring the information needed to unlock the device.

10.177 Some stakeholders have reported shortcomings with Part III of RIPA. Stakeholders have also suggested the introduction of a power under warrant to compel passwords for electronic information. Two main arguments have been put forward for introducing a power under warrant to compel passwords or encryption keys:

(1) if the court is persuaded to issue a warrant permitting entry to the premises to be forced, the premises searched, and a laptop removed, it seems that the warrant should also be capable of permitting access to cloud data accessible from the laptop, as this is arguably a less intrusive act; and

(2) the use of electronic media, cloud storage and encryption is no longer the sole preserve of organised crime and has become common place. If would be burdensome if routine criminal investigations had to involve the special investigative methods in the IPA/RIPA etc.

10.178 Whilst we see merit in these arguments, we consider that to propose this kind of power would fall outside the scope of the present project, as it would in essence be an extension of other statutory powers that have not been the focus of the review. Whether or not such a power is desirable, discussion of it forms no part of the present project.

Chapter 11: Consolidating search warrants legislation

INTRODUCTION

11.1 Lord Justice Gross, in *Gittins*, referred to the legal framework of PACE and CJPA governing search warrants as an "unfortunate jumble of legislative provisions".[896] This was in reference to just two regimes. In the course of this project we have identified 176 search warrant provisions, contained in 138 separate pieces of legislation, listed in Appendix 1. Each power has its own grounds for issuing a warrant, its own conditions under which the search warrant can be executed and, in addition to search, may authorise associated powers (for example seizure).

11.2 The multiplicity of provisions puts a significant burden on issuing authorities and investigative agencies who deal with a wide range of warrants. Magistrates and judges must understand each specific statutory provision, and may only issue the warrant if they are satisfied that each ground set out in the statute has been met. Agencies must also ensure that they apply for a search warrant under the appropriate legislative scheme and abide strictly by the relevant statutory criteria and common law duties.

11.3 The number and complexity of search warrant powers can, and frequently does, lead to errors. One example is *Hargreaves*, discussed in Chapter 3.[897] In that case, both the applications and the magistrates' decisions failed to address each of the statutory grounds. The Divisional Court said that this failure led "inexorably" to the conclusion that the warrants could not stand.[898]

11.4 This leads to the question of whether search warrant powers ought to be consolidated. We use the term consolidation as a general term (not in its specific legislative sense of consolidating Acts), which may encompass:

(1) repealing unnecessary search warrant provisions;

(2) bringing all search warrant provisions into a single enactment;

(3) bringing related groups of search warrant provisions into their own enactments; and

(4) harmonising the language between provisions that are not different in substance.

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896 *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219 at [36(1)] per Gross LJ.

897 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [16].

898 *Hargreaves v Brecknock and Radnorshire Magistrates' Court* [2015] EWHC 1803 (Admin), (2015) 179 JP 399 at [32].

11.5 We discuss each of the above forms of consolidation in turn. Put briefly, the general advantages of consolidation are to bring about simplicity for applicants and issuing authorities. Fewer application forms may be required and the statutory grounds would be better known and understood. Reducing the number of schemes with which an applicant or issuing authority is required to be familiar will also reduce the chances of error.

11.6 On the other hand, the consolidation of so many powers, from so many different sources and drafted in such diverse ways, would be a significant task. There may be good reasons for many of the differences between powers. Furthermore, specialist investigators may prefer to operate under self-contained and comprehensive legislative schemes concerning their area of specialism. We would not wish to make changes to powers which work well simply for the sake of a tidy statute book, when in practice this would make navigating search warrant legislation more difficult.

Repealing unnecessary search warrant provisions

11.7 Stakeholders have indicated that particular statutory provisions are now redundant in light of the general nature of section 8 of PACE. Professor Richard Stone argued that, given the broad nature of section 8 of PACE, many of the specific search warrant provisions could potentially be repealed without any adverse effects on police powers. Rupert Bowers QC of Doughty Street Chambers agreed that section 8 covers most situations and pointed out that warrants under the Theft Act 1968, Misuse of Drugs Act 1971, Sexual Offences Act 2003 and others would seem to be unnecessary given the existence of section 8 of PACE but are still often sought.

11.8 The Metropolitan Police Service agreed that section 8 will invariably be the warrant of choice. However, the existence of other provisions may lead to the possibility of challenge. For example, where there is an importation of large scale drugs, the issuing authority may query why a search warrant under the Misuse of Drugs Act 1971 was not sought. Samantha Riggs of 25 Bedford Row, reported a similar experience in two cases involving environmental offences:

(1) in a case in London, the application for a warrant was made under the Environment Act 1995 and criticised on the ground that it should have been under PACE;

(2) in a case in Liverpool, on almost identical facts, the application was made under PACE and criticised on the ground that it should have been under the Environment Act 1995.

11.9 We are interested in consultees' views on whether there are any search warrant provisions that are unnecessary and therefore ought to be repealed. Care must be taken to prevent gaps in investigatory powers that would be left by repealing statutory provisions. For example, section 23(3) of the Misuse of Drugs Act empowers a constable to search any person found on the premises, which is not provided for by section 8 of PACE. Once lawfully on premises, under section 8 of PACE or otherwise, however, a constable can search a person under section 1(2) of PACE, which would prevent there being a gap.

Consultation Question 58

We invite consultees' views on whether there are any search warrant provisions that are unnecessary and therefore ought to be repealed.

CONSOLIDATING ALL SEARCH WARRANT PROVISIONS INTO A SINGLE ENACTMENT

11.10 The Criminal Law Committee of the Law Society advocated wider structural reform. They argued that the variety of routes and codes of practice provide little assistance in ensuring that applications are made clearly, precisely and objectively. Further, the availability of numerous routes to obtain the same outcome is likely to reduce the effectiveness of training received by applicants and issuing authorities. It was therefore argued that consideration should be given to a consolidation of all powers of entry. Jessica Parker, Partner at Corker Binning, argued that that search powers should be in one statute, as most practitioners deal with a spectrum of offences. Further, she suggested that codes of practice and guidance should also be consolidated in a single document.

11.11 Professors Ed Lloyd-Cape and Peter Hungerford-Welch also stated that are good arguments for codifying search and seizure powers, particularly so that those contained in PACE 1984 and those in the Criminal Justice and Police Act 2001 are dealt with in one piece of legislation. The applicability of the CJPA extends beyond powers in PACE, however, which may make codification to this extent difficult.

11.12 David McCluskey, Partner at Taylor Wessing, pointed out that there are an enormous number of further powers of seizure, which are predicated on officers being lawfully on, or lawfully entering, the premises. Examples include the recently commenced powers to seize "listed items" in the Criminal Finances Act 2017[899] and the various powers accorded to immigration officers on premises. He argues that such a proliferation of powers of seizure is not helpful and further serves to blur the lines of lawful execution of warrants.

11.13 Structural reform by consolidating powers of search and seizure would, in effect, lead to the creation of a Search Warrants Act. Consolidation of this magnitude has been considered in the past. The case has been made to provide a general framework for search warrants,[900] and to provide a single, over-arching power of entry.[901] Consolidation of search warrant powers into a single statute was recommended by the law reform bodies of Canada and the Republic of Ireland.

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899 Section 15 of the Criminal Finances Act 2017 introduces a new chapter 3A into Part 5 of POCA, which includes power for law enforcement agencies to seize and forfeit certain listed items of property. These provisions came into force on 16 April 2018: regulation 4 of the Criminal Finances Act 2017 (Commencement No. 4) Regulations 2018 (SI 2018 No 78).

900 Home Office, *PACE Review: Government proposals in response to the Review of the Police and Criminal Evidence Act 1984* (August 2008) para 9.2 to 9.5.

901 H Snook, *Crossing the Threshold: 266 ways the State can enter your home* (2007) p 54.

11.14 In general, the advantages of structural law reform have long been recognised by the periodic practice of the production of consolidation Bills.[902] Simply providing the law with a new, clearer structure, streamlining provisions where possible and restating the law in more modern language can make an area of law significantly clearer and more accessible.

11.15 The possibility of consolidating some or all of the specialist powers, however, caused some stakeholders concern. The Serious Fraud Office considered that interfering with a bespoke suite of investigation powers, such as theirs, risked disrupting coherent regimes and diluting search powers in all sorts of undesirable ways. Another concern was that jurisdictional anomalies might arise: for example, a different statutory footing for the Serious Fraud Office's search powers in Northern Ireland as compared to England and Wales. A similar view was also held by the legal advisor to the Royal Military Police and Deputy Director of Service Prosecutions, who both considered that service law search warrants ought to remain within a stand-alone military law code. In a similar vein, Jonathan Hall QC of 6KBW College Hill made the point that separate powers for separate agencies can be a good thing, as it keeps agencies focused on their specific remit. Further, those bodies become accustomed to using their particular search powers, thereby reducing the risk of errors.

11.16 Statutory consolidation of all search warrant provisions would be a significant undertaking, even if confined to warrants issued for the purposes of a criminal investigation. For the reasons set out above, we provisionally propose that the disadvantages of consolidating all search warrant provisions outweighs the benefits.

Consultation Question 59

We provisionally conclude that there should not be a single statute consolidating all search warrant provisions. Do consultees agree?

CONSOLIDATING PARTICULAR GROUPS OF SEARCH WARRANT POWERS

11.17 In this section, we consider the different types of warrants, so as to allow consideration of what groups of powers might be consolidated and whether a more limited exercise, consolidating only certain categories of powers, would be beneficial.

Search warrants for the purpose of finding evidence relevant to a criminal offence

11.18 The search warrant power most familiar to applicants and issuing authorities is that in section 8 of PACE. In broad terms this requires reasonable grounds for believing that:

(1) an indictable offence has been committed;

(2) material is on the premises which is likely to be of substantial value to the investigation and relevant evidence, and which is not within one of the exclude categories; and

[902] For discussion see D Greenberg, *Craies on Legislation* (11th ed 2017) para 1.9.1.

(3) it is not practicable to gain access to the premises or materials by other means or, without a warrant, the purpose of the search may be frustrated.

11.19 Many other statutory powers set out grounds that, while similar to section 8 of PACE, include differences. For example:

(1) while section 8 of PACE requires reasonable grounds for believing that an offence has been committed, other powers are broader, and refer to reason to believe or suspect that an offence "is being", or "is about to be", committed on the premises. The purpose of entry may therefore extend to prevention as well as investigation;

(2) while section 8 of PACE may only be used by a constable, many powers refer to different agencies;

(3) while section 8 of PACE is confined to indictable offences, other powers may be used for summary offences or for offences under foreign or military law; and

(4) while section 8 of PACE may only be used to seize relevant evidence of a criminal offence, some powers are not confined to seizing evidence. They may be concerned with removing dangerous or unlawfully possessed objects, or with rescuing endangered people or animals. Other powers are concerned with more complex investigations which might (or might not) result in prosecution.

11.20 Below we provide examples of each of these four categories to illustrate the differences.

Warrants for current or expected offences

11.21 Some warrants refer to a possible offence which *has been or is being committed.* In the following examples, the offence must be committed on the premises which are the subject of the warrant:

(1) section 25 of the Animals (Scientific Procedures) Act 1986, where the conditions of issue are that there are reasonable grounds for believing that an offence under the Act has been committed or is being committed at any place and the warrant gives power to search that place; and

(2) paragraph 5 of Schedule 3B to the Human Fertilisation and Embryology Act 1990, which provides that, if there are reasonable grounds for believing that an offence under the Act is being or has been committed on any premises, a warrant may be issued to search those premises.[903]

11.22 In the following cases, the grounds are that an offence "has been or is being committed", but not necessarily on the premises which are being searched. It is enough that evidence may be found on the premises:

(1) section 366 of the Communications Act 2003, where the conditions of issue are that there are reasonable grounds for believing that an offence under section 363

[903] Similar powers exist under the Human Tissue Act 2004, sch 5, para 3 and the Human Tissue (Quality and Safety for Human Application) Regulations 2007 (SI 2007 No 1523), reg 23.

(unauthorised installation of a television receiver) has been or is being committed, and there is power to test any television found on the premises;

(2) section 97 of the Wireless Telegraphy Act 2006, which relies on reasonable grounds for suspecting that a specified offence under the Act (such as interfering with wireless telegraphy) has been or is being committed; and

(3) section 2B of the Protection from Harassment Act 1997, which relies on reasonable grounds for believing that an offence under section 2A (stalking) has been or is being committed.

11.23 Often there will be no difference between believing that an offence "has been" committed and "is being" committed. The phrase "is being committed" may simply refer to a series of acts, any one of which would be sufficient to constitute the offence. In other cases, however, several acts will be necessary to constitute the offence, and the offence will not have taken place until the final act. In these cases, the inclusion of the words "is being committed" makes a real difference to the scope of the power.[904]

11.24 A more significant difference is where a search power extends to cases where there are grounds for believing or suspecting that a relevant offence *is about to be committed* on the premises. For example:

(1) section 118C of the Customs and Excise Management Act 1979, which relies on reasonable grounds for suspecting either that a serious customs offence is being, has been or is about to be committed on any premises or that evidence of such an offence is to be found there;

(2) section 21A of the Copyright Act 1996, which relies on reasonable grounds for believing that an offence relating to infringing copies has been or is about to be committed on the premises, and there is power to seize the infringing copies, but only for the purposes of evidence;[905]

(3) section 29 of the Chemical Weapons Act 1996, where the conditions of issue are that there are reasonable grounds for suspecting either that an offence under the Act is being, has been or is about to be committed on the premises or that evidence of the commission of such an offence is to be found there; and

(4) section 4 of the Biological Weapons Act 1974, which relies on reasonable grounds for suspecting that an offence under section 1 has been or is about to be committed, and there is power to inspect, seize and detain any equipment found.

11.25 While most search warrant powers require "reasonable grounds for believing", many powers which refer to future offences impose the less onerous standard that there

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904 However, the facts may be such that a person may be guilty of attempting to commit the offence: see Criminal Attempts Act 1981, s 1.

905 There are similar powers under the Copyright (Computer Software) Amendment Act 1985, s 3; and the Copyright, Patents and Designs Act 1988, ss 109, 200 and 297B. See also the Trade Marks Act 1994, s 92A.

should be “reasonable grounds for suspecting”. Clearly, when one is speculating about the future, there is less certainty about what may happen.

11.26 Existing powers of search in relation to future crime mostly concern either dangerous weapons or impending breaches of intellectual property law, where the infringing copies have been brought into existence but have not yet been put into circulation.

Non-police investigations

11.27 One of the main reasons why some statutes provide separate search warrant provisions (rather than simply relying on section 8 of PACE) is that the PACE powers are conferred only on “constables”. Other investigative agencies require different powers.

11.28 It would clearly be possible to expand section 8 so that it could be used by non-police agencies. However, long Schedules would be required to specify who was authorised to use the section and for what purposes.

11.29 There may also be a more fundamental objection. The power to apply for a search warrant sits within more general powers to enter, inspect and require the production of documents. Agency staff are likely to value the ability to see all their powers in one place, rather than being required to leaf through long additional schedules to PACE to find their search warrant power. Furthermore, agencies are likely to be familiar with their own powers, so will not necessarily reap benefits from consolidating their powers with those of others.

Non-indictable offences

11.30 Section 8 of PACE is confined to indictable offences. Some other powers allow search warrants for summary offences. For example:

(1) section 23(1) of the Animal Welfare Act 2006 provides search warrant powers in connection with any offence under the Act, not all of which are indictable; and

(2) similarly, under regulation 115(3) of the Conservation of Habitats and Species Regulations 2017 (SI 2010 No 1012) most offences are indictable but some (such as false statements under regulation 59) are summary only.

11.31 One possible approach might be to extend section 8 of PACE to any summary offences set out in a Schedule. However, it would be important to preserve any limitations to search warrant powers in connection with summary offences.

11.32 Some warrants concern foreign law offences. These are:

(1) sections 16, 17 and 22 of the Crime (International Cooperation) Act 2003 which depend on offences or criminal proceedings or investigations taking place abroad; and

(2) section 156 of the Extradition Act 2003 which depends on reasonable grounds for suspecting that a person has committed an offence abroad, and on that person in fact being accused of it in that foreign jurisdiction.

11.33 Search warrants for foreign offences have their own complexities and are often dependent on international treaties. Our preliminary view is that these would need be retained as discrete powers forming part of their own schemes.

11.34 Other warrants concern offences under service law. These include warrants under:

(1) section 83 of the Armed Forces Act 2006; and

(2) paragraph 12 of Schedule 1 to the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009 (SI 2009 No 2056) (the military equivalent of Schedule 1 to PACE).

11.35 The service law search warrants are closely modelled on section 8 of PACE. The general policy, however, is to keep service law as autonomous as possible, not least because of questions of extraterritoriality. As stated above, following discussions with the legal advisor to the Royal Military Police, we consider that service law search warrants ought to remain within a stand-alone code.

Other powers

11.36 In some cases, a warrant giving power to search for evidence of an offence may also confer other powers, such as to remove dangerous articles. We discuss these below, together with other warrants concerned with the prevention or remedying of dangerous or unlawful situations.

11.37 In other cases, the test is whether the seized material would be of substantial value to the investigation, even if there is no intention to use it in evidence in a criminal prosecution. Several examples of this type of power concern terrorism investigations:

(1) paragraph 1 of Schedule 5 to the Terrorism Act 2000 provides a power to authorise seizure of anything likely to be of substantial value for a terrorist investigation. Although the power is modelled on section 8 of PACE, it does not require suspicion of a specific offence and "terrorist investigation" can go wider than preparing for a prosecution; and

(2) paragraph 8 of Schedule 5 to the Terrorism Prevention and Investigation Measures Act 2011 ("TPIM") is not confined to evidence in relation to an offence. It also permits a search for anything required to ascertain whether an individual is complying with a TPIM notice or to secure compliance with a notice.

11.38 Given public concerns, there is a strong argument that the powers available to terrorism investigations should be wider than those available under section 8 of PACE. This would be an argument against including terrorism investigation powers within any consolidated power.

Consultation Question 60

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with finding evidence relevant to suspected criminal offences.

If so, we invite consultees' views on the extent to which consolidation ought to take place.

Search warrants concerned with dangerous or unlawful situations

11.39 There is a category of warrants in which the conditions of issue do not depend on reasonable grounds to believe that an offence is being or is about to be committed. In these cases, the main ground for the warrant is the presence of some forbidden article or undesirable state of affairs on the premises.

11.40 In Chapter 2 we outlined some commonly used warrants of this kind, concerned with searches for stolen property under section 26 of the Theft Act 1968, controlled drugs under section 23(3) of the Misuse of Drugs Act 1971 and firearms under section 46 of the Firearms Act 1968. There are many other search warrant powers in this category including:

(1) section 19(4) of the Animal Welfare Act 2006, where the condition of access is there are reasonable grounds for believing that a protected animal is on the premises and is suffering or is likely to suffer;

(2) section 5(2) of the Chemical Weapons Act 1996, where the condition of access is that there is reasonable cause to believe that a chemical weapon is on the premises; and

(3) regulation 9(1) of the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (SI 1997 No 1372), where the condition of access is that there are reasonable grounds for believing that an unlawfully imported or acquired specimen is on the premises and there is power to take blood samples and similar, to ascertain the animal's ancestry.

11.41 In some cases, the remedying of the dangerous or unlawful situation is the sole purpose of the warrant. Other warrants may be regarded as hybrid: the purpose may be either to prevent a dangerous or unlawful situation or to find evidence of an offence. For example, a warrant may be issued under section 23(1) of the Animal Welfare Act 2006 if there are reasonable grounds for believing either that a relevant offence has been committed on the premises or that evidence of the commission of the offence is to be found there.[906] In some respects, these warrants, based on grounds for believing or suspecting that an offence is being or is about to be committed, belong to this hybrid group.

11.42 The powers existing for the purpose of preventing or remedying a dangerous or unlawful situation would be difficult to consolidate with that in section 8 of PACE, though it might

[906] See also Chemical Weapons Act 1996, s 29.

be possible to harmonise these powers among themselves, so that they became more standardised.

Consultation Question 61

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with preventing or remedying dangerous or unlawful situations.

If so, we invite consultees' views on the extent to which consolidation ought to take place.

Search warrants in default of a production order

11.43 So far in this chapter, we have considered search warrants that have areas of similarity and difference with section 8 of PACE, in that they depend on reasonable grounds to believe or suspect something akin to a criminal offence.

11.44 Other categories of warrants are issued for the purposes of more complex investigations, for example in the field of financial services. These do not necessarily involve a criminal offence, although a criminal prosecution may be one option anticipated by the investigator.

11.45 A common feature of these wider investigation warrants is that the primary mechanism for obtaining the materials sought is by way of a production order or similar notice. A warrant is only issued if either a production order has been tried and failed or it has not been tried because it would clearly be unsuccessful. Examples are:

(1) Section 28 of the Competition Act 1998, where the condition of access is that there are reasonable grounds for suspecting that there are documents on the premises which may be required to be produced under the Act and either:

(a) their production has been required but they have not been produced;

(b) the power to require their production has not been exercised because there is reason to suspect that they would be concealed, removed, tampered with or destroyed; or

(c) an investigating officer has tried and failed to gain access to the premises.

(2) Section 2(4) of the Criminal Justice Act 1987, where a warrant may be issued on the application of a member of the Serious Fraud Office if there are reasonable grounds for believing that:

(a) a person has failed to produce documents when required to do so under section 2; or

(b) it is not practicable to serve a notice or it would seriously prejudice the investigation.

11.46 These powers tend to be more uniform than the "criminal investigation" powers discussed above. In these cases, the condition of issue is that either:

(1) a production order (or similar procedure by another name) has been made and not complied with, or

(2) no production order has been made, because it would not be successful, usually because products or documents on the premises would be hidden or destroyed.

11.47 This means that it might be possible to consolidate various powers into a single standardised provision, which applies to the production orders listed in a Schedule.

11.48 The advantage is that issuing authorities would be more familiar with the power, and that standard application forms and warrants could be drafted to cover it. The disadvantage is that each of the search warrant powers may be part of a carefully tailored, specialised and comprehensive scheme, which should not be replaced with a "one size fits all" solution.

Consultation Question 62

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with investigations in which production orders or similar procedures are available.

If so, we invite consultees' views on the extent to which consolidation ought to take place.

Consultation Question 63

Do consultees favour any schemes of consolidation of search warrants other than those described in the previous consultation questions, and if so what?

STANDARDISING THE ACCESSIBILITY CONDITIONS

11.49 Most powers to issue warrants depend on conditions showing that the warrant is needed because the material cannot be obtained by other means. The exact conditions vary from one statutory scheme to another, and in the following paragraphs we set out a few examples.

11.50 In section 8 of PACE, the conditions are mostly concerned with access to the premises. They are as follows:

(1) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(2) that it is practicable to communicate with a person entitled to grant entry to the premises, but it is not practicable to communicate with any person entitled to grant access to the evidence;

(3) that entry to the premises will not be granted unless a warrant is produced; or

(4) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

It is sufficient if the court is satisfied that there are reasonable grounds for believing one of these: the court need not be satisfied that any of them is so in fact. Similar conditions are found in connection with many other search powers.[907]

11.51 We have identified the following anomalies across the accessibility conditions:

(1) the lack of availability for a search warrant where access is granted by an occupier to premises but not material on the premises;

(2) the differing states of knowledge in respect of accessibility conditions;

(3) the accessibility conditions relating to production orders; and

(4) the overall number of different accessibility conditions.

Access granted by occupier to premises but not materials on the premises

11.52 Conditions (3) and (4) mainly concern access to the premises: the situations covered are those where either the occupier will never grant entry to the premises, or the occupier will not grant entry until later, by which time the evidence might have been disposed of. There is no power to issue a warrant in cases where the occupier is willing to grant access to the premises but will not allow the investigator to search for and copy materials. If the investigator is on the premises by the permission of the occupier, and not under a warrant, the only power available is that in section 19 of PACE, allowing the seizure of evidence that might otherwise be tampered with or destroyed; and these powers are only available if the investigator is a police officer.

11.53 The Data Protection Act 2018 includes a condition that entry to the premises was granted but the occupier unreasonably refused to comply with a request by the Commissioner or the Commissioner's officers or staff to be allowed to enter and search the premises, inspect, examine, operate and test any equipment.[908]

States of knowledge in respect of accessibility conditions

11.54 There are different conditions for making a production order or issuing a warrant under Schedule 1 to PACE for obtaining access to excluded material or special procedure material. There is a “first set of access conditions”, governing access to special procedure material, and a “second set of access conditions”, which can be used for either excluded or special procedure material.[909] We invite views on whether the second set of access conditions ought to be abolished in Chapter 9.

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907 For example, Anti-terrorism, Crime and Security Act 2001, s 66; Communications Act 2003, s 366; Criminal Justice Act 1988, s 142; Extradition Act 2003, s 156; Marine and Coastal Access Act 2009, s 249; and several powers concerned with immigration.

908 Data Protection Act 2018, sch 15, para 4(3)(b).

909 See the table at para 2.54 above.

11.55 There is some overlap between the conditions under Schedule 1 to PACE and section 8 of PACE. One important difference is that, under Schedule 1, the judge must be satisfied that these conditions are true in fact. In section 8 the issuing authority need only be satisfied that there are reasonable grounds for believing that the conditions are true.

11.56 In other provisions for the issue of warrants, yet another set of four conditions is to be found:

(1) admission has been or is likely to be refused and notice of intention to apply for a warrant has been given;

(2) making an application for admission or giving notice of intention to apply for a warrant would defeat the object of the investigation;

(3) the premises are unoccupied; or

(4) the occupier is temporarily absent and it might defeat the object of the entry to await his return.[910]

11.57 Within this group, in some cases the issuing authority need only be satisfied that there is reason to believe one of these;[911] in others it must be satisfied that one of these is so in fact.[912]

11.58 We have not identified any logical basis for this distinction. In each case the conditions to be fulfilled are a mixture of verifiable facts (such as that admission has been refused, or that the premises are unoccupied) and hypothetical predictions (such as that admission is likely to be refused or that giving notice would defeat the object of the investigation). It would make more sense if there were a uniform rule that:

(1) where the condition relates to a verifiable past or existing fact, the issuing authority has to be satisfied of the truth of that fact; but

(2) where the condition relates to a person's state of mind or a possible future event, the issuing authority need require no more than reasonable grounds for belief or suspicion.

11.59 A further group of powers, mostly concerned with financial services, contains conditions in the form that:

(1) a notice to produce (or, in the case of some powers, a production order or information requirement) has been given and not complied with;

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910 These provisions are listed in the next two footnotes.

911 Human Fertilisation and Embryology Act 1990, sch 3B, para 5; Human Tissue Act 2004, sch 5, para 3.

912 Building Act 1984, s 95(3); Forest Law Enforcement, Governance and Trade Regulations 2012 (SI 2012 No 178), reg 6(6); Non-Commercial Movement of Pet Animals Order 2011 (SI 2011 No 2883), art 15(4); Plant Protection Products Regulations 2011 (SI 2011 No 2131), sch 1, para 2; Radio Equipment and Telecommunications Terminal Equipment Regulations 2000 (SI 2000 No 730), sch 9, para 9(2); and several powers concerned with fisheries.

(2) a notice to produce/production order has not been given because it would not be complied with; or

(3) if a notice to produce/production order were given, it is likely that the material would be removed, destroyed or tampered with.[913] In some cases the requirement is that the notice would not be complied with *and* it is likely that the material would be removed or destroyed;[914] in others it is that the notice would not be complied with *or* it is likely that the material would be removed or destroyed.[915]

11.60 Sometimes there are further alternatives, to the effect that the information provided in answer to a production order justifies further investigation but that if further information or documents were required they would be removed, destroyed or tampered with;[916] or that an inspector has called but been refused entry.[917]

11.61 The purpose of these provisions is to ensure that, wherever possible, investigators should use notices to produce (or production orders) in preference to search warrants. Accordingly, warrants can only be issued if either the procedure for the notice to produce has been tried and failed or it is clearly hopeless for the reasons given.

11.62 Within the group of powers relating to financial services, there is not complete consistency as to whether the court needs to be satisfied that there are reasonable grounds for believing the condition or that the condition is so in fact. The general rule is in accordance with that suggested above: that the court must to be satisfied of the truth of verifiable conditions such as that a production order has been made and not complied with, but need only be satisfied that there are reasonable grounds for believing hypothetical propositions such as the likelihood that material will be removed or destroyed. There are, however, exceptions: for example, in section 83ZL of the Banking Act 2009, the court need not be satisfied that that a person has failed to comply with an information requirement, but only that there are reasonable grounds for believing this.[918]

Accessibility conditions relating to production orders

11.63 One particular gap has been identified in the "financial services" group of powers. Generally, these require that *either* a production order has been made and not complied with *or* it has not been made because it would not be complied with; it is only in the second case that the further concern about the possible destruction or alteration of the material applies. One stakeholder argued that this fails to cover the case where an

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913 Banking Act 2009, s 194; Charities Act 2011, s 48; Companies Act 1985, s 448; Competition Act 1998, s 28A; Financial Services and Markets Act 2000, s 176; Financial Services (Banking Reform) Act 2013; Friendly Societies Act 1992, s 62A; Money Laundering Regulations 2007 (SI 2007 No 2157), reg 39(1); Pensions Act 2004, ss 78 and 194; Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017 No 692), reg 70(1).

914 Banking Act 2009, s 194.

915 Charities Act 2011, s 48.

916 Compensation Act 2006, s 8(5);

917 Banking Act 2009, s 194; Competition Act 1998, ss 28 and 65G.

918 We have not found an exception in the opposite direction, namely a case where the court must be satisfied that there is in fact a risk of removal or destruction.

informal request for the information or documents has been made and agreed to, but the person in question either delays complying or agrees to comply only on conditions (that may change as time passes). In these cases, too, there is always the danger that the material will be interfered with, but there may not be tangible evidence of such a risk. That is, the legislation envisages only immediate compliance or outright refusal, and does not allow for less obvious forms of obstructive behaviour or failure to cooperate. As one stakeholder expressed it, the alternative conditions are not "match fitted".

11.64 That being said, if a production order has been made, it must be complied with within a stated period: no distinction is drawn between delay and outright refusal. If the material is requested informally, and there is undue delay, a production order can be made: it is not a condition of a production order that the materials have been requested and refused. Nevertheless, as suggested in more detail at paragraph 11.73 below, it might be better for the legislation to provide that a warrant may be issued whenever there is a danger of destruction or interference, independent of whether a production order has been made or compliance with a production order or informal request is likely.

The number of different of accessibility conditions

11.65 One feature common to all or most of these conditions is that, like those in section 8 of PACE, they mostly concern the difficulty of access to the premises rather than access to the materials, apart from the case (in section 8 and similar provisions) where the person entitled to grant access to the materials cannot be found. This is a serious gap in the system. As pointed out above in connection with section 8 of PACE at paragraph 11.52 above, there may be cases where the occupier is willing to allow the investigators into the premises, without the need for a warrant, but then refuses to allow them to inspect any of the material there.

11.66 Conversely, there may be cases where the occupier refuses access to the premises but is willing to assemble all material required by the investigator and hand it over at another location. This is particularly likely to be the case where the material is in electronic form and stored remotely. A search warrant should not be issued in these cases unless it is impossible for the investigator to identify the materials he or she requires except by searching the premises.

11.67 A further source of confusion is the relationship between the criteria to be applied by the court in deciding whether to issue a warrant and the criteria to be applied by the searcher when on the premises in deciding what items may be seized. These are often similar without being identical, and some conditions (for example the likelihood of material being destroyed or tampered with) appear in one context in some kinds of warrant and in the other context in other kinds of warrant. We discussed this in Chapter 9, when considering the powers of seizure.

11.68 We do not consider that there is any need for there to be so many different lists of accessibility conditions. A more logical scheme would list the possible reasons that a warrant is required, under the general headings of difficulty of access to the premises, difficulty of access to the materials and risk of impeding or frustrating the investigation (for example by the destruction or removal of the material). These reasons potentially apply equally to all types of investigations: unlike the conditions concerning the reason for the investigation and the nature and presence of the material, they are unlikely to

differ greatly from one subject matter to another. It should therefore be possible to devise a uniform set of accessibility conditions for all types of warrant.

11.69 In addition, the difference in criteria often leads to problems as many statutory powers to issue search warrants are of very restricted scope. HHJ Edmunds QC, Resident Judge at Isleworth Crown Court, told us that any work that reduced the number of different criteria would be of benefit.

11.70 At present different lists of conditions go into different levels of detail. For example, the reason why the investigator cannot obtain access to the premises might be either because the person entitled to grant access cannot be found; because that person has refused or would refuse access; or because the premises are unoccupied. However, not all these reasons are mentioned in connection with all types of warrant. Unlike conditions relating to the materials sought, these conditions relate to logistics and are not related to the subject matter of the investigation. It would be preferable for the condition to be simply that "it would not be practicable to obtain access to the premises without a warrant", mentioning these possible reasons by way of example only.

11.71 Special considerations might apply to warrants within the financial services group, where the remedy of choice is a production order and a warrant is only issued if:

(1) a production order has been made and disobeyed, or

(2) a production order has not been made because it would be not be obeyed or because there is a risk of frustrating the investigation.

11.72 Failure to comply with a production order should continue to be a sufficient ground for issuing a warrant, with no need to prove that any of the other conditions are satisfied, including the conditions relating to the purpose of the search and the nature of the materials sought. The reason for this is that the court needed to be satisfied of these matters as a reason for making a production order. Requiring them to be re-litigated as a condition for issuing a search warrant would reduce the effectiveness of the production order procedure.

11.73 However, we do not consider that there is any need for a further ground depending on the reasons for not making a production order. The normal accessibility conditions all depend on it being impossible to gain access or obtain the material in unaltered form without a search warrant. If the material could have been obtained by giving notice to produce or obtaining a production order, these conditions are necessarily not satisfied. Conversely, if there is danger of the material being removed or tampered with, that should be a sufficient ground for a search warrant whether or not a production order has been or could be made.

11.74 Similarly, there should be special conditions for warrants concerned with dangerous materials or people or animals in danger. In these cases, a warrant may need to be issued in an emergency, where there is reason to suspect that the danger posed by the materials or the danger to the person or animal in question is imminent.

Consultation Question 64

We provisionally propose that there should be a standard set of accessibility conditions for all search warrant provisions. Do consultees agree?

If so, we invite consultees' views on whether those accessibility conditions should include:

(1) reasons for believing that, without a warrant, the investigator could not obtain access to the premises within a reasonable time or at all (and it is not reasonably practicable to identify or have access to the required material without access to those premises);

(2) reasons for believing that, without a warrant, the investigator could not obtain access to the materials within a reasonable time or at all; and

(3) reasons for suspecting that, unless a warrant is issued, the materials might be destroyed, tampered with, concealed or removed or the purposes of the investigation might be otherwise impeded or frustrated.

We also invite consultees' views on whether, in appropriate cases, there should be further alternatives, depending on the purpose of the power, such as that:

(1) a production order has been made and not complied with; or

(2) there are reasonable grounds for suspecting that immediate access to the premises or the materials is required to prevent a dangerous situation or rescue a person or animal in pain or danger.

Chapter 12: Consultation questions

Consultation Question 1

We provisionally propose that the statutory safeguards in sections 15 and 16 of the Police and Criminal Evidence Act 1984 should apply to all search warrants that relate to a criminal investigation. Do consultees agree?

Consultation Question 2

We provisionally propose that anyone who applies for a search warrant that relates to a criminal investigation should be required to follow Code B of the Police and Criminal Evidence Act 1984. Do consultees agree?

Consultation Question 3

We provisionally propose that the definition of a "search warrant that relates to a criminal investigation" should be any search warrant in which the grounds for the application include facts or beliefs which (if true) would show that:

(1) a criminal offence has been, is being or is about to be committed; or

(2) there is to be found on the premises:

(a) evidence of the commission of a criminal offence;

(b) material which it is a criminal offence to possess;

(c) material obtained by means of a criminal offence or representing the proceeds of crime;

(d) material which has been, is being or is about to be used in connection with a criminal offence; or

(e) material connected to an ongoing criminal investigation.

Do consultees agree?

Consultation Question 4

We invite consultees' views on whether the statutory safeguards in sections 15 and 16 of the Police and Criminal Evidence Act 1984 should apply to entry or inspection warrants conferring or giving rise to a power of search that relate to a criminal investigation. If so, to which provisions should this apply?

Consultation Question 5

We provisionally propose that section 15(1) of the Police and Criminal Evidence Act 1984 should be amended to clarify that an entry on, search of, or seizure of materials from, any premises under a warrant is unlawful unless it complies with sections 15 and section 16 of the Police and Criminal Evidence Act 1984. Do consultees agree?

Consultation Question 6

We provisionally propose that section 15(1) of the Police and Criminal Evidence Act 1984 should be amended to clarify that entry, search and seizure are unlawful unless the warrant, entry and search comply with sections 15 and section 16 of the Police and Criminal Evidence Act 1984. Do consultees agree?

Consultation Question 7

We invite consultees' views on whether every breach of section 15 or 16 of the Police and Criminal Evidence Act 1984 ought to have the effect that the search and seizure of material are unlawful. If not, which breaches should and should not have this effect? In particular, we are interested in consultees' views in respect of:

(1) Section 15(6) of the Police and Criminal Evidence Act 1984; and

(2) Section 16(9) to (12) of the Police and Criminal Evidence Act 1984.

We also invite consultees' views on whether it is desirable to confirm the above position in statute.

Consultation Question 8

We invite consultees' views on whether the power to apply for a search warrant should be extended to government agencies currently unable to apply for a search warrant but which are charged with the duty of investigating offences.

If so, we invite consultees' views on:

(1) which agencies ought to be able to apply for a search warrant; and

(2) for which types of investigations the agency ought to be able to apply for a search warrant.

Consultation Question 9

We invite consultees' views on whether the lack of prescribed application forms causes problems in practice. If so, for which search warrant provisions?

We also invite consultees' views on whether:

(1) in principle, application forms should be prescribed for all search warrant provisions;

(2) application forms should be prescribed for only the most common types of warrant;

(3) there should be generic application forms not linked to particular types of warrant; or

(4) there should be no prescribed forms, and applicants should simply set out all the relevant information in narrative form.

We also invite consultees' views on whether online application forms ought to be devised that are interactive and guide the applicant through the appropriate questions.

Consultation Question 10

We provisionally propose that all search warrant application forms should be amended to require the issuing authority to record the time taken to consider the application. This should be divided into time for pre-reading and the hearing itself. Do consultees agree?

We invite consultees' views on how else search warrant application forms ought to be amended.

Consultation Question 11

We provisionally propose that the duty of candour ought to be made more accessible and comprehensible to ensure that investigators comply with the legal duty. Do consultees agree?

We invite consultees' views on whether the scope of the duty of candour ought to be enshrined in:

(1) primary legislation;

(2) rules of court; or

(3) Code B of the Police and Criminal Evidence Act 1984.

We also invite consultees' views on whether any amendments ought to include a list of the information which must always, if it exists, be disclosed?

Consultation Question 12

We provisionally propose that search warrant application forms should include the following questions to assist with the duty of full and frank disclosure, namely that the applicant should be required to specify on the application form:

(1) any previous search warrant applications for the same premises of which he or she is aware which concern the same investigation;

(2) whether any reason exists to suspect that legally privileged material may be on the premises;

(3) the agency which it is intended will be responsible for prosecuting the suspected offence; and

(4) any known circumstances which might weigh against the warrant being issued?

Do consultees agree?

Consultation Question 13

We provisionally propose that the Criminal Procedure Rule Committee should prescribe a standard search warrant template to ensure compliance with section 15(5) to (6) of the Police and Criminal Evidence Act 1984. Do consultees agree?

If so, should this be accompanied by non-statutory guidance about the level of detail required on the actual search warrant?

Consultation Question 14

We invite consultees to share with us their experience of how search warrant hearings are arranged.

Consultation Question 15

We invite consultees' views on whether problems commonly arise because applicants for search warrants do not have sufficient knowledge to answer the questions on oath. If so, do consultees consider that reform is needed to increase the likelihood that a person will have sufficient knowledge to answer questions asked?

We also invite consultees' views on whether there ought to be more detail in rules of court or Code B of the Police and Criminal Evidence Act 1984 on what is required from an applicant at a hearing for a search warrant.

Consultation Question 16

We provisionally propose that the intended search of premises under section 18 of the Police and Criminal Evidence Act 1984 should, absent other intentions, be capable of constituting lawful grounds for arrest under section 24(5)(e) of the Police and Criminal Evidence Act 1984 provided that there are reasonable grounds for believing that it is not practicable to obtain the evidence through other means. Do consultees agree?

Consultation Question 17

We invite consultees' views on whether, in certain cases, it ought to be compulsory for a search warrant application to be made to the Crown Court or District Judges (Magistrates' Courts) rather than the lay magistracy.

If so, we welcome views on:

(1) to which types of cases this rule ought to apply; and

(2) whether the distinction between such cases and routine cases requires to be in legislation.

Consultation Question 18

We provisionally propose that only those lay magistrates who have undergone specialist training should have the power to issue a search warrant. Do consultees agree?

Consultation Question 19

We invite consultees' views on whether, when a search warrant application is made in court, there should be a requirement for a magistrate to be advised by a legal adviser. If so, should this requirement also apply to a magistrate who is a District Judge (Magistrates' Courts)?

Consultation Question 20

We invite consultees' views on whether, when a search warrant application is made in court to a lay magistrate, there ought to be a minimum of two lay magistrates on a bench to consider the application.

Consultation Question 21

We invite consultees' views on whether, when applications for search warrants are made to magistrates out of court sitting hours, the magistrates are able to obtain the legal advice they need.

Consultation Question 22

We invite consultees' views on the desirability of formalising the magistrates' courts' out of hours procedure for hearing search warrant applications. In particular, should applications for warrants be:

(1) submitted and heard remotely, unless otherwise directed; and

(2) always made to a legally qualified judge on a regional rota system.

Consultation Question 23

We provisionally propose formalising the following application process to improve judicial scrutiny:

(1) applications for a search warrant to a magistrates' court or the Crown Court should be submitted electronically, unless it is not practicable in the circumstances to do so; and

(2) applications to a magistrates' court should be filtered by legal advisers who would:

(a) return applications that do not comply with statutory criteria;

(b) forward simple applications to the magistrate or judge, to be decided on the documents alone; or

(c) list other cases for a hearing by video link, telephone, or in court, to be arranged with sufficient notice to read the documents in advance and sufficient time at the hearing for adequate scrutiny.

Do consultees agree?

Consultation Question 24

We invite consultees' views on whether all search warrant applications should in the first instance be sent to a magistrates' court legal adviser who would:

(1) determine whether the application meets the statutory criteria; and

(2) send on those which do comply to a Circuit judge or District Judge (Magistrates' Courts) or lay justices as appropriate given the complexity of the case.

Consultation Question 25

We provisionally propose that:

(1) there ought to be a standard procedure for audio recording search warrant hearings; and

(2) this should only be transcribed and made available to the occupier in the same way, and on the same conditions, as the Information sworn in support of the warrant under the Criminal Procedure Rules.

Do consultees agree?

Consultation Question 26

We provisionally propose that the requirement for the issuing authority to provide written reasons for issuing or refusing a search warrant should be enshrined in statute. This should not displace the current position in law that a failure to give reasons does not necessarily invalidate a search warrant if it is clear that the court was presented with evidence of sufficient grounds to issue the warrant. Do consultees agree?

If not, we invite consultees' views on by which other means the issuing authority ought to be encouraged to give reasons.

Consultation Question 27

We provisionally propose that data on the number of search warrant applications received under each statutory basis, together with the number of warrants granted and refused should be gathered for each court centre. Do consultees agree?

If so, we invite consultees' views on what other data ought to be collected.

Consultation Question 28

We invite consultees' views on whether, in light of their experiences in practice, there are investigative agencies whose investigatory or enforcement powers are unnecessarily hindered because they are unable to execute a search warrant.

Consultation Question 29

We provisionally propose that section 16(2) of the Police and Criminal Evidence Act 1984 should permit a search warrant relating to a criminal investigation to authorise the agency executing the warrant to be accompanied either by a named individual or by a person exercising the role or position specified in the warrant. Do consultees agree?

Do consultees agree that this should not displace current statutory provisions which enable persons executing a warrant to take others with them without this being specified in the warrant?

Consultation Question 30

We invite consultees' views on whether there should be uniformity in relation to the period for which a search warrant remains valid. If so, what should this period be?

If consultees do not consider that it is necessary to have complete uniformity, we invite views on whether the period of validity for any particular search warrant provision ought to be altered.

Consultation Question 31

We invite consultees' views on whether the issuing authority should have the power to authorise multiple searches for all search warrants relating to a criminal investigation.

If not, are there particular search warrant provisions that should allow for multiple entry warrants?

Consultation Question 32

We provisionally propose that:

(1) where an investigator seeks to execute a search warrant between the hours of 10pm and 6am, prior judicial authorisation to do so should be required;

(2) the existing rule, that searches under warrant must take place at a reasonable hour unless it appears to the constable that the purpose of a search may otherwise be frustrated, should continue to apply; and

(3) a search warrant should be required to state whether it authorises a search only between 6am and 10pm or at any time.

Do consultees agree?

We also invite consultees' views on whether further guidance should be provided on what is likely to constitute a reasonable hour in the case of residential and commercial premises

Consultation Question 33

We provisionally propose that section 16(5) of the Police and Criminal Evidence Act 1984 ought to be amended to take account of developments in case law, namely to specify that:

(1) a copy of the full warrant must be supplied, including any schedule appended to it;

(2) a warrant is 'produced' where the occupier is given a chance to inspect it;

(3) non-compliance with section 16(5)(a) and (b) of the Police and Criminal Evidence Act 1984 may be justified where it appears to the officer, once lawful entry is effected, that the search may be frustrated; and

(4) it is permissible for all premises warrants to be redacted to omit the identity of other premises to be searched.

Do consultees agree?

Consultation Question 34

We provisionally propose that a person carrying out a search should provide the occupier with an authoritative guide to search powers, written in plain English for non-lawyers and available in other languages. Do consultees agree?

Consultation Question 35

We provisionally propose that a search warrant should be required to state that the person is entitled to the information sworn in support of the warrant and how to apply for a copy. Do consultees agree?

Consultation Question 36

We provisionally propose that Code B of the Police and Criminal Evidence Act 1984 be amended to state that:

(1) if the occupier asks for a legal adviser or support to be present during the search, this should be allowed if it can be done without unduly delaying the search; and

(2) if present, a legal adviser or assistant has the right to observe the search and seizure of material in order to make their own notes.

Code B of the Police and Criminal Evidence Act 1984 should also provide guidance on how far it is reasonable to delay a search to wait for a legal representative to attend. Do consultees agree?

Consultation Question 37

We provisionally propose that the Crown Court be able to review the issue and execution of search warrants relating to a criminal investigation, to examine:

(1) whether the procedure for applying for or issuing the warrant was defective; and/or

(2) whether the search was properly conducted (for example, whether items seized were within the powers of seizure).

Do consultees agree?

Consultation Question 38

We provisionally propose the following new procedure:

Anyone with a relevant interest in property which has been seized or produced in response to a search warrant to which section 15(1) of the Police and Criminal Evidence Act 1984 applies (as defined in Consultation Question 3) should be able to apply to a judge of the Crown Court for either:

(1) the warrant to be set aside (resulting in the return of material seized or produced); or

(2) the return of material seized or produced, without setting aside the warrant.

The grounds on which the Court must be satisfied before setting aside a warrant and ordering the return of the material are that:

(1) the applicant for the warrant did not provide the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled; or

(2) the provisions of section 15 of the Police and Criminal Evidence Act 1984 were not followed.

The grounds on which the Court must be satisfied before ordering the return of material seized or obtained by production, without setting aside the warrant, are that:

(1) the materials were unlawfully seized (for example because they were legally privileged, or because they were special procedure or excluded material and the warrant did not confer power to seize such materials); or

(2) the provisions of section 16 were not followed.

However, neither of these orders would be made if the investigator satisfied the Crown Court judge to the civil standard of proof that:

(1) the conditions for issuing a warrant are fulfilled, so far as they concern the subject matter of the investigation and the nature and relevance of the materials in question; and

(2) it is in the interests of justice for material to be retained (having regard to a non-exhaustive list of factors).

In an application under the new procedure, the Crown Court judge would have the power to:

(1) set aside the warrant;

(2) order the return of seized or produced material;

(3) authorise the retention of seized or produced material;

(4) give directions as to the examination, retention, separation or return of the whole or any part of the seized property;

(5) order the return or destruction of copies of material; and

(6) order for costs between parties.

The High Court when granting judicial review of the issue or execution of a search warrant should have all the powers and duties of the Crown Court in relation to the return or retention of materials, as described in the previous proposals.

The Criminal Procedure and Investigations Act 1996 Code of Practice ought to be amended to state that the duty on prosecutors to retain material does not apply where an order has been made for the return or destruction of the material and/or copies.

Legal aid funding ought to be available for the proposed new procedure.

Do consultees agree that there should be such a procedure?

Do consultees agree with the detail of the procedure described above?

Consultation Question 39

We invite consultees' views on whether the proposed new procedure set out in Consultation Question 38 ought to include:

(1) a permission filter whereby an applicant must obtain permission to proceed to a full hearing; and

(2) a power for the Crown Court judge to award damages.

Consultation Question 40

We invite consultees' views on whether there are any aspects of the proposed new procedure set out in Consultation Question 39 that ought to be transposed into section 59 of the Criminal Justice and Police Act 2001. In particular, should a judge hearing an application under section 59 have the power to order for costs between parties?

Consultation Question 41

We invite consultees' views on whether the current procedure for dealing with sensitive information and public interest immunity in relation to search warrants requires reform.

Consultation Question 42

We provisionally propose that the current procedures for instructing independent lawyers (independent counsel) or other experts to resolve issues of legal privilege ought to be enshrined in secondary legislation. Do consultees agree?

If so, we welcome consultees' views on the content of those rules, including whether the use of independent lawyers ought to be mandatory either:

(1) when a claim to legal privilege is made; or

(2) when no claim to legal privilege is made but there are other reasons for believing that legally privileged material may be present at the premises or form part of the material that has been seized.

Consultation Question 43

To enable the swift segregation, return and deletion of legally privileged material, and examination of non-privileged material, we provisionally propose that a person claiming legal privilege in respect of material seized following the execution of a search warrant should be required to make all reasonable efforts to assist the investigators in identifying what is legally privileged.

Do consultees agree?

If so, we invite consultees' views on whether:

(1) this should take the form of a procedure in which a judge of the Crown Court makes an order requiring details for the identification of materials for which privilege is claimed within a specified time; and

(2) the Crown Court judge should have the power to order the person claiming privilege to pay the costs of the application and of the sifting procedure if the claim to privilege is clearly unfounded or the identification details supplied are too wide and not made in good faith.

Consultation Question 44

We provisionally propose that:

(1) there should be a uniform rule for the availability of search warrants in respect of medical and counselling records, irrespective of the particular power under which the warrant is sought and the identity of the person applying for or executing the warrant;

(2) that rule should provide that medical and counselling records are excluded from the scope of search warrants in all cases, whatever the statutory source of the power to issue a search warrant; and

(3) there should be a tightly circumscribed exceptions to this exclusion in the case of investigations where medical and counselling records are central to the issues investigated.

Do consultees agree?

We invite consultees' views on whether:

(1) if medical records are to remain within the scope of search warrants, then in those instances where the patient is not the suspect, they should have the right to be informed and make representations before a warrant is issued or a production order is made; and

(2) a similar uniform rule ought to exist in respect of human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence under section 11(1)(b) of the Police and Criminal Evidence Act 1984.

Consultation Question 45

We provisionally propose that:

(1) there should be a uniform rule for the availability of search warrants in respect of confidential journalistic material, irrespective of the particular power under which the warrant is sought and the identity of the person applying for or executing the warrant; and

(2) that rule should provide that confidential journalistic material should be excluded from the scope of search warrants in all cases, whatever the statutory source of the power to issue a search warrant.

(3) The statutory regime under Schedule 5 to the Terrorism Act 2005 ought not to be amended.

Do consultees agree?

We invite consultees' views on whether there should be any exceptions to this exclusion and, if so, what those exceptions should be.

Consultation Question 46

We invite consultees' views as to whether the second set of access conditions under Schedule 1 to the Police and Criminal Evidence Act 1984 ought to be abolished.

Consultation Question 47

We invite consultees' views on whether there are particular difficulties in practice in searches which relate to special procedure material and in particular whether greater clarity needs to be introduced in defining searches for special procedure material held with the intention of furthering a criminal purpose.

Consultation Question 48

We invite consultees' views on whether:

(1) the exemption of confidential business records from search warrant powers under section 9(2) of the Police and Criminal Evidence Act 1984 ought to apply to all criminal investigations, irrespective of whether the investigation is carried out by the police;

(2) the special procedure for applying for production orders and search warrants in respect of confidential business records and non-confidential journalistic material under Schedule 1 of the Police and Criminal Evidence Act 1984 ought to be available in all cases in which those records are exempted from the power to issue a search warrant under (1) above; and

(3) there ought to be an exception to (1) above in the case of search powers for the purposes of specialist investigation where production orders, information requirements or similar procedures are available.

Consultation Question 49

We invite consultees' views on whether excluded and special procedure material ought to be exempted from seizure under sections 18, 19, 20 and 32 of the Police and Criminal Evidence Act 1984.

Consultation Question 50

We invite consultees to share examples of the types of electronic material that investigators may seek under a search warrant. We are particularly interested in any examples of search warrants granted in relation to intangible material stored remotely in electronic form.

Consultation Question 51

We invite consultees' views on the operation of the search warrants regime where warrants are drafted in terms of "devices" rather than specifying electronic information on devices.

In particular, we invite views on whether:

(1) exempted material is adequately protected where search warrants are drafted to authorise the search for, and seizure of, electronic devices as distinct from specified electronic information; and

(2) the single item theory, which treats electronic devices as a single item, works effectively and fairly in practice.

Consultation Question 52

We invite consultees' views on the operation of the search warrants regime where warrants are drafted in terms of "information" rather than specifying devices.

In particular, we are interested to hear of experiences where searches under warrant for information stored in electronic form have created difficulties.

Consultation Question 53

We invite consultees' views on:

(1) the current operation of Part 2 of the Criminal Justice and Police Act 2001 in relation to electronic material;

(2) whether the Criminal Justice and Police Act 2001 contains adequate safeguards where there is a search and seizure of electronic devices containing large volumes of data; and

(3) how, if the current safeguards are inadequate, consultees propose the scheme should be amended.

Consultation Question 54

We invite consultees' views on the operation of sections 19(4) and 20(1) of the Police and Criminal Evidence Act 1984 in respect of electronic information when searching premises under a search warrant. In particular, we invite consultees' views on whether reform of sections 19(4) and 20(1) of the Police and Criminal Evidence Act 1984 is needed. If so, we invite further views on:

(1) how these provisions ought to be reformed; and

(2) whether there is a need to reform these provisions beyond the context of searches of premises (which is the extent of the scope of this project).

Consultation Question 55

We invite consultees' views on whether existing search warrant powers provide law enforcement agencies with sufficient powers to ensure the effective investigation of crime in the digital age. In particular, we invite views on:

(1) whether law enforcement agencies require powers of extraterritorial search, seizure and production under warrant;

(2) if so, when in practice there may be a need to engage in the extraterritorial search, seizure or production of electronic information under warrant; and

(3) whether reform to the Police and Criminal Evidence Act 1984 is required to permit any such investigative measures.

Consultation Question 56

We provisionally propose that additional steps should be introduced to require investigators and issuing authorities to consider the necessity and proportionality of the seizure of electronic devices. Do consultees agree?

If so, we invite consultees' views on whether:

(1) the legislative framework for applying for search warrants in relation to electronic devices ought to be clarified in order to ensure that this type of search warrant can be granted;

(2) additional criteria ought to be satisfied during the application stage and, if so, what; and

(3) investigators should have to present search protocols to the issuing authority in relation to electronic devices to be seized.

Consultation Question 57

We provisionally propose that, in principle, the procedures and safeguards in the Criminal Justice and Police Act 2001 ought to apply whenever electronic devices are seized pursuant to a search warrant. Do consultees agree? If so, we invite consultees' views on which procedures and safeguards ought to apply.

Consultation Question 58

We invite consultees' views on whether there are any search warrant provisions that are unnecessary and therefore ought to be repealed.

Consultation Question 59

We provisionally conclude that there should not be a single statute consolidating all search warrant provisions. Do consultees agree?

Consultation Question 60

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with finding evidence relevant to suspected criminal offences.

If so, we invite consultees' views on the extent to which consolidation ought to take place.

Consultation Question 61

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with preventing or remedying dangerous or unlawful situations.

If so, we invite consultees' views on the extent to which consolidation ought to take place.

Consultation Question 62

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with investigations in which production orders or similar procedures are available.

If so, we invite consultees' views on the extent to which consolidation ought to take place.

Consultation Question 63

Do consultees favour any schemes of consolidation of search warrants other than those described in the previous consultation questions, and if so what?

Consultation Question 64

We provisionally propose that there should be a standard set of accessibility conditions for all search warrant provisions. Do consultees agree?

If so, we invite consultees' views on whether those accessibility conditions should include:

(1) reasons for believing that, without a warrant, the investigator could not obtain access to the premises within a reasonable time or at all (and it is not reasonably practicable to identify or have access to the required material without access to those premises);

(2) reasons for believing that, without a warrant, the investigator could not obtain access to the materials within a reasonable time or at all; and

(3) reasons for suspecting that, unless a warrant is issued, the materials might be destroyed, tampered with, concealed or removed or the purposes of the investigation might be otherwise impeded or frustrated.

We also invite consultees' views on whether, in appropriate cases, there should be further alternatives, depending on the purpose of the power, such as that:

(1) a production order has been made and not complied with; or

(2) there are reasonable grounds for suspecting that immediate access to the premises or the materials is required to prevent a dangerous situation or rescue a person or animal in pain or danger.

Appendix 1: List of all search warrant provisions

1.1 This appendix lists all 176 search warrant provisions. The list does not include warrants that confer powers of entry and inspection only.

(1) Section 8 of the Police and Criminal Evidence Act 1984.

(2) Paragraph 12 of Schedule 1 to the Police and Criminal Evidence Act 1984.

(3) Paragraph 2 of Schedule 5 to the Afghanistan (United Nations Measures) (Overseas Territories) Order 2012 (SI 2012 No 1758).

(4) Section 19(4) of the Animal Welfare Act 2006.

(5) Section 22(4) of the Animal Welfare Act 2006.

(6) Section 23(1) of the Animal Welfare Act 2006.

(7) Section 25 of the Animals (Scientific Procedures) Act 1986.

(8) Section 52 of the Anti-terrorism, Crime and Security Act 2001.

(9) Section 66 of the Anti-terrorism, Crime and Security Act 2001.

(10) Section 83 of the Armed Forces Act 2006.

(11) Paragraph 12 of Schedule 1 to the Armed Forces (Powers of Stop and Search, Seizure and Retention) Order 2009 (SI 2009 No 2056).

(12) Section 83ZL of the Banking Act 2009.

(13) Section 194 of the Banking Act 2009.

(14) Article 9(2) of the Beef Special Premium (Protection of Payments) Order 1989 (SI 1989 No 574).

(15) Paragraph 2 of Schedule 5 to the Belarus (Restrictive Measures) (Overseas Territories) Order 2011 (SI 2011 No 2440).

(16) Section 4 of the Biological Weapons Act 1974.

(17) Section 196 of the Broadcasting Act 1990.

(18) Section 95(3) of the Building Act 1984.

(19) Paragraph 2 of Schedule 3 to the Burma (Sanctions) (Overseas Territories) Order 2013 (SI 2013 No 1447).

(20) Paragraph 2 of Schedule 3 to the Burundi (Sanctions) (Overseas Territories) Order 2015 (SI 2015 No 1898).

(21) Paragraph 2 of Schedule 3 to the Central African Republic (Sanctions) (Overseas Territories) Order 2014 (SI 2014 No 1368).

(22) Article 14(4) of the Channel Tunnel (Security) Order 1994 (SI 1994 No 570).

(23) Article 14(5) of the Channel Tunnel (Security) Order 1994 (SI 1994 No 570).

(24) Article 15(4) of the Channel Tunnel (Security) Order 1994 (SI 1994 No 570).

(25) Article 15(5) of the Channel Tunnel (Security) Order 1994 (SI 1994 No 570).

(26) Section 5 of the Chemical Weapons Act 1996.

(27) Section 29 of the Chemical Weapons Act 1996.

(28) Section 102 of the Children Act 1989.

(29) Section 3 of the Children and Young Persons (Harmful Publications) Act 1955.

(30) Section 12(2) of the Cluster Munitions (Prohibitions) Act 2010.

(31) Section 366 of the Communications Act 2003.

(32) Section 448 of the Companies Act 1985.

(33) Section 8(5) of the Compensation Act 2006.

(34) Regulation 34 of the Compensation (Claims Management Services) Regulations 2006 (SI 2006 No 3322).

(35) Regulation 37(1) of the Compensation (Claims Management Services) Regulations 2006 (SI 2006 No 3322).

(36) Regulation 37(2) of the Compensation (Claims Management Services) Regulations 2006 (SI 2006 No 3322).

(37) Section 28 of the Competition Act 1998.

(38) Section 28A of the Competition Act 1998.

(39) Section 62 of the Competition Act 1998.

(40) Section 62A of the Competition Act 1998.

(41) Section 63 of the Competition Act 1998.

(42) Section 65G of the Competition Act 1998.

(43) Section 65H of the Competition Act 1998.

(44) Regulation 115(3) of the Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012).

(45) Regulation 9(1) of the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (SI 1997 No 1372).

(46) Section 21A of the Copyright Act 1956.

(47) Section 3 of the Copyright (Computer Software) Amendment Act 1985.

(48) Section 109 of the Copyright, Designs and Patents Act 1988.

(49) Section 200 of the Copyright, Designs and Patents Act 1988.

(50) Section 297B of the Copyright, Designs and Patents Act 1988.

(51) Regulation 33(5) of the Credit Rating Agencies Regulations 2010.

(52) Section 16 of the Crime (International Co-operation) Act 2003.

(53) Section 17 of the Crime (International Co-operation) Act 2003.

(54) Section 22(1) of the Crime (International Co-operation) Act 2003.

(55) Section 22(5) of the Crime (International Co-operation) Act 2003.

(56) Section 6 of the Criminal Damage Act 1971.

(57) Section 2(4) of the Criminal Justice Act 1987.

(58) Section 142 of the Criminal Justice Act 1988.

(59) Section 23(1) of the Cultural Property (Armed Conflicts) Act 2017.

(60) Section 118C of the Customs and Excise Management Act 1979.

(61) Section 161A(1) of the Customs and Excise Management Act 1979.

(62) Section 161A(3) of the Customs and Excise Management Act 1979.

(63) Section 5 of the Dangerous Dogs Act 1991.

(64) Paragraph 1 of Schedule 15 to the Data Protection Act 2018.

(65) Paragraph 2 of Schedule 4 of the Democratic People's Republic of Korea (Sanctions) (Overseas Territories) Order 2012 (SI 2012 No 3066).

(66) Paragraph 2 of Schedule 3 to the Democratic Republic of the Congo (Sanctions) (Overseas Territories) Order 2015 (SI 2015 No 1382).

(67) Section 2A of the Dogs (Protection of Livestock) Act 1953.

(68) Section 56 of the Drug Trafficking Act 1994.

(69) Paragraph 2 of Schedule 5 to the Egypt (Restrictive Measures) (Overseas Territories) Order 2011 (SI 2011 No 1679).

(70) Regulation 16 of the Electricity and Gas (Market Integrity and Transparency) (Enforcement etc.) Regulations 2013 (SI 2013 No 1389).

(71) Paragraph 2 of Schedule 1 to the Emergency Laws (Re-enactments and Repeals) Act 1964.

(72) Section 194 of the Enterprise Act 2002.

(73) Paragraph 2 of Schedule 18 to the Environment Act 1995.

(74) Paragraph 2 of Schedule 6 to the Eritrea (Sanctions) (Overseas Territories) Order 2012 (SI 2012 No 2751).

(75) Section 156 of the Extradition Act 2003.

(76) Section 122D of the Financial Services and Markets Act 2000.

(77) Section 131FB of the Financial Services and Markets Act 2000.

(78) Section 176 of the Financial Services and Markets Act 2000.

(79) Regulation 17 of the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (SI 2013 No 504).

(80) Section 88 of the Financial Services (Banking Reform) Act 2013.

(81) Section 46 of the Firearms Act 1968.

(82) Section 25 of the Foreign Enlistment Act 1870.

(83) Regulation 6(6) of the Forest Law Enforcement, Governance and Trade Regulations 2012 (SI 2012 No 178).

(84) Section 7 of the Forgery and Counterfeiting Act 1981.

(85) Section 24 of the Forgery and Counterfeiting Act 1981.

(86) Section 62A of the Friendly Societies Act 1992.

(87) Paragraph 2 of Schedule 6 to the Guinea (Sanctions) (Overseas Territories) Order 2013 (SI 2013 No 244).

(88) Paragraph 2 of Schedule 5 to the Guinea-Bissau (Sanctions) (Overseas Territories) Order 2012 (SI 2012 No 3068).

(89) Paragraph 1 of Schedule 5 to the Higher Education and Research Act 2017.

(90) Paragraph 5 of Schedule 3B to the Human Fertilisation and Embryology Act 1990.

(91) Paragraph 3 of Schedule 5 to the Human Tissue Act 2004.

(92) Regulation 23 of the Human Tissue (Quality and Safety for Human Application) Regulations 2007 (SI 2007 No 1523).

(93) Section 28B of the Immigration Act 1971.

(94) Section 28FB of the Immigration Act 1971.

(95) Section 28D of the Immigration Act 1971.

(96) Paragraph 17 of Schedule 2 to the Immigration Act 1971.

(97) Paragraph 25A of Schedule 2 to the Immigration Act 1971.

(98) Section 92A of the Immigration and Asylum Act 1999.

(99) Section 2 of the Incitement to Disaffection Act 1934.

(100) Section 2(3) of the Indecent Displays (Control) Act 1981.

(101) Section 365(1) of the Insolvency Act 1986.

(102) Section 365(3) of the Insolvency Act 1986.

(103) Section 37 and Schedule 5 to the International Criminal Court Act 2001.

(104) Paragraph 2 of Schedule 2 to the Iran (United Nations Sanctions) Order 2009 (SI 2009 No 886).

(105) Paragraph 2 of Schedule 3 to the Iraq (United Nations Sanctions) Order 2003 (SI 2003 No 1519).

(106) Paragraph 2 of Schedule 3 to the ISIL (Da'esh) and Al-Qaida (Sanctions) (Overseas Territories) Order 2016 (SI 2016 No 1218).

(107) Section 5 of the Knives Act 1997.

(108) Section 18 of the Landmines Act 1998.

(109) Paragraph 2 of Schedule 3 to the Lebanon (United Nations Sanctions) (Overseas Territories) Order 2007 (SI 2007 No 283).

(110) Section 42(3) of the Legal Services Act 2007.

(111) Section 48 of the Legal Services Act 2007.

(112) Section 79 of the Legal Services Act 2007.

(113) Paragraph 2 of Schedule 6 to the Libya (Restrictive Measures) (Overseas Territories) Order 2011 (SI 2011 No 1080).

(114) Paragraph 2 of Schedule 3 to the Mali (Sanctions) (Overseas Territories) Order 2017 (SI 2017 No 1107).

(115) Paragraph 5B of Schedule 4 to the Medical Act 1983.

(116) Section 135(1) of the Mental Health Act 1983.

(117) Section 135(3) of the Mental Health Act 1983.

(118) Section 247 of the Merchant Shipping Act 1995.

(119) Section 23(3) of the Misuse of Drugs Act 1971.

(120) Regulation 70(1) of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017 No 692).

(121) Regulation 8(4) of the Motor Vehicles (Refilling of Air Conditioning Systems by Service Providers) Regulations 2009 (SI 2009 No 2194).

(122) Article 15(4) of the Non-Commercial Movement of Pet Animals Order 2011 (SI 2011 No 2883).

(123) Paragraph 2 of Schedule 2 to the North Korea (United Nations Sanctions) Order 2009 (SI 2009 No 1749).

(124) Section 6 of the Northern Ireland (Location of Victims' Remains) Act 1999.

(125) Section 8 of the Nuclear Safeguards Act 2000.

(126) Section 3 of the Obscene Publications Act 1959.

(127) Section 65 of the Offences Against the Person Act 1861.

(128) Section 9(1) of the Official Secrets Act 1911.

(129) Paragraph 3 of Schedule 2 to the Oil Stocking Order 2012 (SI 2012 No 2862).

(130) Regulation 23 of the Operation of Air Services in the Community (Pricing etc.) Regulations 2013 (SI 2013 No 486).

(131) Section 78 of the Pensions Act 2004.

(132) Section 194 of the Pensions Act 2004.

(133) Paragraph 2 of Schedule 1 to the Plant Protection Products Regulations 2011 (SI 2011 No 2131).

(134) Paragraph 2 of Schedule 3 to the Plant Protection Products (Sustainable Use) Regulations 2012 (SI 2012 No 1657).

(135) Section 352 of the Proceeds of Crime Act 2002.

(136) Article 13 of the Proceeds of Crime Act 2002 (External Investigations) Order 2013 (SI 2013 No 2605).

(137) Article 13 of the Proceeds of Crime Act 2002 (External Investigations) Order 2014 (SI 2014 No 1893).

(138) Section 2B of the Protection from Harassment Act 1997.

(139) Section 4 of the Protection of Children Act 1978.

(140) Section 39 of the Psychoactive Substances Act 2016.

(141) Section 61(3) of the Public Health (Control of Disease) Act 1984.

(142) Section 2(5) of the Public Order Act 1936.

(143) Section 24 of the Public Order Act 1986.

(144) Section 29H of the Public Order Act 1986.

(145) Regulation 14(3) of the Registration of Fish Buyers and Sellers and Designation of Fish Auction Sites Regulations 2005 (SI 2005 No 1605).

(146) Paragraph 2 of Schedule 3 Russia, Crimea and Sevastopol (Sanctions) (Overseas Territories) Order 2014 (SI 2014 No 2710).

(147) Section 33(2) of the Salmon and Freshwater Fisheries Act 1975.

(148) Article 7(3) of the Sea Fishing (Enforcement of Measures for the Recovery of the Stock of Cod) (Irish Sea) Order 2000 (SI 2000 No 435).

(149) Regulation 6 of the Sea Fish (Marketing Standards) (England and Wales and Northern Ireland) Regulations 2018 (SI 2018 No 437) (in force from 30 April 2018).

(150) Section 52 and Schedule 2 to the Serious Crime Act 2015.

(151) Section 66 of the Serious Organised Crime and Police Act 2005.

(152) Section 96B of the Sexual Offences Act 2003.

(153) Paragraph 2 of Schedule 2 to the Somalia (United Nations Sanctions) Order 2002 (SI 2002 No 2628).

(154) Paragraph 2 of Schedule 3 to the South Sudan (Sanctions) (Overseas Territories) Order 2014 (SI 2014 No 2703).

(155) Section 32 of the Space Industry Act 2018 (not yet in force).

(156) Paragraph 2 of Schedule 3 to the Sudan (Sanctions) (Overseas Territories) Order 2014 (SI 2014 No 2707).

(157) Paragraph 5 of Schedule 5 to the Syria (Restrictive Measures) (Overseas Territories) Order 2012 (SI 2012 No 1755).

(158) Section 42 of the Terrorism Act 2000.

(159) Paragraph 1 of Schedule 5 to the Terrorism Act 2000.

(160) Paragraph 11 of Schedule 5 to the Terrorism Act 2000.

(161) Section 28 of the Terrorism Act 2006.

(162) Paragraph 8 of Schedule 5 to the Terrorism Prevention and Investigation Measures Act 2011.

(163) Section 26 of the Theft Act 1968.

(164) Section 92A of the Trademarks Act 1994.

(165) Paragraph 15 of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007.

(166) Paragraph 2 of Schedule 4 to the Tunisia (Restrictive Measures) (Overseas Territories) Order 2011 (SI 2011 No 748).

(167) Section 45(2) of the UK Borders Act 2007.

(168) Paragraph 2 of Schedule 3 to the Ukraine (Sanctions) (Overseas Territories) (No. 2) Order 2014 (SI 2014 No 1100).

(169) Paragraph 2 of Schedule 3 to the Ukraine (Sanctions) (Overseas Territories) (No. 3) Order 2014 (SI 2014 No 1098).

(170) Article 16 of the United Nations (International Residual Mechanism for Criminal Tribunals) Order 2018 (SI 2018 No 187).

(171) Paragraph 2 of Schedule 3 to the Venezuela (Sanctions) (Overseas Territories) Order 2018 (SI 2018 No 179).

(172) Section 17 of the Video Recordings Act 1984.

(173) Section 19(3) of the Wildlife and Countryside Act 1981.

(174) Section 97 of the Wireless Telegraphy Act 2006.

(175) Paragraph 2 of Schedule 3 to the Yemen (Sanctions) (Overseas Territories) (No.2) Order 2015 (SI 2015 No 1381).

(176) Paragraph 2 of Schedule 6 to the Zimbabwe (Sanctions) (Overseas Territories) Order 2012 (SI 2012 No 2753).

Appendix 2: Extracts from relevant legislation

2.1 This appendix provides relevant extracts from the text of the following legislation:

(1) The Police and Criminal Evidence Act 1984; and

(2) The Criminal Justice and Police Act 2001.

8.— Power of justice of the peace to authorise entry and search of premises.

(1) If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing—

(a) that an indictable offence has been committed; and

(b) that there is material on premises mentioned in subsection (1A) below which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and

(c) that the material is likely to be relevant evidence; and

(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and

(e) that any of the conditions specified in subsection (3) below applies in relation to each set of premises specified in the application,

he may issue a warrant authorising a constable to enter and search the premises.

(1A) The premises referred to in subsection (1)(b) above are—

(a) one or more sets of premises specified in the application (in which case the application is for a "specific premises warrant"); or

(b) any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an "all premises warrant").

(1B) If the application is for an all premises warrant, the justice of the peace must also be satisfied—

(a) that because of the particulars of the offence referred to in paragraph (a) of subsection (1) above, there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application in order to find the material referred to in paragraph (b) of that subsection; and

(b) that it is not reasonably practicable to specify in the application all the premises which he occupies or controls and which might need to be searched.

(1C) The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant.

(1D) If it authorises multiple entries, the number of entries authorised may be unlimited, or limited to a maximum.

(2) A constable may seize and retain anything for which a search has been authorised under subsection (1) above.

(3) The conditions mentioned in subsection (1)(e) above are—

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

(4) In this Act "relevant evidence", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.

(5) The power to issue a warrant conferred by this section is in addition to any such power otherwise conferred.

(6) This section applies in relation to a relevant offence as defined in section 28D(4) of the Immigration Act 1971 as it applies in relation to an indictable offence.

(7) Section 4 of the Summary Jurisdiction (Process) Act 1881 (execution of process of English courts in Scotland) shall apply to a warrant issued on the application of an officer of Revenue and Customs under this section by virtue of section 114 below.

9.— Special provisions as to access.

(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.

(2) Any Act (including a local Act) passed before this Act under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches—

(a) for items subject to legal privilege; or

(b) for excluded material; or

(c) for special procedure material consisting of documents or records other than documents.

(2A) Section 4 of the Summary Jurisdiction (Process) Act 1881 (c. 24) (which includes provision for the execution of process of English courts in Scotland) and section 29 of the Petty Sessions (Ireland) Act 1851 (c. 93) (which makes equivalent provision for execution in Northern Ireland) shall each apply to any process issued by a judge under Schedule 1 to this Act as it applies to process issued by a magistrates' court under the Magistrates' Courts Act 1980 (c. 43).

10.— Meaning of 'items subject to legal privilege'.

(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c) items enclosed with or referred to in such communications and made—

(i) in connection with the giving of legal advice; or

(ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

(iii) when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.

11.— Meaning of "excluded material".

(1) Subject to the following provisions of this section, in this Act "excluded material" means—

(a) personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;

(b) human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;

(c) journalistic material which a person holds in confidence and which consists—

(i) of documents; or

(ii) of records other than documents.

(2) A person holds material other than journalistic material in confidence for the purposes of this section if he holds it subject—

(a) to an express or implied undertaking to hold it in confidence; or

(b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after this Act.

(3) A person holds journalistic material in confidence for the purposes of this section if—

(a) he holds it subject to such an understanding, restriction or obligation; and

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.

12.— Meaning of "personal records".

In this Part of this Act "personal records" means documentary and other records concerning an individual (whether living or dead) who can be identified from them and relating—

(a) to his physical or mental health;

(b) to spiritual counselling or assistance given or to be given to him; or

(c) to counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who—

(i) by reason of his office or occupation has responsibilities for his personal welfare; or

(ii) by reason of an order of a court has responsibilities for his supervision.

13.— Meaning of "journalistic material".

(1) Subject to subsection (2) below, in this Act "journalistic material" means material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.

14.— Meaning of "special procedure material".

(1) In this Act "special procedure material" means—

(a) material to which subsection (2) below applies; and

(b) journalistic material, other than excluded material.

(2) Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who—

(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and

(b) holds it subject—

(i) to an express or implied undertaking to hold it in confidence; or

(ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above.

(3) Where material is acquired—

(a) by an employee from his employer and in the course of his employment; or

(b) by a company from an associated company,

it is only special procedure material if it was special procedure material immediately before the acquisition.

(4) Where material is created by an employee in the course of his employment, it is only special procedure material if it would have been special procedure material had his employer created it.

(5) Where material is created by a company on behalf of an associated company, it is only special procedure material if it would have been special procedure material had the associated company created it.

(6) A company is to be treated as another's associated company for the purposes of this section if it would be so treated under section 449 of the Corporation Tax Act 2010.

15.— Search warrants–safeguards.

(1) This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

(2) Where a constable applies for any such warrant, it shall be his duty—

(a) to state—

(i) the ground on which he makes the application;

(ii) the enactment under which the warrant would be issued; and

(iii) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired;

(b) to specify the matters set out in subsection (2A) below; and

(c) to identify, so far as is practicable, the articles or persons to be sought.

(2A) The matters which must be specified pursuant to subsection (2)(b) above are—

(a) if the application relates to one or more sets of premises specified in the application, each set of premises which it is desired to enter and search;

(b) if the application relates to any premises occupied or controlled by a person specified in the application–

(i) as many sets of premises which it is desired to enter and search as it is reasonably practicable to specify;

(ii) the person who is in occupation or control of those premises and any others which it is desired to enter and search;

(iii) why it is necessary to search more premises than those specified under sub-paragraph (i); and

(iv) why it is not reasonably practicable to specify all the premises which it is desired to enter and search.

(3) An application for such a warrant shall be made ex parte and supported by an information in writing.

(4) The constable shall answer on oath any question that the justice of the peace or judge hearing the application asks him.

(5) A warrant shall authorise an entry on one occasion only unless it specifies that it authorises multiple entries.

(5A) If it specifies that it authorises multiple entries, it must also specify whether the number of entries authorised is unlimited, or limited to a specified maximum.

(6) A warrant —

(a) shall specify —

(i) the name of the person who applies for it;

(ii) the date on which it is issued;

(iii) the enactment under which it is issued; and

(iv) each set of premises to be searched, or (in the case of an all premises warrant) the person who is in occupation or control of premises to be searched, together with any premises under his occupation or control which can be specified and which are to be searched; and

(b) shall identify, so far as is practicable, the articles or persons to be sought.

(7) Two copies shall be made of a warrant which specifies only one set of premises and does not authorise multiple entries; and as many copies as are reasonably required may be made of any other kind of warrant.

(8) The copies shall be clearly certified as copies.

16.— Execution of warrants.

(1) A warrant to enter and search premises may be executed by any constable.

(2) Such a warrant may authorise persons to accompany any constable who is executing it.

(2A) A person so authorised has the same powers as the constable whom he accompanies in respect of—

(a) the execution of the warrant, and

(b) the seizure of anything to which the warrant relates.

(2B) But he may exercise those powers only in the company, and under the supervision, of a constable.

(3) Entry and search under a warrant must be within three months from the date of its issue.

(3A) If the warrant is an all premises warrant, no premises which are not specified in it may be entered or searched unless a police officer of at least the rank of inspector has in writing authorised them to be entered.

(3B) No premises may be entered or searched for the second or any subsequent time under a warrant which authorises multiple entries unless a police officer of at least the rank of inspector has in writing authorised that entry to those premises.

(4) Entry and search under a warrant must be at a reasonable hour unless it appears to the constable executing it that the purpose of a search may be frustrated on an entry at a reasonable hour.

(5) Where the occupier of premises which are to be entered and searched is present at the time when a constable seeks to execute a warrant to enter and search them, the constable—

(a) shall identify himself to the occupier and, if not in uniform, shall produce to him documentary evidence that he is a constable;

(b) shall produce the warrant to him; and

(c) shall supply him with a copy of it.

(6) Where—

(a) the occupier of such premises is not present at the time when a constable seeks to execute such a warrant; but

(b) some other person who appears to the constable to be in charge of the premises is present,

subsection (5) above shall have effect as if any reference to the occupier were a reference to that other person.

(7) If there is no person who appears to the constable to be in charge of the premises, he shall leave a copy of the warrant in a prominent place on the premises.

(8) A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued.

(9) A constable executing a warrant shall make an endorsement on it stating—

(a) whether the articles or persons sought were found; and

(b) whether any articles were seized, other than articles which were sought

and, unless the warrant is a warrant specifying one set of premises only, he shall do so separately in respect of each set of premises entered and searched, which he shall in each case state in the endorsement.

(10) A warrant shall be returned to the appropriate person mentioned in subsection (10A) below—

(a) when it has been executed; or

(b) in the case of a specific premises warrant which has not been executed, or an all premises warrant, or any warrant authorising multiple entries, upon the expiry of the period of three months referred to in subsection (3) above or sooner.

(10A) The appropriate person is—

(a) if the warrant was issued by a justice of the peace, the designated officer for the local justice area in which the justice was acting when he issued the warrant;

(b) if it was issued by a judge, the appropriate officer of the court from which he issued it.

(11) A warrant which is returned under subsection (10) above shall be retained for 12 months from its return—

(a) by the designated officer for the local justice area, if it was returned under paragraph (i) of that subsection; and

(b) by the appropriate officer, if it was returned under paragraph (ii).

(12) If during the period for which a warrant is to be retained the occupier of premises to which it relates asks to inspect it, he shall be allowed to do so.

17.— Entry for purpose of arrest etc.

(1) Subject to the following provisions of this section, and without prejudice to any other enactment, a constable may enter and search any premises for the purpose—

(a) of executing—

(i) a warrant of arrest issued in connection with or arising out of criminal proceedings; or

(ii) a warrant of commitment issued under section 76 of the Magistrates' Courts Act 1980;

(b) of arresting a person for an indictable offence;

(c) of arresting a person for an offence under—

(i) section 1 (prohibition of uniforms in connection with political objects), of the Public Order Act 1936;

(ii) any enactment contained in sections 6 to 8 or 10 of the Criminal Law Act 1977 (offences relating to entering and remaining on property);

(iii) section 4 of the Public Order Act 1986 (fear or provocation of violence);

(iiia) section 4 (driving etc. when under influence of drink or drugs) or 163 (failure to stop when required to do so by constable in uniform) of the Road Traffic Act 1988;

(iiib) section 27 of the Transport and Works Act 1992 (which relates to offences involving drink or drugs);

(iv) section 76 of the Criminal Justice and Public Order Act 1994 (failure to comply with interim possession order);

(v) any of sections 4, 5, 6(1) and (2), 7 and 8(1) and (2) of the Animal Welfare Act 2006 (offences relating to the prevention of harm to animals);

(vi) section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (squatting in a residential building);

(ca) of arresting, in pursuance of section 32(1A) of the Children and Young Persons Act 1969, any child or young person who has been remanded to local authority accommodation or youth detention accommodation under section 91 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

(caa) of arresting a person for an offence to which section 61 of the Animal Health Act 1981 applies;

(cab) of arresting a person under any of the following provisions—

(i) section 30D(1) or (2A);

(ii) section 46A(1) or (1A);

(iii) section 5B(7) of the Bail Act 1976 (arrest where a person fails to surrender to custody in accordance with a court order);

(iv) section 7(3) of the Bail Act 1976 (arrest where a person is not likely to surrender to custody etc);

(v) section 97(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (arrest where a child is suspected of breaking conditions of remand);

(cb) of recapturing any person who is, or is deemed for any purpose to be, unlawfully at large while liable to be detained—

(i) in a prison, young offender institution, secure training centre or secure college , or

(ii) in pursuance of section 92 of the Powers of Criminal Courts (Sentencing) Act 2000 (dealing with children and young persons guilty of grave crimes), in any other place;

(d) of recapturing any person whatever who is unlawfully at large and whom he is pursuing; or

(e) of saving life or limb or preventing serious damage to property.

(2) Except for the purpose specified in paragraph (e) of subsection (1) above, the powers of entry and search conferred by this section—

(a) are only exercisable if the constable has reasonable grounds for believing that the person whom he is seeking is on the premises; and

(b) are limited, in relation to premises consisting of two or more separate dwellings, to powers to enter and search—

(i) any parts of the premises which the occupiers of any dwelling comprised in the premises use in common with the occupiers of any other such dwelling; and

(ii) any such dwelling in which the constable has reasonable grounds for believing that the person whom he is seeking may be.

(3) The powers of entry and search conferred by this section are only exercisable for the purposes specified in subsection (1)(c)(ii), (iv) or (vi) above by a constable in uniform.

(4) The power of search conferred by this section is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised.

(5) Subject to subsection 6 below, all the rules of common law under which a constable has power to enter premises without a warrant are hereby abolished.

(6) Nothing in subsection (5) above affects any power of entry to deal with or prevent a breach of the peace.

18.— Entry and search after arrest.

(1) Subject to the following provisions of this section, a constable may enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates—

(a) to that offence; or

(b) to some other indictable offence which is connected with or similar to that offence.

(2) A constable may seize and retain anything for which he may search under subsection (1) above.

(3) The power to search conferred by subsection (1) above is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence.

(4) Subject to subsection (5) below, the powers conferred by this section may not be exercised unless an officer of the rank of inspector or above has authorised them in writing.

(5) A constable may conduct a search under subsection (1)—

(a) before the person is taken to a police station or released under section 30A, and

(b) without obtaining an authorisation under subsection (4),

if the condition in subsection (5A) is satisfied.

(5A) The condition is that the presence of the person at a place (other than a police station) is necessary for the effective investigation of the offence.

(6) If a constable conducts a search by virtue of subsection (5) above, he shall inform an officer of the rank of inspector or above that he has made the search as soon as practicable after he has made it.

(7) An officer who—

(a) authorises a search; or

(b) is informed of a search under subsection (6) above, shall make a record in writing—

(i) of the grounds for the search; and

(ii) of the nature of the evidence that was sought.

(8) If the person who was in occupation or control of the premises at the time of the search is in police detention at the time the record is to be made, the officer shall make the record as part of his custody record.

19.— General power of seizure etc.

(1) The powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.

(2) The constable may seize anything which is on the premises if he has reasonable grounds for believing—

(a) that it has been obtained in consequence of the commission of an offence; and

(b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

(3) The constable may seize anything which is on the premises if he has reasonable grounds for believing—

(a) that it is evidence in relation to an offence which he is investigating or any other offence; and

(b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

(4) The constable may require any information which is stored in any electronic form and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form if he has reasonable grounds for believing—

(a) that—

(i) it is evidence in relation to an offence which he is investigating or any other offence; or

(ii) it has been obtained in consequence of the commission of an offence; and

(b) that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed.

(5) The powers conferred by this section are in addition to any power otherwise conferred.

(6) No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege.

20.— Extension of powers of seizure to computerised information.

(1) Every power of seizure which is conferred by an enactment to which this section applies on a constable who has entered premises in the exercise of a power conferred by an enactment shall be construed as including a power to require any information stored in any electronic form contained in a computer and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form.

(2) This section applies—

(a) to any enactment contained in an Act passed before this Act;

(b) to sections 8 and 18 above;

(c) to paragraph 13 of Schedule 1 to this Act; and

(d) to any enactment contained in an Act passed after this Act.

21. — Access and copying.

(1) A constable who seizes anything in the exercise of a power conferred by any enactment, including an enactment contained in an Act passed after this Act, shall, if so requested by a person showing himself—

(a) to be the occupier of premises on which it was seized; or

(b) to have had custody or control of it immediately before the seizure,

provide that person with a record of what he seized.

(2) The officer shall provide the record within a reasonable time from the making of the request for it.

(3) Subject to subsection (8) below, if a request for permission to be granted access to anything which—

(a) has been seized by a constable; and

(b) is retained by the police for the purpose of investigating an offence,

is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized or by someone acting on behalf of such a person, the officer shall allow the person who made the request access to it under the supervision of a constable.

(4) Subject to subsection (8) below, if a request for a photograph or copy of any such thing is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized, or by someone acting on behalf of such a person, the officer shall—

(a) allow the person who made the request access to it under the supervision of a constable for the purpose of photographing or copying it; or

(b) photograph or copy it, or cause it to be photographed or copied.

(5) A constable may also photograph or copy, or have photographed or copied, anything which he has power to seize, without a request being made under subsection (4) above.

(6) Where anything is photographed or copied under subsection (4)(b) above, the photograph or copy shall be supplied to the person who made the request.

(7) The photograph or copy shall be so supplied within a reasonable time from the making of the request.

(8) There is no duty under this section to grant access to, or to supply a photograph or copy of, anything if the officer in charge of the investigation for the purposes of which it was seized has reasonable grounds for believing that to do so would prejudice—

(a) that investigation;

(b) the investigation of an offence other than the offence for the purposes of investigating which the thing was seized; or

(c) any criminal proceedings which may be brought as a result of—

(i) the investigation of which he is in charge; or

(ii) any such investigation as is mentioned in paragraph (b) above.

(9) The references to a constable in subsections (1), (2), (3)(a) and (5) include a person authorised under section 16(2) to accompany a constable executing a warrant.

(10) The references to a constable in subsections (1) and (2) do not include a constable who has seized a thing under paragraph 19ZE of Schedule 3 to the Police Reform Act 2002.

22.— Retention.

(1) Subject to subsection (4) below, anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 above may be retained so long as is necessary in all the circumstances.

(2) Without prejudice to the generality of subsection (1) above—

(a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below—

(i) for use as evidence at a trial for an offence; or

(ii) for forensic examination or for investigation in connection with an offence; and

(b) anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence.

(3) Nothing seized on the ground that it may be used—

(a) to cause physical injury to any person;

(b) to damage property;

(c) to interfere with evidence; or

(d) to assist in escape from police detention or lawful custody,

may be retained when the person from whom it was seized is no longer in police detention or the custody of a court or is in the custody of a court but has been released on bail.

(4) Nothing may be retained for either of the purposes mentioned in subsection (2)(a) above if a photograph or copy would be sufficient for that purpose.

(5) Nothing in this section affects any power of a court to make an order under section 1 of the Police (Property) Act 1897.

(6) This section also applies to anything retained by the police under section 28H(5) of the Immigration Act 1971.

(7) The reference in subsection (1) to anything seized by a constable includes anything seized by a person authorised under section 16(2) to accompany a constable executing a warrant.

23. — Meaning of "premises" etc.

In this Act—

"premises" includes any place and, in particular, includes—

(a) any vehicle, vessel, aircraft or hovercraft;

(b) any offshore installation;

(ba) any renewable energy installation;

(c) any tent or movable structure;

"offshore installation" has the meaning given to it by section 1 of the Mineral Workings (Offshore Installations) Act 1971.

"renewable energy installation" has the same meaning as in Chapter 2 of Part 2 of the Energy Act 2004.

24.— Arrest without warrant: constables

(1) A constable may arrest without a warrant—

(a) anyone who is about to commit an offence;

(b) anyone who is in the act of committing an offence;

(c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;

(d) anyone whom he has reasonable grounds for suspecting to be committing an offence.

(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.

(3) If an offence has been committed, a constable may arrest without a warrant—

(a) anyone who is guilty of the offence;

(b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.

(5) The reasons are—

(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);

(b) correspondingly as regards the person's address;

(c) to prevent the person in question—

(i) causing physical injury to himself or any other person;

(ii) suffering physical injury;

(iii) causing loss of or damage to property;

(iv) committing an offence against public decency (subject to subsection (6)); or

(v) causing an unlawful obstruction of the highway;

(d) to protect a child or other vulnerable person from the person in question;

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

(6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question.

32. — Search upon arrest.

(1) A constable may search an arrested person, in any case where the person to be searched has been arrested at a place other than a police station, if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others.

(2) Subject to subsections (3) to (5) below, a constable shall also have power in any such case—

(a) to search the arrested person for anything—

(i) which he might use to assist him to escape from lawful custody; or

(ii) which might be evidence relating to an offence; and

(b) if the offence for which he has been arrested is an indictable offence, to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence.

(3) The power to search conferred by subsection (2) above is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence.

(4) The powers conferred by this section to search a person are not to be construed as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket or gloves but they do authorise a search of a person's mouth.

(5) A constable may not search a person in the exercise of the power conferred by subsection (2)(a) above unless he has reasonable grounds for believing that the person to be searched may have concealed on him anything for which a search is permitted under that paragraph.

(6) A constable may not search premises in the exercise of the power conferred by subsection (2)(b) above unless he has reasonable grounds for believing that there is evidence for which a search is permitted under that paragraph on the premises.

(7) In so far as the power of search conferred by subsection (2)(b) above relates to premises consisting of two or more separate dwellings, it is limited to a power to search—

(a) any dwelling in which the arrest took place or in which the person arrested was immediately before his arrest; and

(b) any parts of the premises which the occupier of any such dwelling uses in common with the occupiers of any other dwellings comprised in the premises.

(8) A constable searching a person in the exercise of the power conferred by subsection (1) above may seize and retain anything he finds, if he has reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person.

(9) A constable searching a person in the exercise of the power conferred by subsection (2)(a) above may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing—

(a) that he might use it to assist him to escape from lawful custody; or

(b) that it is evidence of an offence or has been obtained in consequence of the commission of an offence.

(10) Nothing in this section shall be taken to affect the power conferred by section 43 of the Terrorism Act 2000.

SHEDULE 1 TO THE POLICE AND CRIMINAL EVIDENCE ACT 1984.

1.

If on an application made by a constable a judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.

2.

The first set of access conditions is fulfilled if—

(a) there are reasonable grounds for believing—

(i) that an indictable offence has been committed;

(ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);

(iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

(iv) that the material is likely to be relevant evidence;

(b) other methods of obtaining the material—

(i) have been tried without success; or

(ii) have not been tried because it appeared that they were bound to fail; and

(c) it is in the public interest, having regard—

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

3.

The second set of access conditions is fulfilled if—

(a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);

(b) but for section 9(2) above a search of such premises for that material could have been authorised by the issue of a warrant to a constable under an enactment other than this Schedule; and

(c) the issue of such a warrant would have been appropriate.

4.

An order under this paragraph is an order that the person who appears to the judge to be in possession of the material to which the application relates shall—

(a) produce it to a constable for him to take away; or

(b) give a constable access to it,

not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify.

5.

Where the material consists of information stored in any electronic form—

(a) an order under paragraph 4(a) above shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form; and

(b) an order under paragraph 4(b) above shall have effect as an order to give a constable access to the material in a form in which it is visible and legible.

6.

For the purposes of sections 21 and 22 above material produced in pursuance of an order under paragraph 4(a) above shall be treated as if it were material seized by a constable.

7.

An application for an order under paragraph 4 above that relates to material that consists of or includes journalistic material shall be made inter partes.

8.

Notice of an application for an order under paragraph 4 above that relates to material that consists of or includes journalistic material may be served on a person either by delivering it to him or by leaving it at his proper address or by sending it by post to him in a registered letter or by the recorded delivery service.

9.

Notice of an application for an order under paragraph 4 above that relates to material that consists of or includes journalistic material may be served—

(a) on a body corporate, by serving it on the body’s secretary or clerk or other similar officer; and

(b) on a partnership, by serving in on one of the partners.

10.

For the purposes of paragraph 8, and of section 7 of the Interpretation Act 1978 in its application to paragraph 8 , the proper address of a person, in the case of secretary or clerk or other similar officer of a body corporate, shall be that of the registered or principal office of

that body, in the case of a partner of a firm shall be that of the principal office of the firm, and in any other case shall be the last known address of the person to be served.

11.

Where notice of an application for an order under paragraph 4 above has been served on a person, he shall not conceal, destroy, alter or dispose of the material to which the application relates except—

(a) with the leave of a judge; or

(b) with the written permission of a constable,

until—

(i) the application is dismissed or abandoned; or

(ii) he has complied with an order under paragraph 4 above made on the application.

12.

If on an application made by a constable a judge—

(a) is satisfied—

(i) that either set of access conditions is fulfilled; and

(ii) that any of the further conditions set out in paragraph 14 below is also fulfilled in relation to each set of premises specified in the application; or

(b) is satisfied—

(i) that the second set of access conditions is fulfilled; and

(ii) that an order under paragraph 4 above relating to the material has not been complied with,

he may issue a warrant authorising a constable to enter and search the premises or (as the case may be) all premises occupied or controlled by the person referred to in paragraph 2(a)(ii) or 3(a), including such sets of premises as are specified in the application (an "all premises warrant") .

12A.

The judge may not issue an all premises warrant unless he is satisfied—

(a) that there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application, as well as those which are, in order to find the material in question; and

(b) that it is not reasonably practicable to specify all the premises which he occupies or controls which might need to be searched.

13.

A constable may seize and retain anything for which a search has been authorised under paragraph 12 above.

14.

The further conditions mentioned in paragraph 12 (a)(ii) above are—

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;

(c) that the material contains information which—

(i) is subject to a restriction or obligation such as is mentioned in section 11(2)(b) above; and

(ii) is likely to be disclosed in breach of it if a warrant is not issued;

(d) that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation.

15.

(1) If a person fails to comply with an order under paragraph 4 above, a judge may deal with him as if he had committed a contempt of the Crown Court.

(2) Any enactment relating to contempt of the Crown Court shall have effect in relation to such a failure as if it were such a contempt.

15A.

Criminal Procedure Rules may make provision about proceedings under this Schedule, other than proceedings for an order under paragraph 4 above that relates to material that consists of or includes journalistic material.

16.

The costs of any application under this Schedule and of anything done or to be done in pursuance of an order made under it shall be in the discretion of the judge.

17.

In this Schedule “judge” means a Circuit judge a qualifying judge advocate (within the meaning of the Senior Courts Act 1981) or a District Judge (Magistrates' Courts).

Criminal Justice and Police Act 2001

50.— Additional powers of seizure from premises

(1) Where —

(a) a person who is lawfully on any premises finds anything on those premises that he has reasonable grounds for believing may be or may contain something for which he is authorised to search on those premises,

(b) a power of seizure to which this section applies or the power conferred by subsection (2) would entitle him, if he found it, to seize whatever it is that he has grounds for believing that thing to be or to contain, and

(c) in all the circumstances, it is not reasonably practicable for it to be determined, on those premises—

(i) whether what he has found is something that he is entitled to seize, or

(ii) the extent to which what he has found contains something that he is entitled to seize,

that person's powers of seizure shall include power under this section to seize so much of what he has found as it is necessary to remove from the premises to enable that to be determined.

(2) Where—

(a) a person who is lawfully on any premises finds anything on those premises ("the seizable property") which he would be entitled to seize but for its being comprised in something else that he has (apart from this subsection) no power to seize,

(b) the power under which that person would have power to seize the seizable property is a power to which this section applies, and

(c) in all the circumstances it is not reasonably practicable for the seizable property to be separated, on those premises, from that in which it is comprised,

that person's powers of seizure shall include power under this section to seize both the seizable property and that from which it is not reasonably practicable to separate it.

(3) The factors to be taken into account in considering, for the purposes of this section, whether or not it is reasonably practicable on particular premises for something to be determined, or for something to be separated from something else, shall be confined to the following—

(a) how long it would take to carry out the determination or separation on those premises;

(b) the number of persons that would be required to carry out that determination or separation on those premises within a reasonable period;

(c) whether the determination or separation would (or would if carried out on those premises) involve damage to property;

(d) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation; and

(e) in the case of separation, whether the separation—

(i) would be likely, or

(ii) if carried out by the only means that are reasonably practicable on those premises, would be likely,

to prejudice the use of some or all of the separated seizable property for a purpose for which something seized under the power in question is capable of being used.

(4) Section 19(6) of the 1984 Act and Article 21(6) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)) (powers of seizure not to include power to seize anything that a person has reasonable grounds for believing is legally privileged) shall not apply to the power of seizure conferred by subsection (2).

(5) This section applies to each of the powers of seizure specified in Part 1 of Schedule 1.

(6) Without prejudice to any power conferred by this section to take a copy of any document, nothing in this section, so far as it has effect by reference to the power to take copies of documents under section 28(2)(b) of the Competition Act 1998 (c. 41), shall be taken to confer any power to seize any document.

51.— Additional powers of seizure from the person.

(1) Where —

(a) a person carrying out a lawful search of any person finds something that he has reasonable grounds for believing may be or may contain something for which he is authorised to search,

(b) a power of seizure to which this section applies or the power conferred by subsection (2) would entitle him, if he found it, to seize whatever it is that he has grounds for believing that thing to be or to contain, and

(c) in all the circumstances it is not reasonably practicable for it to be determined, at the time and place of the search—

(i) whether what he has found is something that he is entitled to seize, or

(ii) the extent to which what he has found contains something that he is entitled to seize,

that person's powers of seizure shall include power under this section to seize so much of what he has found as it is necessary to remove from that place to enable that to be determined.

(2) Where—

(a) a person carrying out a lawful search of any person finds something ("the seizable property") which he would be entitled to seize but for its being comprised in something else that he has (apart from this subsection) no power to seize,

(b) the power under which that person would have power to seize the seizable property is a power to which this section applies, and

(c) in all the circumstances it is not reasonably practicable for the seizable property to be separated, at the time and place of the search, from that in which it is comprised,

that person's powers of seizure shall include power under this section to seize both the seizable property and that from which it is not reasonably practicable to separate it.

(3) The factors to be taken into account in considering, for the purposes of this section, whether or not it is reasonably practicable, at the time and place of a search, for something to be determined, or for something to be separated from something else, shall be confined to the following—

(a) how long it would take to carry out the determination or separation at that time and place;

(b) the number of persons that would be required to carry out that determination or separation at that time and place within a reasonable period;

(c) whether the determination or separation would (or would if carried out at that time and place) involve damage to property;

(d) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation; and

(e) in the case of separation, whether the separation—

(i) would be likely, or

(ii) if carried out by the only means that are reasonably practicable at that time and place, would be likely,

to prejudice the use of some or all of the separated seizable property for a purpose for which something seized under the power in question is capable of being used.

(4) Section 19(6) of the 1984 Act and Article 21(6) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)) (powers of seizure not to include power to seize anything a person has reasonable grounds for believing is legally privileged) shall not apply to the power of seizure conferred by subsection (2).

(5) This section applies to each of the powers of seizure specified in Part 2 of Schedule 1.

52.— Notice of exercise of power under s. 50 or 51.

(1) Where a person exercises a power of seizure conferred by section 50, it shall (subject to subsections (2) and (3)) be his duty, on doing so, to give to the occupier of the premises a written notice—

(a) specifying what has been seized in reliance on the powers conferred by that section;

(b) specifying the grounds on which those powers have been exercised;

(c) setting out the effect of sections 59 to 61;

(d) specifying the name and address of the person to whom notice of an application under section 59(2) to the appropriate judicial authority in respect of any of the seized property must be given; and

(e) specifying the name and address of the person to whom an application may be made to be allowed to attend the initial examination required by any arrangements made for the purposes of section 53(2).

(2) Where it appears to the person exercising on any premises a power of seizure conferred by section 50—

(a) that the occupier of the premises is not present on the premises at the time of the exercise of the power, but

(b) that there is some other person present on the premises who is in charge of the premises,

subsection (1) of this section shall have effect as if it required the notice under that subsection to be given to that other person.

(3) Where it appears to the person exercising a power of seizure conferred by section 50 that there is no one present on the premises to whom he may give a notice for the purposes of complying with subsection (1) of this section, he shall, before leaving the premises, instead of complying with that subsection, attach a notice such as is mentioned in that subsection in a prominent place to the premises.

(4) Where a person exercises a power of seizure conferred by section 51 it shall be his duty, on doing so, to give a written notice to the person from whom the seizure is made—

(a) specifying what has been seized in reliance on the powers conferred by that section;

(b) specifying the grounds on which those powers have been exercised;

(c) setting out the effect of sections 59 to 61;

(d) specifying the name and address of the person to whom notice of any application under section 59(2) to the appropriate judicial authority in respect of any of the seized property must be given; and

(e) specifying the name and address of the person to whom an application may be made to be allowed to attend the initial examination required by any arrangements made for the purposes of section 53(2).

(5) The Secretary of State may by regulations made by statutory instrument, after consultation with the Scottish Ministers, provide that a person who exercises a power of seizure conferred by section 50 shall be required to give a notice such as is mentioned in subsection (1) of this section to any person, or send it to any place, described in the regulations.

(6) Regulations under subsection (5) may make different provision for different cases.

(7) A statutory instrument containing regulations under subsection (5) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

53.— Examination and return of property seized under s. 50 or 51.

(1) This section applies where anything has been seized under a power conferred by section 50 or 51.

(2) It shall be the duty of the person for the time being in possession of the seized property in consequence of the exercise of that power to secure that there are arrangements in force which (subject to section 61) ensure—

(a) that an initial examination of the property is carried out as soon as reasonably practicable after the seizure;

(b) that that examination is confined to whatever is necessary for determining how much of the property falls within subsection (3);

(c) that anything which is found, on that examination, not to fall within subsection (3) is separated from the rest of the seized property and is returned as soon as reasonably practicable after the examination of all the seized property has been completed; and

(d) that, until the initial examination of all the seized property has been completed and anything which does not fall within subsection (3) has been returned, the seized property is kept separate from anything seized under any other power.

(3) The seized property falls within this subsection to the extent only—

(a) that it is property for which the person seizing it had power to search when he made the seizure but is not property the return of which is required by section 54;

(b) that it is property the retention of which is authorised by section 56; or

(c) that it is something which, in all the circumstances, it will not be reasonably practicable, following the examination, to separate from property falling within paragraph (a) or (b).

(4) In determining for the purposes of this section the earliest practicable time for the carrying out of an initial examination of the seized property, due regard shall be had to

the desirability of allowing the person from whom it was seized, or a person with an interest in that property, an opportunity of being present or (if he chooses) of being represented at the examination.

(5) In this section, references to whether or not it is reasonably practicable to separate part of the seized property from the rest of it are references to whether or not it is reasonably practicable to do so without prejudicing the use of the rest of that property, or a part of it, for purposes for which (disregarding the part to be separated) the use of the whole or of a part of the rest of the property, if retained, would be lawful.

54.— Obligation to return items subject to legal privilege.

(1) If, at any time after a seizure of anything has been made in exercise of a power of seizure to which this section applies—

(a) it appears to the person for the time being having possession of the seized property in consequence of the seizure that the property—

(i) is an item subject to legal privilege, or

(ii) has such an item comprised in it,

and

(b) in a case where the item is comprised in something else which has been lawfully seized, it is not comprised in property falling within subsection (2),

it shall be the duty of that person to secure that the item is returned as soon as reasonably practicable after the seizure.

(2) Property in which an item subject to legal privilege is comprised falls within this subsection if—

(a) the whole or a part of the rest of the property is property falling within subsection (3) or property the retention of which is authorised by section 56; and

(b) in all the circumstances, it is not reasonably practicable for that item to be separated from the rest of that property (or, as the case may be, from that part of it) without prejudicing the use of the rest of that property, or that part of it, for purposes for which (disregarding that item) its use, if retained, would be lawful.

(3) Property falls within this subsection to the extent that it is property for which the person seizing it had power to search when he made the seizure, but is not property which is required to be returned under this section or section 55.

(4) This section applies—

(a) to the powers of seizure conferred by sections 50 and 51;

(b) to each of the powers of seizure specified in Parts 1 and 2 of Schedule 1; and

(c) to any power of seizure (not falling within paragraph (a) or (b)) conferred on a constable by or under any enactment, including an enactment passed after this Act.

55.— Obligation to return excluded and special procedure material.

(1) If, at any time after a seizure of anything has been made in exercise of a power to which this section applies—

(a) it appears to the person for the time being having possession of the seized property in consequence of the seizure that the property—

(i) is excluded material or special procedure material, or

(ii) has any excluded material or any special procedure material comprised in it,

(b) its retention is not authorised by section 56, and

(c) in a case where the material is comprised in something else which has been lawfully seized, it is not comprised in property falling within subsection (2) or (3),

it shall be the duty of that person to secure that the item is returned as soon as reasonably practicable after the seizure.

(2) Property in which any excluded material or special procedure material is comprised falls within this subsection if—

(a) the whole or a part of the rest of the property is property for which the person seizing it had power to search when he made the seizure but is not property the return of which is required by this section or section 54; and

(b) in all the circumstances, it is not reasonably practicable for that material to be separated from the rest of that property (or, as the case may be, from that part of it) without prejudicing the use of the rest of that property, or that part of it, for purposes for which (disregarding that material) its use, if retained, would be lawful.

(3) Property in which any excluded material or special procedure material is comprised falls within this subsection if—

(a) the whole or a part of the rest of the property is property the retention of which is authorised by section 56; and

(b) in all the circumstances, it is not reasonably practicable for that material to be separated from the rest of that property (or, as the case may be, from that part of it) without prejudicing the use of the rest of that property, or that part of it, for purposes for which (disregarding that material) its use, if retained, would be lawful.

(4) This section applies (subject to subsection (5)) to each of the powers of seizure specified in Part 3 of Schedule 1

(5) In its application to the powers of seizure conferred by—

(a) section 56(5) of the Drug Trafficking Act 1994 (c. 37),

(b) Article 51(5) of the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996 1299 (N.I. 6)), and

(c) section 352(4) of the Proceeds of Crime Act 2002,

this section shall have effect with the omission of every reference to special procedure material.

(6) In this section, except in its application to—

(a) the power of seizure conferred by section 8(2) of the 1984 Act,

(b) the power of seizure conferred by Article 10(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)),

(c) each of the powers of seizure conferred by the provisions of paragraphs 1 and 3 of Schedule 5 to the Terrorism Act 2000 (c. 11), and

(d) the power of seizure conferred by paragraphs 15 and 19 of Schedule 5 to that Act of 2000, so far only as the power in question is conferred by reference to paragraph 1 of that Schedule,

"special procedure material" means special procedure material consisting of documents or records other than documents.

56.— Property seized by constables etc.

(1) The retention of—

(a) property seized on any premises by a constable who was lawfully on the premises,

(b) property seized on any premises by a relevant person who was on the premises accompanied by a constable, and

(c) property seized by a constable carrying out a lawful search of any person,

is authorised by this section if the property falls within subsection (2) or (3).

(2) Property falls within this subsection to the extent that there are reasonable grounds for believing—

(a) that it is property obtained in consequence of the commission of an offence; and

(b) that it is necessary for it to be retained in order to prevent its being concealed, lost, damaged, altered or destroyed.

(3) Property falls within this subsection to the extent that there are reasonable grounds for believing—

(a) that it is evidence in relation to any offence; and

(b) that it is necessary for it to be retained in order to prevent its being concealed, lost, altered or destroyed.

(4) Nothing in this section authorises the retention (except in pursuance of section 54(2)) of anything at any time when its return is required by section 54.

(4A) Subsection (1)(a) includes property seized on any premises—

(a) by a person authorised under section 16(2) of the 1984 Act to accompany a constable executing a warrant, or

(b) by a person accompanying a constable under section 2(6) of the Criminal Justice Act 1987 in the execution of a warrant under section 2(4) of that Act.

(5) In subsection (1)(b) the reference to a relevant person's being on any premises accompanied by a constable is a reference only to a person who was so on the premises under the authority of—

(a) a warrant under section 448 of the Companies Act 1985 (c. 6) authorising him to exercise together with a constable the powers conferred by subsection (3) of that section;

(b) a warrant under Article 441 of the Companies (Northern Ireland) Order 1986 (S.I. 1986 1032 (N.I. 6)) authorising him to exercise together with a constable the powers conferred by paragraph (3) of that Article;

57.— Retention of seized items.

(1) This section has effect in relation to the following provisions (which are about the retention of items which have been seized and are referred to in this section as "the relevant provisions")—

(a) section 22 of the 1984 Act;

(b) Article 24 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12));

(f) section 448(6) of the Companies Act 1985 (c. 6);

(k) section 40(4) of the Human Fertilisation and Embryology Act 1990 (c. 37);

(l) section 5(4) of the Knives Act 1997 (c. 21);

(n) section 28(7) of the Competition Act 1998 (c. 41);

(o) section 176(8) of the Financial Services and Markets Act 2000 (c. 8);

(p) paragraph 7(2) of Schedule 3 to the Freedom of Information Act 2000 (c. 36).

(q) paragraph 5(4) of Schedule 5 to the Human Tissue Act 2004;

(r) paragraph 12(3) of Schedule 2 to the Animal Welfare Act 2006;

(s) paragraphs 28(7) and 29(8) of Schedule 5 to the Consumer Rights Act 2015;

(t) paragraph 10 of Schedule 15 to the Data Protection Act 2018.

(2) The relevant provisions shall apply in relation to any property seized in exercise of a power conferred by section 50 or 51 as if the property had been seized under the power of seizure by reference to which the power under that section was exercised in relation to that property.

(3) Nothing in any of sections 53 to 56 authorises the retention of any property at any time when its retention would not (apart from the provisions of this Part) be authorised by the relevant provisions.

(4) Nothing in any of the relevant provisions authorises the retention of anything after an obligation to return it has arisen under this Part.

58.— Person to whom seized property is to be returned.

(1) Where—

(a) anything has been seized in exercise of any power of seizure, and

(b) there is an obligation under this Part for the whole or any part of the seized property to be returned,

the obligation to return it shall (subject to the following provisions of this section) be an obligation to return it to the person from whom it was seized.

(2) Where—

(a) any person is obliged under this Part to return anything that has been seized to the person from whom it was seized, and

(b) the person under that obligation is satisfied that some other person has a better right to that thing than the person from whom it was seized,

his duty to return it shall, instead, be a duty to return it to that other person or, as the case may be, to the person appearing to him to have the best right to the thing in question.

(3) Where different persons claim to be entitled to the return of anything that is required to be returned under this Part, that thing may be retained for as long as is reasonably necessary for the determination in accordance with subsection (2) of the person to whom it must be returned.

(4) References in this Part to the person from whom something has been seized, in relation to a case in which the power of seizure was exercisable by reason of that thing's having been found on any premises, are references to the occupier of the premises at the time of the seizure.

(5) References in this section to the occupier of any premises at the time of a seizure, in relation to a case in which—

(a) a notice in connection with the entry or search of the premises in question, or with the seizure, was given to a person appearing in the occupier's absence to be in charge of the premises, and

(b) it is practicable, for the purpose of returning something that has been seized, to identify that person but not to identify the occupier of the premises,

are references to that person.

59.— Application to the appropriate judicial authority.

(1) This section applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure.

(2) Any person with a relevant interest in the seized property may apply to the appropriate judicial authority, on one or more of the grounds mentioned in subsection (3), for the return of the whole or a part of the seized property.

(3) Those grounds are—

(a) that there was no power to make the seizure;

(b) that the seized property is or contains an item subject to legal privilege that is not comprised in property falling within section 54(2);

(c) that the seized property is or contains any excluded material or special procedure material which—

(i) has been seized under a power to which section 55 applies;

(ii) is not comprised in property falling within section 55(2) or (3); and

(iii) is not property the retention of which is authorised by section 56;

(d) that the seized property is or contains something seized under section 50 or 51 which does not fall within section 53(3);

and subsections (5) and (6) of section 55 shall apply for the purposes of paragraph (c) as they apply for the purposes of that section.

(4) Subject to subsection (6), the appropriate judicial authority, on an application under subsection (2), shall—

(a) if satisfied as to any of the matters mentioned in subsection (3), order the return of so much of the seized property as is property in relation to which the authority is so satisfied; and

(b) to the extent that that authority is not so satisfied, dismiss the application.

(5) The appropriate judicial authority—

(a) on an application under subsection (2),

(b) on an application made by the person for the time being having possession of anything in consequence of its seizure under a relevant power of seizure, or

may give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property.

(6) On any application under this section, the appropriate judicial authority may authorise the retention of any property which—

(a) has been seized in exercise, or purported exercise, of a relevant power of seizure, and

(b) would otherwise fall to be returned,

if that authority is satisfied that the retention of the property is justified on grounds falling within subsection (7).

(7) Those grounds are that (if the property were returned) it would immediately become appropriate—

(a) to issue, on the application of the person who is in possession of the property at the time of the application under this section, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property; or

(b) to make an order under—

(i) paragraph 4 of Schedule 1 to the 1984 Act,

(ii) paragraph 4 of Schedule 1 to the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)),

(iii) section 20BA of the Taxes Management Act 1970 (c. 9), or

(iv) paragraph 5 of Schedule 5 to the Terrorism Act 2000 (c. 11),

under which the property would fall to be delivered up or produced to the person mentioned in paragraph (a).

(8) Where any property which has been seized in exercise, or purported exercise, of a relevant power of seizure has parts (“part A” and “part B”) comprised in it such that—

(a) it would be inappropriate, if the property were returned, to take any action such as is mentioned in subsection (7) in relation to part A,

(b) it would (or would but for the facts mentioned in paragraph (a)) be appropriate, if the property were returned, to take such action in relation to part B, and

(c) in all the circumstances, it is not reasonably practicable to separate part A from part B without prejudicing the use of part B for purposes for which it is lawful to use property seized under the power in question,

the facts mentioned in paragraph (a) shall not be taken into account by the appropriate judicial authority in deciding whether the retention of the property is justified on grounds falling within subsection (7).

(9) If a person fails to comply with any order or direction made or given by a judge of the Crown Court in exercise of any jurisdiction under this section—

(a) the authority may deal with him as if he had committed a contempt of the Crown Court; and

(b) any enactment relating to contempt of the Crown Court shall have effect in relation to the failure as if it were such a contempt.

(10) The relevant powers of seizure for the purposes of this section are—

(a) the powers of seizure conferred by sections 50 and 51;

(b) each of the powers of seizure specified in Parts 1 and 2 of Schedule 1; and

(c) any power of seizure (not falling within paragraph (a) or (b)) conferred on a constable by or under any enactment, including an enactment passed after this Act.

(11) References in this section to a person with a relevant interest in seized property are references to—

(a) the person from whom it was seized;

(b) any person with an interest in the property; or

(c) any person, not falling within paragraph (a) or (b), who had custody or control of the property immediately before the seizure.

(12) For the purposes of subsection (11)(b), the persons who have an interest in seized property shall, in the case of property which is or contains an item subject to legal privilege, be taken to include the person in whose favour that privilege is conferred.

(13) Criminal Procedure Rules may make provision about proceedings under this section on an application to a judge of the Crown Court in England and Wales.

60.— Cases where duty to secure arises.

(1) Where property has been seized in exercise, or purported exercise, of any power of seizure conferred by section 50 or 51, a duty to secure arises under section 61 in relation to the seized property if—

(a) a person entitled to do so makes an application under section 59 for the return of the property;

(b) in relation to England, Wales and Northern Ireland, at least one of the conditions set out in subsections (2) and (3) is satisfied;

(c) in relation to Scotland, the condition set out in subsection (2) is satisfied; and

(d) notice of the application is given to a relevant person.

(2) The first condition is that the application is made on the grounds that the seized property is or contains an item subject to legal privilege that is not comprised in property falling within section 54(2).

(3) The second condition is that—

(a) the seized property was seized by a person who had, or purported to have, power under this Part to seize it by virtue only of one or more of the powers specified in subsection (6); and

(b) the application—

(i) is made on the ground that the seized property is or contains something which does not fall within section 53(3); and

(ii) states that the seized property is or contains special procedure material or excluded material.

(4) In relation to property seized by a person who had, or purported to have, power under this Part to seize it by virtue only of one or more of the powers of seizure conferred by—

(b) section 56(5) of the Drug Trafficking Act 1994 (c. 37),

(c) Article 51(5) of the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996 1299 (N.I. 6)), or

(d) section 352(4) of the Proceeds of Crime Act 2002,

the second condition is satisfied only if the application states that the seized property is or contains excluded material

(5) In relation to property seized by a person who had, or purported to have, power under this Part to seize it by virtue only of one or more of the powers of seizure specified in Part 3 of Schedule 1 but not by virtue of—

(a) the power of seizure conferred by section 8(2) of the 1984 Act,

(b) the power of seizure conferred by Article 10(2) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)),

(c) either of the powers of seizure conferred by paragraphs 1 and 3 of Schedule 5 to the Terrorism Act 2000 (c. 11), or

(d) either of the powers of seizure conferred by paragraphs 15 and 19 of Schedule 5 to that Act of 2000 so far as they are conferred by reference to paragraph 1 of that Schedule,

the second condition is satisfied only if the application states that the seized property is or contains excluded material or special procedure material consisting of documents or records other than documents.

(6) The powers mentioned in subsection (3) are—

(a) the powers of seizure specified in Part 3 of Schedule 1;

(b) the powers of seizure conferred by the provisions of Parts 2 and 3 of the 1984 Act (except section 8(2) of that Act);

(c) the powers of seizure conferred by the provisions of Parts 3 and 4 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (except Article 10(2) of that Order);

(d) the powers of seizure conferred by the provisions of paragraph 11 of Schedule 5 to the Terrorism Act 2000; and

(e) the powers of seizure conferred by the provisions of paragraphs 15 and 19 of that Schedule so far as they are conferred by reference to paragraph 11 of that Schedule.

(7) In this section "a relevant person" means any one of the following—

(a) the person who made the seizure;

(b) the person for the time being having possession, in consequence of the seizure, of the seized property;

(c) the person named for the purposes of subsection (1)(d) or (4)(d) of section 52 in any notice given under that section with respect to the seizure.

61.— The duty to secure.

(1) The duty to secure that arises under this section is a duty of the person for the time being having possession, in consequence of the seizure, of the seized property to secure that arrangements are in force that ensure that the seized property (without being returned) is not, at any time after the giving of the notice of the application under section 60(1), either—

(a) examined or copied, or

(b) put to any use to which its seizure would, apart from this subsection, entitle it to be put,

except with the consent of the applicant or in accordance with the directions of the appropriate judicial authority.

(2) Subsection (1) shall not have effect in relation to any time after the withdrawal of the application to which the notice relates.

(3) Nothing in any arrangements for the purposes of this section shall be taken to prevent the giving of a notice under section 49 of the Regulation of Investigatory Powers Act 2000 (c. 23) (notices for the disclosure of material protected by encryption etc.) in respect of any information contained in the seized material; but subsection (1) of this

section shall apply to anything disclosed for the purpose of complying with such a notice as it applies to the seized material in which the information in question is contained.

(4) Subsection (9) of section 59 shall apply in relation to any jurisdiction conferred on the appropriate judicial authority by this section as it applies in relation to the jurisdiction conferred by that section.

62.— Use of inextricably linked property.

(1) This section applies to property, other than property which is for the time being required to be secured in pursuance of section 61, if—

(a) it has been seized under any power conferred by section 50 or 51 or specified in Part 1 or 2 of Schedule 1, and

(b) it is inextricably linked property.

(2) Subject to subsection (3), it shall be the duty of the person for the time being having possession, in consequence of the seizure, of the inextricably linked property to ensure that arrangements are in force which secure that that property (without being returned) is not at any time, except with the consent of the person from whom it was seized, either—

(a) examined or copied, or

(b) put to any other use.

(3) Subsection (2) does not require that arrangements under that subsection should prevent inextricably linked property from being put to any use falling within subsection (4).

(4) A use falls within this subsection to the extent that it is use which is necessary for facilitating the use, in any investigation or proceedings, of property in which the inextricably linked property is comprised.

(5) Property is inextricably linked property for the purposes of this section if it falls within any of subsections (6) to (8).

(6) Property falls within this subsection if—

(a) it has been seized under a power conferred by section 50 or 51; and

(b) but for subsection (3)(c) of section 53, arrangements under subsection (2) of that section in relation to the property would be required to ensure the return of the property as mentioned in subsection (2)(c) of that section.

(7) Property falls within this subsection if—

(a) it has been seized under a power to which section 54 applies; and

(b) but for paragraph (b) of subsection (1) of that section, the person for the time being having possession of the property would be under a duty to secure its return as mentioned in that subsection.

(8) Property falls within this subsection if—

(a) it has been seized under a power of seizure to which section 55 applies; and

(b) but for paragraph (c) of subsection (1) of that section, the person for the time being having possession of the property would be under a duty to secure its return as mentioned in that subsection.

63.— Copies.

(1) Subject to subsection (3)—

(a) in this Part, "seize" includes "take a copy of", and cognate expressions shall be construed accordingly;

(b) this Part shall apply as if any copy taken under any power to which any provision of this Part applies were the original of that of which it is a copy; and

(c) for the purposes of this Part, except sections 50 and 51, the powers mentioned in subsection (2) (which are powers to obtain hard copies etc. of information which is stored in electronic form) shall be treated as powers of seizure, and references to seizure and to seized property shall be construed accordingly.

(2) The powers mentioned in subsection (1)(c) are any powers which are conferred by—

(a) section 19(4) or 20 of the 1984 Act;

(b) Article 21(4) or 22 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12));

(c) section 46(3) of the Firearms Act 1968 (c. 27);

(f) section 32(6)(b) of the Food Safety Act 1990 (c. 16);

(g) Article 34(6)(b) of the Food Safety (Northern Ireland) Order 1991 (S.I. 1991 762 (N.I. 7));

(ga) section 23E(5)(b) (as read with section 23K(2)) of the Criminal Law (Consolidation) (Scotland) Act 1995;

(h) section 28(2)(f) of the Competition Act 1998 (c. 41); or

(i) section 8(2)(c) of the Nuclear Safeguards Act 2000 (c. 5).

(3) Subsection (1) does not apply to section 50(6) or 57.

64.— Meaning of "appropriate judicial authority".

(1) Subject to subsection (2), in this Part "appropriate judicial authority" means—

(a) in relation to England and Wales and Northern Ireland, a judge of the Crown Court;

(b) in relation to Scotland, a sheriff.

(2) In this Part "appropriate judicial authority", in relation to the seizure of items under any power mentioned in subsection (3) and in relation to items seized under any such power, means—

(a) in relation to England and Wales and Northern Ireland, the High Court;

(b) in relation to Scotland, the Court of Session.

(3) Those powers are—

(a) the powers of seizure conferred by—

(i) section 448(3) of the Companies Act 1985 (c. 6);

(ii) Article 441(3) of the Companies (Northern Ireland) Order 1986 (S.I. 1986 1032 (N.I. 6)); and

(iii) section 28(2) of the Competition Act 1998;

(aa) the power of seizure conferred by section 352(4) of the Proceeds of Crime Act 2002, if the power is exercisable for the purposes of a civil recovery investigation or a detained cash investigation (within the meaning of Part 8 of that Act);

(b) any power of seizure conferred by section 50, so far as that power is exercisable by reference to any power mentioned in paragraph (a).

65.— Meaning of "legal privilege".

(1) Subject to the following provisions of this section, references in this Part to an item subject to legal privilege shall be construed—

(a) for the purposes of the application of this Part to England and Wales, in accordance with section 10 of the 1984 Act (meaning of "legal privilege");

(b) for the purposes of the application of this Part to Scotland, in accordance with section 412 of the Proceeds of Crime Act 2002 (interpretation); and

(c) for the purposes of the application of this Part to Northern Ireland, in accordance with Article 12 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)) (meaning of "legal privilege").

(2) In relation to property which has been seized in exercise, or purported exercise, of—

(a) the power of seizure conferred by section 28(2) of the Competition Act 1998, or

(b) so much of any power of seizure conferred by section 50 as is exercisable by reference to that power,

references in this Part to an item subject to legal privilege shall be read as references to a privileged communication within the meaning of section 30 of that Act.

(3A) In relation to property which has been seized in exercise, or purported exercise, of—

(a) the power of seizure conferred by section 352(4) of the Proceeds of Crime Act 2002, or

(b) so much of any power of seizure conferred by section 50 as is exercisable by reference to that power,

references in this Part to an item subject to legal privilege shall be read as references to privileged material within the meaning of section 354(2) of that Act.

(4) An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by section 448(3) of the Companies Act 1985 (c. 6) shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of section 452(2) of that Act (privileged information).

(5) An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by Article 441(3) of the Companies (Northern Ireland) Order 1986 (S.I. 1986 1032 (N.I. 6)) shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of Article 445(2) of that Order (privileged information).

(6) An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by sub-paragraph (2) of paragraph 3 of Schedule 2 to the Timeshare Act 1992 (c. 35) shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of sub-paragraph (4) of that paragraph (privileged documents).

(7) An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by paragraphs 1 and 2 of Schedule 15 to the Data Protection Act 2018 shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of paragraph 11 (matters exempt from inspection and seizure: privileged communications) of that Schedule (privileged communications).

(8) An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by paragraph 1 of Schedule 3 to the Freedom of Information Act 2000 (c. 36) shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of paragraph 9 of that Schedule (privileged communications).

(8B) An item which is, or is comprised in, property which has been seized in exercise or purported exercise of the power of seizure conferred by paragraph 27(1)(b) or 29(1) of Schedule 5 to the Consumer Rights Act 2015 shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of paragraph 27(6) or (as the case may be) 29(6) of that Schedule (privileged documents).

(9) An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of so much of any power of seizure conferred by section 50 as is exercisable by reference to a power of seizure conferred by—

(a) section 448(3) of the Companies Act 1985,

(b) Article 441(3) of the Companies (Northern Ireland) Order 1986,

(c) paragraph 3(2) of Schedule 2 to the Timeshare Act 1992,

(d) paragraph 1 of Schedule 9 to the Data Protection Act 1998, or

(e) paragraph 1 of Schedule 3 to the Freedom of Information Act 2000,

shall be taken for the purposes of this Part to be an item subject to legal privilege if, and only if, the item would have been taken for the purposes of this Part to be an item subject to legal privilege had it been seized under the power of seizure by reference to which the power conferred by section 50 was exercised.

66.— General interpretation of Part 2.

(1) In this Part—

"appropriate judicial authority" has the meaning given by section 64;

"documents" includes information recorded in any form;

"item subject to legal privilege" shall be construed in accordance with section 65;

"marine installation" has the meaning given by section 262 of the Marine and Coastal Access Act 2009;

"premises" includes any vehicle, stall or moveable structure (including an offshore installation or other marine installation) and any other place whatever, whether or not occupied as land;

"offshore installation" has the same meaning as in the Mineral Workings (Offshore Installations) Act 1971 (c. 61);

"return", in relation to seized property, shall be construed in accordance with section 58, and cognate expressions shall be construed accordingly;

"seize", and cognate expressions, shall be construed in accordance with section 63(1) and subsection (5) below;

"seized property", in relation to any exercise of a power of seizure, means (subject to subsection (5)) anything seized in exercise of that power; and

"vehicle" includes any vessel, aircraft or hovercraft.

(2) In this Part references, in relation to a time when seized property is in any person's possession in consequence of a seizure ("the relevant time"), to something for which the person making the seizure had power to search shall be construed—

(a) where the seizure was made on the occasion of a search carried out on the authority of a warrant, as including anything of the description of things the

presence or suspected presence of which provided grounds for the issue of the warrant;

(b) where the property was seized in the course of a search on the occasion of which it would have been lawful for the person carrying out the search to seize anything which on that occasion was believed by him to be, or appeared to him to be, of a particular description, as including—

(i) anything which at the relevant time is believed by the person in possession of the seized property, or (as the case may be) appears to him, to be of that description; and

(ii) anything which is in fact of that description;

(c) where the property was seized in the course of a search on the occasion of which it would have been lawful for the person carrying out the search to seize anything which there were on that occasion reasonable grounds for believing was of a particular description, as including—

(i) anything which there are at the relevant time reasonable grounds for believing is of that description; and

(ii) anything which is in fact of that description;

(d) where the property was seized in the course of a search to which neither paragraph (b) nor paragraph (c) applies, as including anything which is of a description of things which, on the occasion of the search, it would have been lawful for the person carrying it out to seize otherwise than under section 50 and 51; and

(e) where the property was seized on the occasion of a search authorised under section 82 of the Terrorism Act 2000 (c. 11) (seizure of items suspected to have been, or to be intended to be, used in commission of certain offences), as including anything—

(i) which is or has been, or is or was intended to be, used in the commission of an offence such as is mentioned in subsection (3)(a) or (b) of that section; or

(ii) which at the relevant time the person who is in possession of the seized property reasonably suspects is something falling within sub-paragraph (i).

(3) For the purpose of determining in accordance with subsection (2), in relation to any time, whether or to what extent property seized on the occasion of a search authorised under section 9 of the Official Secrets Act 1911 (c. 28) (seizure of evidence of offences under that Act having been or being about to be committed) is something for which the person making the seizure had power to search, subsection (1) of that section shall be construed—

(a) as if the reference in that subsection to evidence of an offence under that Act being about to be committed were a reference to evidence of such an offence having been, at the time of the seizure, about to be committed; and

(b) as if the reference in that subsection to reasonable ground for suspecting that such an offence is about to be committed were a reference to reasonable ground for suspecting that at the time of the seizure such an offence was about to be committed.

(4) References in subsection (2) to a search include references to any activities authorised by virtue of any of the following—

(b) section 29(1) of the Fair Trading Act 1973 (c. 41) (power to enter premises and to inspect and seize goods and documents);

(h) section 29 of the Consumer Protection Act 1987 (c. 43) (powers of search etc.);

(j) section 32(5) of the Food Safety Act 1990 (c. 16) (power to inspect records relating to a food business);

(ja) paragraph 5 of Schedule 3B to the Human Fertilisation and Embryology Act 1990;

(l) Article 33(6) of the Food Safety (Northern Ireland) Order 1991 (S.I. 1991 762 (N.I. 7));

(m) paragraph 3 of Schedule 2 to the Timeshare Act 1992 (c. 35) (powers of officers of enforcement authority);

(n) paragraph 2 of Schedule 5 to the Human Tissue Act 2004 (entry and inspection of licensed premises);

(o) regulation 22(4) of the General Product Safety Regulations 2005 (powers of entry and search etc);

(p) sections 26(1), 27(1), 28(1) and 29(1) of the Animal Welfare Act 2006 (inspection in connection with licences, inspection in connection with registration, inspection of farm premises and inspection relating to EU obligations);

(t) Part 4 of Schedule 5 to the Consumer Rights Act 2015.

(5) References in this Part to a power of seizure include references to each of the powers to take possession of items under—

(b) section 448(3) of the Companies Act 1985 (c. 6);

(f) section 2(5) of the Criminal Justice Act 1987 (c. 38);

(h) section 28(2)(c) of the Competition Act 1998 (c. 41); and

(i) section 176(5) of the Financial Services and Markets Act 2000 (c. 8);

and references in this Part to seizure and to seized property shall be construed accordingly.

(6) In this Part, so far as it applies to England and Wales—

(a) references to excluded material shall be construed in accordance with section 11 of the 1984 Act (meaning of "excluded material"); and

(b) references to special procedure material shall be construed in accordance with section 14 of that Act (meaning of "special procedure material").

(7) In this Part, so far as it applies to Northern Ireland—

(a) references to excluded material shall be construed in accordance with Article 13 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989 1341 (N.I. 12)) (meaning of "excluded material"); and

(b) references to special procedure material shall be construed in accordance with Article 16 of that Order (meaning of "special procedure material").

(8) References in this Part to any item or material being comprised in other property include references to its being mixed with that other property.

(9) In this Part "enactment" includes an enactment contained in Northern Ireland legislation.

67.— Application to officers of Revenue and Customs.

The powers conferred by section 114(2) of the 1984 Act and Article 85(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (application of provisions relating to police officers to officers of Revenue and Customs) shall have effect in relation to the provisions of this Part as they have effect in relation to the provisions of that Act or, as the case may be, that Order.

67A.— Application to Welsh Revenue Authority

(1) The Welsh Ministers may by regulations—

(a) direct that any provision of this Part is to apply, subject to such modifications as the regulations may specify, to investigations of offences conducted by the Welsh Revenue Authority;

(b) make provision permitting a person exercising a function conferred on the Welsh Revenue Authority by the regulations to use reasonable force in the exercise of such a function.

(2) Regulations under subsection (1) may—

(a) make provision that applies generally or only in specified cases,

(b) make different provision for different cases or circumstances, and

(c) may, in modifying a provision, in particular impose conditions on the exercise of a function.

(3) The power to make regulations under subsection (1) is exercisable by statutory instrument.

(4) A statutory instrument containing regulations under subsection (1) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the National Assembly for Wales.

68.— Application to Scotland.

(1) In the application of this Part to Scotland—

(a) subsection (4) of section 54 and subsection (10) of section 59 shall each have effect with the omission of paragraph (c) of that subsection;

(b) section 55 and subsection (3)(c) of section 59 shall be omitted; and

(c) Schedule 1 shall have effect as if the powers specified in that Schedule did not include any power of seizure under any enactment mentioned in that Schedule, so far as it is exercisable in Scotland by a constable, except a power conferred by an enactment mentioned in subsection (2).

(2) Those enactments are—

(a) section 43(5) of the Gaming Act 1968 (c. 65);

(c) section 448(3) of the Companies Act 1985 (c. 6);

(f) section 176(5) of the Financial Services and Markets Act 2000 (c. 8); and

(g) regulation 70(7) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

69.— Application to powers designated by order.

(1) The Secretary of State may by order—

(a) provide for any power designated by the order to be added to those specified in Schedule 1 or section 63(2);

(b) make any modification of the provisions of this Part which the Secretary of State considers appropriate in consequence of any provision made by virtue of paragraph (a);

(c) make any modification of any enactment making provision in relation to seizures, or things seized, under a power designated by an order under this subsection which the Secretary of State considers appropriate in consequence of any provision made by virtue of that paragraph.

(2) Where the power designated by the order made under subsection (1) is a power conferred in relation to Scotland, the Secretary of State shall consult the Scottish Ministers before making the order.

(2A) Where the power designated by the order made under subsection (1) is a power conferred in relation to Northern Ireland, the Secretary of State shall consult the Department of Justice in Northern Ireland before making the order.

(3) The power to make an order under subsection (1) shall be exercisable by statutory instrument; and no such order shall be made unless a draft of it has been laid before Parliament and approved by a resolution of each House.

(4) In this section “modification” includes any exclusion, extension or application.

70.— Consequential applications and amendments of enactments.

Schedule 2 (which applies enactments in relation to provision made by this Part and contains minor and consequential amendments) shall have effect.