Law Commission consultation on Search Warrants

Law Society response

September 2018

Introduction

The Law Society of England and Wales ("The Society") is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

The Society welcomes the opportunity to respond to this consultation. This response has been prepared on the Society's behalf by members of its specialist Criminal Law Committee. The Committee is drawn from a wide range of criminal law backgrounds, including prosecution and defence solicitors.

Summary

The Society agrees with the majority of proposals in this detailed and considered consultation paper, which, if enacted, will significantly improve the clarity of the law and procedure relating to search warrants.

As a result, those issuing warrants will be much better able to balance individuals' rights to privacy and freedom of expression (as set out in the European Convention of Human Rights and domestic legislation and common law), with the needs of law enforcement agencies to investigate criminal offences. This is all the more important in this age of the digital revolution and the ubiquity of massive amounts of electronic data.

We will set out our comments in relation to each of the 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?

Yes, we agree. This would lend consistency to the process and clear up the current statutory ambiguity.

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?

We agree; this would lend transparency to the process and it would remove any doubts about the obligation to follow Code B which exist amongst non-police enforcement officers.

For clarity, the bodies which would be subject to this provision expressly could be listed in a schedule to PACE 1984. Doing so would provide certainty to the applicant, the court and the public about who is subject to the safeguards in sections 15 and 16. The Debenhams case (Dudley Metropolitan Borough Council v Debenhams Plc (Case Stated Magistrates Court)

Divisional Court CO-3537-9313, July 1994, WL 1060875) indicates that local authorities should be on the list.

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?

Yes; the proposed definition is appropriate and would fit in alongside the other powers to apply for and grant search warrants. Section 8 says that an application under PACE for a search warrant must be where the offence being investigated is 'indictable'.

The proposed definition should also catch all those warrants where there is a power of entry and inspection, as well as those which include an express or implied power to search.

However, for clarity all those provisions which it is considered are caught by this new legislation, if and when it is enacted, should contain an amendment to this effect, otherwise this could be overlooked by those whose role is to enforce those particular provisions.

An additional safeguard could be provided by expressly listing in a schedule to PACE 1984 those enactments that are subject to sections 15 and 16. This would also have the advantage of providing a future template for Parliament to add to the schedule as and when new powers are introduced.

Incidentally, there are other powers for enforcement officers, other than police, to apply for search warrants that relate to investigations into summary-only offences. Such warrants should be regulated in the same way. For example, the Licensing Act 2003 provides for warrants to enter club premises (s90(5)) and powers to seize and remove documents (s90(6)). There are several summary-only offences in that Act relating to premises operating unlawfully.

It is necessary to consider the position of devolved legislatures, which may create their own powers within their respective competencies to seek warrants for entry and search While PACE is part of the law on reserved matters, it is easy to foresee modifications to the schedule being required as a result of the creation of a devolved offence and an accompanying search power within the devolved legislatures' competence (see, for

example, s 85 of the Public Health (Wales) Act 2017 and paragraph 2 of schedule 7B of the Government of Wales Act 2006). This is an important consideration to build into any future legislation.

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?

Yes, they should apply to all entry and inspection warrants where the search relates to a criminal investigation, as defined in question 3 above.

Generally, each piece of empowering legislation usually contains a number of criminal offences and the warrant provisions are contained in the corresponding enforcement provisions.

It should, therefore, apply for example to s 318 of the Gambling Act 2005. This Act, but not the specific section, is mentioned in the consultation document as an example of an entry warrant, at paragraph 3.30. This provision enables the grant to an enforcement officer of a warrant of entry into a dwelling house in order to carry out section 317 powers which are:

- entry,
- inspect,
- question,
- require access to electronic records,
- remove and retain anything if the officer reasonably believes that it constitutes or contains evidence of the commission of an offence under the Act or the breach of a term or condition of a licence issued under the Act,
- remove and retain anything if the officer reasonably believes that it is being used or has been used in the commission of an offence under the Act.

There are other powers contained in other legislation, and which could be numerous, for example the Licensing Act 2003 referred to in response to question 4 above.

Warrants under the Theatres Act 1968 are referred to as that of entry and inspection onto 'any premises', with no search or seizure powers specified, but what is seen by those executing the warrant on entry and inspection could well amount to evidence of a criminal offence under that Act; it would therefore be caught by the definition.

It is difficult to differentiate between this type of warrant and the other 'search warrants' for the purposes of the section 15 and 16 safeguards if the main criterion is that the warrant relates to a criminal offence.

We note that other legislation seems to point to other criteria; for example, the Gambling Act 2005 specifies that a warrant must be obtained where the premise to be entered is a 'dwelling house', ensuring that the safeguard of a judge or magistrate authorising a warrant

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for entry into a dwelling house applies (presumably because of the higher risk of intrusion into private and family life).

The fact that some parts of sections 15 and 16 will not apply to entry or inspection warrants is easily remedied by marking the relevant questions on any proforma as 'not applicable' and could be accompanied by an explanation. This would provide the adequate safeguards and also assist in limiting the number of forms that are proscribed or provided for in the Criminal Procedure Rules.

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?

Yes, we agree. Such an amendment would not constitute a major change to the existing law, as interpreted in case law, and would clarify that all elements of the search are rendered unlawful, including any seizure.

Consultation Question 6
We provisionally propose that section 15(1) of the Police and Criminal Evidence Act1984 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?

Yes, we agree, because it reflects the intention of the legislation more accurately. It is not possible to legislate for every eventuality and it is to be hoped that any new provisions would still allow some judicial discretion in the event of a truly 'technical' breach.

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.

Section 15(6) provisions relating to the form of the warrant itself are important and failure to comply with them should still give rise to the possibility that the warrant could be found to be unlawful. This is not new, and judges can exercise their discretion when a breach is 'technical' or 'de minimis'. Likewise, the requirements that apply after execution in s 16(9)-(12) are important safeguards which should not be overlooked – the same applies to them.

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It is not desirable to limit by statute, nor possible to list extensively, all the types of breaches that will lead to a determination that the entry, search and seizure was unlawful. The facts of each case will be relevant to determine any breach and whether that amounts to a ruling that the warrant, etc was unlawful. Each requirement of sections 15 and 16 is important, and one should not be given emphasis over another in determining if a breach has occurred.

Any breach in relation to the application and/or execution of a warrant may render the warrant and/or entry, seizures etc. unlawful. Unlawfully obtained evidence may nonetheless be admissible in related criminal proceedings subject to the normal rules of evidence. If it is judged admissible notwithstanding any breaches, it may then be excluded, for example, under section 78 of PACE.

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.

There is no compelling reason why other agencies tasked with the duty to investigate offences should not be able to apply for a search warrant. Provided those agencies can match the level of expertise, experience and training of the police it may be acceptable for them to have the power to apply. We note that it is possible for enforcement officers to approach the police for assistance or to conduct joint operations.

However, we understand that there is little, or no training given to police officers, or to officers of other agencies, on the application for warrants or their execution. As the overall aim of this consultation is to provide the public with a greater degree of protection and reduce the number of expensive court proceedings, it would be sensible that there be a focus on training, and possibly a requirement in the legislation that a warrant can only be sought if the applicant has undertaken appropriate training.

A standard format or list of authorised applicants, as there is for issuing charges with requisitions, might be an option.

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.

Prescribed forms should be used for all search warrant provisions, as this would provide the applicant with a checklist for a particular type of warrant. The use of technology could capture all warrants under one template, which could be adjusted from time to time. The proforma currently in use for section 8 and section 15 and16 warrants under the Criminal Procedure Rules would be a good place to start, but that should be subject to further consultation.

Any such forms could conceivably ask for additional information that would impact on the application, for example whether the subject is of good character, whether the premises have been subject to a search previously and if so when, or whether others reside there. These additional factors would not be exhaustive and could be identified from case law as having caused failings in past applications.

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.

This would be good practice and would assist the issuing authority to demonstrate that they had scrutinised the application. It would also be good practice to record the time an application commenced, including any time spent in pre-reading. The time of grant of an application is already endorsed next to the issuing authority's signature, so it would make sense that the time it commenced is also endorsed on the application.

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?

We agree that the importance of the duty of candour ought to be raised, and made more accessible and comprehensible to investigators, as it seems from the numbers of challenges

that current training and experience are not enough. All enforcement officers who regularly apply for warrants should be aware of the duty of candour. It should feature in their training materials and be acknowledged as best practice. It is also something that can be questioned by the issuing authority on the day of the hearing of the application.

We suggest that enshrining the duty explicitly in primary legislation would be the best option. It could be given the general name as it has emerged in common law, i.e. the duty of candour, but it could be expressed as 'including' certain specific instances, such as those questions listed in question 12 below, for example, have the premises been searched before and the outcome.

There are so many potential variations that it would be very difficult to list all possible questions; but while all the possible iterations may not be able to be listed, setting out the duty in legislation would provide real consequences for not complying with it.

Explanatory Notes and/or Ministerial statements in Parliament could be used to give non-exhaustive examples as guidance to applicants for warrants, and material to which a court interpreting the duty could have regard. Code B could also flesh it out, give examples etc. It could also be included on the notice which has to be given to the person against whom the warrant is issued, and in these ways would have a higher profile with the police and enforcement officers to whom PACE is familiar.

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?

Yes, we agree this would be a good idea. The title to this section of the application form should be headed 'Duty of Candour'. The Law Commission, at paragraph 4.43, helpfully summarises this duty as follows: '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.' We suggest that this text should accompany this heading. There should then be a space for anything the applicant need to mention; it should then have four more sections after that saying such a duty could include disclosing the following – listing the four items above, with a space below each for details.

Consultation Question 13

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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?

Yes, we agree that the Commission is correct in its assessment that warrants require uniformity; and we further agree that it would be sufficient that non-statutory guidance be created to set out the level of detail, of which judges, magistrates and legal advisors should be aware.

There should be a prescribed warrant form, in the same way that there is a prescribed information. Currently the Criminal Procedure Rules do not prescribe any warrant proforma for any type of warrant. A prescribed form would provide the level of detail required to comply with legislative requirements.

Consultation Question 14
We invite consultees to share with us their experience of how search warrant hearings are arranged.

There are a variety of methods currently in operation across the jurisdiction, from in-person to video-link applications, and from electronically to on-paper only. A harmonisation of the processes may not always be practically suited to arrangements in individual areas due to resource constraints at the court.

In in the magistrates' court in London and other areas, there are now dedicated applications courts which consider a variety of applications, including entry and search warrants. They are often heard by a lay magistrate sitting with a legal adviser. For all non-urgent applications, the applicant contacts the court and books a hearing slot. If the paperwork is voluminous the applicant will be asked to submit it in advance, in other cases on the day prior to the hearing. For urgent applications, contact with the court is preferred; but it is more likely the applicant will attend for an urgent application, they will be attended to by the court first able to hear them and slotted into the list. In order to do this, they will need to alert administrative staff or list callers/ushers, or in some cases the legal adviser/court associate, to their presence before they can be heard.

There has been some centralisation of these applications in parts of the country, for example in the 'South East', defined as the counties around London, both north and south. In these areas applications are heard via telephone/live link, on one or two days a week. On those days there would be one or two courts running. Applicants book in using an online system but do not submit their paperwork in advance. Hearings are allocated 15-minute slots and if there are errors with the paperwork, or further information needs to be obtained, the applicant loses their slot and must book in again for the next court. This naturally causes issues with execution of the warrant, particularly if there is some urgency about it. Out-of-hours arrangements exist, but again these are organised across several counties. The

volume of applications is high both in- and out-of-hours and there is little scope to rearrange slots or accommodate applicants at other times.

A central booking system that would allow applicants to seek time in courts across the country would be preferable; this flexibility would mean the court could utilise dead time more effectively, and applicants would be able to attend during dedicated times for non-urgent matters with a real prospect of being heard in good time.

Both the court service and the agencies that apply for warrants are restricted in their resources; this is unlikely to change and inevitably has had an impact on the way these applications are arranged, including when and where. Any future model needs to account for constrained resources or be innovative such that the lack of resources would be negated. One way of doing this would be by introducing a secure application portal that would serve several purposes – providing all the necessary templates; early transmission to the authority considering the application; the ability to make the application at distance; the ability for the public to challenge warrants later; the recording of reasons, and so on.

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.

In our experience, applicants for search warrants often have very limited knowledge of the investigation. It is not uncommon for junior police officers to be instructed by senior officers to "go and get this warrant", although most other agencies send the lead investigator, and/or the lawyer assigned to the case.

It would provide a significant safeguard if the applicant had sufficient knowledge of the investigation to answer questions. If relevant questions cannot be answered by the applicant arguably the warrant should not be issued. This is a matter for the issuer of the warrant to check.

However, 'sufficient knowledge' is a vague phrase and would require further guidance. That could be issued separately or contained within Code B.

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?

No, we do not agree with the proposal that an intended search of premises under section 18 should be capable of constituting lawful grounds of arrest under section 24 PACE, albeit with the requirement that there should be reasonable grounds for believing that it is not practicable to obtain the evidence through other means.

Section 18 allows a search where a person has been arrested; to justify an arrest on the grounds that a search must be carried out would amount to a circular reasoning. The proposal would effectively condone the police practice of arresting in order to carry out a search, and this could not be remedied by a claim for wrongful arrest if set out in legislation in this way.

The effects of an arrest on an individual can be far-reaching, and include, for example, that a person may not be able to obtain a visa to certain jurisdictions such as the US and Australia, which in turn can have a significant impact on a person's employment and family life.

This could also raise the possibility of a person who is unconnected with the offence which is under investigation, but who is in control of a relevant property, being arrested in order to expedite a search. The starting point for a search should be section 8 of PACE 1984; section 18 should be reserved for cases where there is a demonstrable operational need.

In addition, the use of arrest to seize items would also have the consequence of circumventing judicial oversight in relation to section 49 notices issued under the Regulation of Investigatory Powers Act 2000. In the normal course of events, a section 49 RIPA notice needs judicial approval and flagging in a warrant application. But, under Schedule 2 paragraph 4, where the police have exercised a statutory power to seize material, a senior officer rather than a judge may authorise the section 49 notice. Therefore, the suggestion would therefore weaken two safeguards in one swoop.

We cannot see the need for any extension of arrest powers, which were comprehensively reviewed and overhauled in the Serious Organised Crime and Police Act 2005. This is a considered piece of legislation that sought to strike the delicate balance between the police needing appropriate powers to investigate crime and the need to protect the public from excesses. As police powers to arrest were extended to any offence, by abolishing the concept of 'arrestable offences', so the counterbalancing statutory requirement for an arrest to be 'necessary' was introduced. We would submit that section 24(5), including 24(5)(e), is more than adequate for the intended purpose; including this one. Any re-extension of arrest powers would, we believe, be in danger of eroding the protections that were assured to the public in 2005. Powers to search should be kept separate from powers to arrest.

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.

The consultation paper at paragraph 5.7, describes a broad-brush procedure employed in the arranging, considering and issuing of a search warrant. It should be noted this varies greatly from area to area; however, in all areas the application and warrant should be vetted by the legal adviser, both in- and out-of-hours, prior to it being placed before a lay magistrate or a judge. Paragraph 5.7(4) notes “in the South East of England the legal adviser accompanies the justice during the application.” This should be the standard practice in-hours, so that every application considered by a lay magistrate or a judge should be with the support of a legal adviser. Our experience suggests this is generally true: if some areas are not applying this option it should be made mandatory.

Legal advisers will consider which tribunal to place an application before. It is often obvious from the vetting process as to whether it is appropriate to place before a lay magistrate or a judge. Legal advisers are well trained in the vetting of applications and how to allocate them. However, in some areas judges are rare and only lay magistrates are available. It would be undesirable and impractical, in the majority of cases, to restrict by legislation to a particular authority.

We agree that cases involving legally privileged, excluded, special procedure and sensitive material should be referred to a judge.

With the above background in mind, it would preferable to issue guidance on the types of cases that should be heard before a particular court or authority. It is too difficult to identify comprehensively the factors that would make a case ‘complex’; however, guidance on the type of cases/factors would guide applicants to make more informed choices about venue and assist legal advisers in allocation of the cases.

To assist applicants, an online application form, supported by online guidance (similar to the NCA's Suspicions Activity Report web pages) would make it possible for triage to be done on every application by trained duty officers, who could be on a national rota.

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?

Yes, we agree.

However, it is not feasible for them to be trained in every single ‘specialist’ warrant. It would be enough that they are trained on the most common warrants and the main principles, and that they are made aware of the existence of other warrants and the need to scrutinise the legal requirements. This would not be too difficult an undertaking. Rather than the creation of a ticket system, it could be incorporated into the requirements of being a magistrate. This would ensure that each magistrate would have to undergo the training in order to continue sitting.

In London there is a constant cycle of training in search warrants for magistrates. There is a set crib sheet with the most common legislation under which a warrant can be issued, and

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the requirements that must be satisfied to issue a warrant. This is supplemented by training, in particular on how and why to challenge applicants. Each magistrate is required to attend, with their attendance recorded by the Bench Support Team who manage their sittings and the other requirements they must fulfil to continue sitting as a magistrate (minimum days sat, appraisals, etc).

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)?

We consider that magistrates hearing search warrant applications should always be advised by a legal adviser (both in- and out-of-hours) who should be present during the application (when in-hours). This should include a District Judge (Magistrates' Court), save that they may direct otherwise.

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.

As is clear from the national press, there is a crisis amongst both the lay magistracy and the professional judiciary in recruitment and retention. If the need for a legal adviser to advise and the suggested training requirements are implemented there would be no justification to increase the number of magistrates considering an application.

The level of judicial scrutiny would not be improved by the addition of a further magistrate. With the proper guidance and support there is no reason why a single magistrate should not consider an application for a search warrant.

The impact of introducing a second magistrate is likely to cause specialist applications courts to be disbanded for a lack of available magistrates, and on the day increase the length of time to consider the application, record the reasons and sign the documentation. The standard form documentation would also need to be altered to allow for noting of additional magistrates' details.

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.

It is, of course, desirable for a lay magistrate to have out-of-hours access. The current position in the majority of the country is any application made out-of-hours passes through a legal adviser prior to going to the lay magistrate. The application is vetted in the same way as if made in-hours and the lay magistrate is briefed by the legal adviser; however, they are

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not present or dialled-in when the application is made. If there is any doubt the magistrate is entitled to seek support from the on-call legal adviser. This would have little impact if made a formal requirement, and would of course be beneficial to both applicants, the magistrate and serve the public interest better.

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.

There is already a formal rota system in place for many parts of the country. This is organised by the Justices' Clerks Society and HMCTS through local/defined areas. There is therefore no need to create a new system, only to formally extend the current one across the whole country.

Currently, out-of-hours applicants attend in person to the magistrate to make the application. This is open to change, because in-hours remote applications have become more frequent. It would assist the applicant in not having to attend and speed up the process of obtaining urgent search warrants out-of-hours.

As identified in the consultation paper there are insufficient numbers of judges across the country for all applications to be made to them out-of-hours. But there is no need for more judges: this assumes that magistrates are not able to perform the function, but the function is the same whether in-hours or out-of-hours. What would be beneficial is the inclusion of judges in the out-of-hours rota, so that there is an additional option of a tribunal.

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?

To a large degree these procedures are already employed. Applicants are usually the blockage in providing applications in advance, digitally or in hard-copy. If the procedure was formalised it would improve the ability to consider the application in advance.

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Applications are already filtered and vetted by legal advisers, and requests are made to alter or amend them either on the day it is due, or in advance on occasion, or for their return on another day if it is impractical to hear it the same day.

Search warrant applications rarely contain all the relevant information from the applicant for it to be issued without some questioning. This aspect of the application process would need to improve greatly before they could be considered on the papers alone, at least in the magistrates' court jurisdiction.

A formal system for appearance by live link or telephone would be welcome; however, it would need to be flexible to account for applicants being taken away at short notice and other applications overrunning.

The consultation mentions the South East regions arrangements. While it is accepted these are somewhat ahead of other areas, it should be noted that the South East covers a number of counties; the 32 slots are only for a single day of the week; there is no advance time for screening of applications (they are done on the day, there is no time for applicants to make many changes); a slot is only 15 minutes, and there is no space for applicants to come back. This is an indication that the resources available are limited. For this approach to be properly implemented HMCTS would need to provide the proper level of resources.

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.

In principle, this is a sound proposal. However, the Crown Court is not the only level of court that is short of staff. The numbers of legal advisers have been reduced significantly and continue to fall. Additional applications to be checked or sifted will only stretch resources further and potentially lead to delays or errors being missed. With the introduction of Digital Mark Up there is currently a high degree of work pressure already on legal advisers. HMCTS would need to commit further legal adviser resources to make this viable.

A warrant is really a direction, rather than an authority, to search. The issuing authority hears evidence on oath and makes a direction to search based on that evidence. A direction to search should only be made by a qualified and accountable person, whether it be a lay magistrate, District or Circuit Judge. Further, it ought not to be forgotten that civil Search Orders have some provided some useful guidance already.

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?

None of the proposals are entirely satisfactory. Recording of the proceedings will be unlikely, due to the cost involved. The application form itself was designed with a view to recording any additional information given by the officer on the form, so there should be no need to record the evidence as it should be contained in the information; there is only a need to record any additional information given.

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.

Best practice is to provide reasons for any judicial decision, even if those reasons only refer to the relevant test being applied.

We are aware of the need to balance the efficient use of court resources with the public interest in ensuring judicial decision making is transparent and bears up to scrutiny,

From a rule of law and Article 6 ECHR perspective, we consider that it would be preferable for the statute to require written reasons to be given. If the objection is that the common law already requires as much, we see merit in codifying the principle and therefore making it more accessible. It is increasingly common in devolved legislation to include a statutory requirement that public bodies give written reasons for decisions which affect fundamental rights.

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.

Although HMCTS could provide statistics on the number of warrants granted and refused, we are unclear what purpose would be served by tis data collection. Some areas will naturally have to deal with more applications, while others will deal with a disproportionately high number because they have an amalgamated applications court for several counties, compared with those that do very few. Clearly, some applicants do forum-shop, but statistics will not prevent this.

If statistics are to be collected for a clear purpose and published, the onus ought not to be solely on HMCTS but also on the agencies who apply for the warrants; this seems potentially more useful than gathering information by court centre, as it could provide a degree of transparency and accountability.

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.

We are unaware of any agency that is unnecessarily hindered.

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?

There is space on the application form to identify the function of any persons who will accompany those executing the warrant. To formally include this would be beneficial as it would then provide the occupier with certainty about who is entering. It would also assist agencies in not having to seek permission later for those persons to enter the premises.

Naming individuals would be unnecessarily restrictive; it would be sufficient to identify the function of the accompanying person.

This should not displace the current statutory provisions. However, best practice would always be for the applicant to be explicit at the time of applying, and have those persons endorsed on the warrant for the avoidance of doubt. This information should be brought to the attention of applicants through appropriate guidance material – perhaps the notes to the application form itself.

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.

While some legislation pre-dates the general change to a three-month maximum, it is clear that Parliament specifically considers what the maximum should be whenever enacting new legislation. It would be inappropriate to extend these time limits to create uniformity without a body of evidence to support the need for increased time limits.

What may be more appropriate is to allow the issuing authority the ability to provide a limit on the warrant, which could be extended later if required. Applicants are already asked on

the pro-forma when they intend to execute; some will give a date, while others will say within the three-month period. If the intention is to create greater judicial scrutiny and oversight, this could be achieved by limiting the length of time an applicant has to infringe an occupier's Article 8 rights. It is recognised there may be occasions when a three-month limit is needed for operational reasons, and it is open to applicants to provide justification for exercising the maximum power and to judicial decision makers to determine whether it will be granted.

The range and nature of matters in respect of which warrants can be sought points away from a uniform validity period. The balancing exercise, in terms of the public interest in effective enforcement versus private individuals' convention rights, may be better struck in individual cases by a suitably qualified magistrate/judge.

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?

There is no evidence that a need exists and as such would be a disproportionate interference with individuals' rights. If there were to be an extension the current legislative safeguards are appropriate and should be mirrored in those provisions. As noted in the consultation, multiple entry warrants are little used in practice and the likelihood in the course of a criminal context that the investigation does not concern an indictable offence would be low. In those circumstances section 8 PACE warrants could be utilised. The applicant would simply need to consider under which legislation to apply if more than one power was available.

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

We agree; the number of warrants executed outside the 6am to 10pm time range is likely to be low. Most warrants are executed 'first thing'; however, the additional judicial oversight would provide safeguards for individuals rights.

Non-exhaustive guidance ought to be provided as to what constitutes a reasonable hour generally.

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?

We agree; given the interference with the rights of the individual they should be duly informed at the time of that interference why it is occurring. It is the practice of certain agencies, when dealing with high volumes of items, to employ a schedule; this practice should cease, and all the relevant information should be contained within the warrant. This would provide the individual with certainty that the court granted what appears above its signature, rather than what is contained within another document.

More generally, codification of the case law is desirable from a rule and accessibility, of law perspective.

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 nonlawyers and available in other languages. Do consultees agree?

We agree. However, while this should be definitive it should be something the individual is able to consider and absorb quickly, otherwise it could be perceived to be a token gesture that does not provide them with the ability to challenge the method or nature of the search. It should also be available in appropriate formats for visually or hearing-impaired individuals. It should specify rights of challenge, appeals, rights to compensation, and how to access legal advice.

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?

We agree. Any guidance provided should also indicate where the relevant forms can be found, and to which court the application must be made. It should also be considered whether the agency executing the warrant should be asked to disclose the information directly, and if they chose not to do so a formal application can be made to the court which issued the warrant.

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?

We agree, it is in the interests of the individual to be able to consult a legal adviser or have them present. However, this will not always be possible. Guidance needs to be provided to those executing as to the actions they may take.

This information could also be noted on the warrant produced to the individual and prevent further material being provided to them – since they are already receiving a guide and the warrant. If the right to a representative were included in the guide the individual may not realise they were entitled to such until it is too late, hence the suggestion it should be on the 'face' of the warrant.

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?

Yes, we agree this is a sensible approach. The current options would remain and therefore the methods available to challenge warrants is made more accessible, rather than restrictive.

We would be interested to know how the Crown Court would be able to accommodate such cases in its current listing practice, however. We appreciate that resources are stretched but that should not impact on any consideration of these procedures.

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.

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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?

It seems sensible to have two parts to the consideration of the crown court – i.e. whether the warrant was lawfully issued and whether it was lawfully executed. However, the test applied by the crown court must be that the information at the time satisfied the issuing authority, *not* that the material seized justified it. The material seized is not the only factor when considering whether the warrant was executed lawfully, and that should be made clear.

When considering the test as to whether the material was seized lawfully, access to that material may be required by either party to demonstrate whether it was or not. Since the material is in the possession of the police there may need to be rules in place about the sharing of copies to ensure both parties are on an equal footing.

There must be protection for the public where a warrant has been issued based on defective information or procedure. Those executing a tainted warrant carry the taint with them. This principle is being eroded; it should be maintained.

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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.

Yes, there should be a permission filter. Without one it would lead to a challenge and delay in every case. The proposal is to make the procedure more accessible in cases where it would be thought too expensive at present, rather than to be used as a tactic. A permission filter would achieve that aim.

There should be the power to award damages –

1. For the damage caused by execution of a warrant
    a. It is often difficult to obtain proper assistance from police post execution for the damage they have caused whether justified or not.
2. For the unlawful execution of a warrant
    a. By the items being seized outside the power of the warrant there may have been consequences which have financial implications, if quantifiable these should be compensated.
3. For the unlawful issue of a warrant
    a. If the warrant has been granted but not executed there is an argument to be had whether there was any impact of it – to whom would damages be paid?
    b. If the warrant has been executed clearly there has been a breach of human rights of the individual and damages should follow.

A major concern is that this will lead to further litigation over the amounts; therefore, rules as to what can be claimed would be needed. It would also be prudent to consider what overlap, if any, there would be with civil action in the event that damages or compensation awarded did not go far enough.

While an argument could be made for not allowing damages because that it is a matter to be pursued in the civil courts, in our opinion legal aid for those proceedings is even less likely, and therefore the individuals who this procedure is meant to serve, by it being more accessible, would still be disadvantaged.

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?

No, we do not believe any aspects of the new procedure ought to be transposed into section 59. The section 59 procedure exists to serve a slightly different purpose, and with the advent of the new procedure, and that fact that both procedures would be considered by the Crown Court, there would be no need to change the purpose of section 59.

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.

In our view, the current procedure operates appropriately. The recent decisions of the Supreme Court referred to in the consultation are very clear: the procedure should operate at speed and what is in the public interest changes over time.

The current procedure is to provide the sensitive information in a separate document, which is usually in a sealed envelope which is viewed and resealed. The envelope is then signed and endorsed by both the applicant and issuing authority with words to the effect that the applicant 'undertakes to store it under ref … and to disclose it if required by an order of the court'. The exterior of that envelope, with signatures and undertaking, is copied and stored by the court with the information.

The above procedure is clear, prevents unnecessary hearings and costs until an application is made, but makes clear there is information that is sensitive which was considered by the issuing authority, and therefore provides the opportunity to apply for its disclosure in the appropriate forum.

Thus, the issuing Article 6 authority has to be satisfied that the relevant tests are met, and there is the facility to apply for disclosure.

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.

We agree. It would be prudent to instruct independent lawyers for the purposes of identifying or sifting legally privileged material. This should be done as a matter of course and as such to achieve consistency of approach it should be enshrined in legislation. Guidance ought to be provided to investigators and the indication regarding legally privileged material ought to form part of the informational booklet served at the time executing the warrant. We would propose the following:

1. Where a claim to legal privilege is made it should be mandatory to instruct an independent lawyer.

2. If no claim is made it is a subjective consideration as to whether legally privileged materials may be present. It is more likely in the digital age that such material is present, as people tend to retain more digitally than on paper now. Given that background it ought to be 'may' instruct an independent lawyer, but with the caveat that if it is found to be present then it becomes a must, as per (1).

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.

If there is an assertion of privilege it is clearly helpful if the party making that assertion can identify where the material is to be found. However, the state should not force individuals to assist with investigations being made against them.

It can be difficult to identify materials over which privilege is claimed when there is a seizure of a large quantity of material, particularly when the person claiming privilege no longer has access to that material, and the material is poorly defined by the seizing authority. For example, we are aware of situations where the investigating authority has seized several computer hard drives and have labelled them "Hard Drive 1" etc., identifying them with serial numbers. The hard drives were very old and related to material formerly held by the suspect which was some years old. In these circumstances, it was very difficult for the suspect to assist the authorities in locating this material.

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.

We agree. On proposal (1) we agree that there should be uniformity in the application of the rule regarding search warrants where medical or counselling records are concerned. On

proposals (2) and (3), again we agree that medical and counselling records should indeed be exempt, unless they are the focus of the investigation. In such cases there should be an appropriate test (as is currently contained in PACE) before warrants are granted.

Patients that can be identified ought to have an opportunity to comment on the use of their own records. However, if the intention is to seize the records under warrant this may not always be practical and therefore, while it would be prudent to consult the patient, it may only be possible after the records are seized, particularly where the patient is not identifiable, save from the records.

Clearly, warrants in relation to such highly personal records engage individuals' Article 8 rights to privacy in a fundamental way, and any interference at this end of the spectrum requires very persuasive justification.

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 2000 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.

We agree; the same considerations as apply in relation to medical and counselling records ought to apply in respect of journalistic material. The issue of warrants in relation to such material engages freedom of speech and the press, a cornerstone of our democratic society.

Terrorism investigations are obviously of a different nature and the specific statutory regime in schedule 5 of TACT 2005 has been drafted for its particular use and should remain unamended.

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.

We agree. If the provisional proposals are to be introduced, it would seem sensible that the second set of access conditions are removed, given that they appear to be unnecessary.

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.

We are not aware of any particular difficulties.

We refer to paragraph 9.68, in relation to the concern regarding material held with the intention of furthering a criminal purpose, and the argument that it be excluded from the definitions of exclude and special material. We submit the burden to show reasonable cause to believe that any otherwise protected material was created to further an unlawful purpose must remain with the applicant and be heard by a senior judge, and any such material must be specifically identified. Again, civil search order procedures (as referred to in our answer to question 24) may be helpful in such situations.

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.

We agree that the exemption ought to apply, irrespective of the investigation agency in question; that the special procedure ought to be available where confidential business records are exempted; and there be an exemption to (1) where specialist orders 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.

We agree. It would be appropriate to apply the same rule concerning excluded and protected material being exempted from a seizure made not under a warrant. Failing to do so would render the law incompliant with the EHCR, nor be consistent with other domestic legislation. It could also encourage the arrest of individuals in order to gain access to material that would otherwise be exempted.

Chapter 10: Electronic material

Questions 50 to 57 engage the issues raised by Privacy International in their recent report *Digital Stop and Search* on the issue of mobile phone extraction.

Data stored on such devices engages Article 8 privacy rights issues and may also engage Article 10 on freedom of expression, and Article 1 of Protocol 1 property rights. Given the nature and range of data likely to be stored; the technical issues; and the lack of standardisation and oversight of extraction equipment; it would seem that PACE is an outdated vehicle with which to address the issues of proportionality in terms of search,

extraction, retention and deletion. This topic may require separate, detailed legislation in its own right.

As a minimum, we would suggest that any reform of the law concerning searches of electronic material include the following features:
(a) any extraction of data from mobile phones or other electronic devices should be authorised by warrant;
(b) that warrant should be material-specific, rather than authorising seizure of a whole device (or of all the devices on the premises);
(c) specific guidance should be provided both to investigators and the individuals' whose devices are seized on their respective powers and rights; and
(d) more detailed rules are required as to search mechanisms, retention and deletion (not least to achieve GDPR compliance).

This topic seems to require separate, specialist consideration and consultation in its own right.

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.

Aside from those mentioned in the consultation paper, we are not aware that there are any unusual types of electronic devices or material being sought by investigators.

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.

In our opinion investigators cannot reasonably seek whole devices - they are undertaking an investigation, and that investigation is, or should be, focused in some way on an offence or subject matter. The warrant should be based on the items they are seeking contained within a list of electronic devices.

For any issuing authority to grant a warrant regarding whole devices is too wide and may constitute a breach of convention rights. It may be that an investigator ought to treat the device differently, and rules or guidance might be necessary in that regard. In particular it may be appropriate to extend seize and sift powers to these devices.

Similarly, warrants granting seizure of a mobile phone within multi-occupancy premises means the seizure of all mobiles phones within that premises, whether or not they relate to the investigation – this is too wide a power to grant. The case law authorities are clear that

any grant of a power to interfere with individuals' rights must be proportionate and restrictive; this principle does not reconcile itself well when considered against the single device principle employed in warrants and should be clarified.

There must be reasonable grounds to seize whatever is being seized; whereas current practice seems to be for the police to seize every electronic device and search it. That should stop.

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.

The real issue is the single item concept. By allowing the seizure of a device there is an inherent risk, and a real likelihood, that exempted material and irrelevant material is also seized. The existence of these modern devices and the manner in which individuals store data is being largely ignored by the High Court authorities in the single item concept, the suggestion being it is less intrusive to allow the seizure of the item than to engage the safeguards of CJPA. In our view, the latter is far preferable, since it minimises the intrusion by the state against the individual by limiting the items that can be searched for and seized. When those items are stored digitally, it allows the seizure, thereby maintaining the ability of the investigator to preserve evidence but also preserving the rights of the individual in being invited to a sift of the material.

The current operation of Part 2 of the CJPA needs to be more comprehensively applied to all seizures of electronic material as a minimum, regardless of whether the investigator considered it did so. We would suggest that amendments to PACE and its Codes, are needed to provide those safeguards.

The issue is set to become even more pressing with the introduction of Overseas Production Orders. If the Crime (Overseas Production Order) Bill is enacted, it will allow massive quantities of data to be obtained from, for example, Google or Facebook under a production order rather than as a seizure. Where that seizure is of a mailbox, it is highly likely that it will contain exempted material. Part 2 CJPA should be amended to include cases in which material is produced under compulsion, as well as seized.

In addition, the provisions should be amended to allow the reclassification of material if seized under a power which was clearly incorrect.

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

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(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).

The ancillary powers in sections 19 and 20 of PACE, exercised by constables on lawfully premises, whether with or without warrant, fail to provide clarity and adequate safeguards both to protect individuals' rights or to protect the investigators' position.

We agree that the narrow interpretation suggested by the courts is the correct one; there should be no power in such a situation to compel the production of passwords or login data. Indeed, it could be argued this is not "information which is stored in any electronic form and is accessible from the premises"; rather, in fact, it is the means by which information is accessed and, therefore, not what the investigator is seeking. The powers in RIPA were enacted with the clear intention of providing the ability to obtain information protected in this way while safeguarding individuals' rights.

Sections 19 and 20 therefore require reform, in so far as it should be made clearer they do not operate as a means to conduct a search, and that they do not provide carte blanche to interfere with individuals' rights.

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.

As the consultation has identified, the law in relation to jurisdiction very complex. Some situations exist in which jurisdiction is not an issue, but in many others, it is. It would be perverse to suggest that simply because the information, which can be accessed by a device controlled by a suspect, cannot be looked at because the information is purposefully stored abroad to frustrate action against the individual.

While it is conceded that law enforcement agencies require extraterritorial powers, some of which already exist, it is difficult to see how these would be enacted and lawful in domestic legislation without international co-operation. Perhaps an amendment to RIPA could include a provision that the views of the service provider ought to be provided, if reasonably practicable; this would provide an ability to obtain access to known and unknown accounts of protected data. The issue of that data existing in another jurisdiction still exists, however, without co-operation abroad.

The Crime (Overseas Production Order) Bill would give UK authorities the power to obtain data extraterritorially. Whilst it is accepted that, in the modern world, such powers may be necessary, the way that the current scheme is drafted risks mapping the inadequacies of the current system, as identified by the Law Commission, on to the international framework. Given that such orders could result in massive data transfers to the UK, a robust system for the identification, separation and return of privileged or other exempted material, must be put

in place. This would not only ensure safeguards for individuals, but also to prevent investigations from becoming overwhelmed with privilege and relevance reviews.

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.

Yes, we agree. Necessity and proportionality are important considerations when the issuing authority considers granting a warrant and it should be no different when the warrant is executed.

In relation to (1) above, the legislative position is far from clear and open to over interpretation by those executing warrants. It would be beneficial to both the rights of the individual and investigators to have clarity on the powers available and the extent of them.

On (2), we do not believe that additional criteria would be necessary generally, if the single item concept were to be abolished.

The proposal in (3) would assist in the consideration of necessity and proportionality of granting a warrant and therefore is advisable.

In relation to this and the preceding questions 54 and 55, we would point out that RIPA has provisions relating to the requirement to provide key codes, which seem to be often ignored and/or misrepresented. There are clear dangers of duplicating legislation here.

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.

Yes, we agree. The safeguards would protect individual rights but allow investigators to ensure they have powers to seize evidence.

Consultation Question 58
We invite consultees' views on whether there are any search warrant provisions that are unnecessary and therefore ought to be repealed.

We know of none that are unnecessary.

Consultation Question 59

We provisionally conclude that there should not be a single statute consolidating all search warrant provisions. Do consultees agree?

Yes, we agree. There is a plethora of specialist search warrant powers in different areas of enforcement for public authorities other than the police. It would be a significant undertaking to identify them all and the process of rationalisation could well be detrimental to the powers of specific specialist investigators.

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.

We are unconvinced of the benefits of a consolidation exercise, but if any consolidation were to be undertaken, it would be preferable to consolidate the powers of a constable only. Attempting to consolidate the plethora of warrants available under special subject matter legislation, so as to take those powers away and replace them with general powers under PACE, would be impracticable.

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.

We do not consider there to be advantages in consolidating these types of warrant.

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.

We do not consider consolidation appropriate for these warrant provisions. Such warrants form part of a specialised set of powers for a specialist investigation. It could be detrimental to the agencies who use these powers if a set of general rules were introduced.

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?

No.

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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.

Yes, we agree. All the access provisions referred to above are sensible, including the additional ones. However, rather than enact a single amendment expressed as applying to all search warrants, each warrant provision to which the provisions are intended to apply should be sought out and the relevant parts repealed and amended, as with the safeguards in sections 15 and 16 of PACE. Otherwise, there may be difficult clashes between the wording of the new access provisions and existing ones. Listing the relevant legislation in a schedule to the Act may be the neatest solution.

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