



BAR COUNCIL & CRIMINAL BAR ASSOCIATION RESPONSE TO THE LAW COMMISSION CONSULTATION PAPER 235 'SEARCH WARRANTS'

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission Consultation Paper 235 'Search Warrants'.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
5. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
6. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the

delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

7. We are grateful for the Law Commission for the opportunity to respond to this important consultation paper, concerning an area of law which has generated much judicial scrutiny. Much of the consultation paper concerns important practical matters rather than law reform. Nonetheless we have sought to respond to as many questions as possible.

8. The purpose of the Law Commission project 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.” [para 1.3]

“This project does not concern powers of stop and search or police powers more generally.” [para 1.9]

“We do not make any recommendations for law reform at this stage” [para 1.11]. Despite this, the aim is to simplify the law; make the law fairer; modernise the law and make the law cost-effective [para 1.29].

9. The purpose of the project is worthwhile and should be supported. There are myriad provisions creating powers of search, many including powers of entry onto premises. The Law Commission identified 176 search warrant provisions as well as ancillary provisions in the Police and Criminal Evidence Act 1984 and Part 2 of the Criminal Justice and Police Act 2001. [para 1.6]

CHAPTER 3: OPERATION OF THE STATUTORY SAFEGUARDS

Q1: 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?

10. Yes. The manner in which sections 15 and 16 were drafted indicates that Parliament’s intention was for the statutory safeguards to apply to all criminal investigation warrant applications, whether sought under PACE or a subsequent statutory enactment and whether sought by a constable or other applicant. In constitutional terms it is surprising, and therefore highly indicative, that the intention to govern legislation passed by future Parliaments should

have been so boldly expressed. Moreover, whilst the fact that search warrants were primarily sought by constables at the time when PACE was enacted has been overtaken by legislation that allows persons other than constables to apply, that should not mask the reality that the section 15 and 16 safeguards were intended to apply to all warrants of this particular nature. We further agree in principle that the provisions of a Code of Practice (similar to Code B) should apply to all search warrants that relate to a criminal investigation.

11. We suggest that consideration is given to whether all of the statutory safeguards are necessary or whether some of the more administrative safeguards could be removed from the statute and incorporated into the Codes of Practice (i.e. section 16(10) & s.16 (11) return to and retention by the court).

Q2: 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 PACE 1984. Do consultees agree?

12. Yes. The Code complements the statutory safeguards and we agree in principle that those who apply for a search warrant should follow a relevant Code of Practice. The PACE codes are designed for those with police powers and in accordance with the police rank structure. The Codes would have to be reconsidered to take account of a multitude of investigative agencies if they are to apply to all as opposed to those other agencies simply having to “have regard” to their provisions.

Q3: 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?

13. We query the need to define a phrase as simple as “a search warrant that relates to a criminal investigation”. These words themselves make clear that the application should concern an investigation into potential criminality and the warrant should relate to a particular investigation.

14. Moreover, it is respectfully suggested that the current proposed definition is somewhat disjointed. The first part relates to criminal offences generally, is very broad and would encompass each of the scenarios contained within the second part. For example, if it is believed that there is material on premises that represents the proceeds of crime then there must also be a belief that a crime has been committed or is being committed (such as handling stolen goods). The second part, in contrast, relates more specifically to the premises to be searched and reads more like a threshold to be attained than a definition. We therefore suggest that the first part of the definition could stand alone with the addition of words to the effect that the application must relate to that offence/those offences.

Q4: We invite consultees' views on whether the statutory safeguards in sections 15 and 16 of PACE 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?

15. We agree that warrants conferring a power of search should be subject to the statutory safeguards. Different concerns will apply to warrants that have a purpose other than to search and consequently different safeguards should apply.

Q5: We provisionally propose that section 15(1) of PACE 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 16 of PACE 1984. Do consultees agree?

Q6: We provisionally proposed that section 15(1) of PACE 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 PACE 1984. Do consultees agree?

Q7: We invite consultees' views on whether every breach of section 15 or 16 of PACE 1984 ought to have the effect that the search and seizure of material are unlawful. If not, which breaches should not have this effect? In particular, we are interested in consultees views in respect of:

- (1) Section 15(6) of PACE 1984; and
- (2) Section 16(9) to (12) of PACE 1984.

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

16. We consider questions 5, 6 & 7 together. We agree that safeguards designed to protect an occupier's right to privacy and to understand the scope of the warrant should be set out in statute and that a failure to comply with such statutory safeguards should render the entry, search and seizure unlawful. We see the merit in making it clear to those applying for and

executing warrants that a failure to comply with the safeguards will render a warrant unlawful.

17. Our concern is that a failure to comply with some of the more technical requirements of ss.15 and 16 safeguards (as presently enacted) should not automatically result in the warrant being unlawful. We therefore do not think that every breach of section 15 or 16 should have the effect that the search and seizure of material is unlawful. We are concerned that such rigidity could encourage technical and unmeritorious challenges whilst unduly limiting the ability of the state to combat serious crime. There should be scope to distinguish between those breaches that are material and important (an extreme example might be the wrong address) and those that are immaterial, such as an error in the date of the enactment under which the warrant was issued. Detailed consideration would need to be given as to what would constitute a technical as opposed to material safeguard but in our view it is vital that the warrant sets out to the occupier that it has been issued by a judicial authority, the premises to which it relates and, so far as is practicable specifies the articles sought. That enable the occupier to know where the warrant applies, what can be searched for and seized and that the warrant was lawfully issued. Other so called "safeguards" could be regarded as administrative technicalities. Provided that the warrant was in fact issued by a judicial authority we query whether the failure by the court to certify *each* copy of the warrant should render the warrant unlawful (s.15(8)). Court certification is an important stage in issuing the warrant because it is currently the only means to provide certainty and reassurance to the unsuspecting occupier that the warrant has been issued by a judicial authority. The copy provided to the occupier of each premises should be certified. . Whilst it is inexcusable for an warrant to contain an error as to the enactment under which it was granted, we again query whether a minor error in referring to the date of the legislation should automatically render the warrant unlawful (e.g. an incorrect reference to section 8 of the Police & Criminal Evidence Act 1983 rather than 1984) (s.15(6)).

18. In our view it would not necessarily be appropriate for a search warrant that was executed in accordance with section 16 (1) to (8) to be automatically unlawful because of; a failure to endorse the warrant (s.16(9)); a copy of the warrant was not returned to the appropriate court (s.16(10)); the appropriate court did not retain the returned warrant for 12 months (s.16(11)); or an occupier is refused permission to inspect the warrant over the course of the following 12 months (s.16(10)).

19. We would therefore propose that consideration is given as to which provisions constitute safeguards. A failure to comply with a safeguard, which causes prejudice to the occupier, should render the warrant unlawful but a failure to comply with a technical or procedural provision should not. The technical requirements could be removed from statute and incorporated into a Code of Practice.

20. **CHAPTER 4: APPLYING FOR A SEARCH WARRANT**

Q8: 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.**

21. We agree that the power to apply for a search warrant should be extended to all government agencies which are charged with the duty of investigating criminal offences. There should be no limit to the particular agencies empowered to make an application but they should be limited to those offences within the remit of their own investigative responsibilities. It is of concern that some agencies, such as the Department of Work and Pensions, have no power to apply for a search warrant and are therefore obliged to seek the cooperation of a constable who may have limited knowledge of the investigation. We agree that a constable placed in such a position may not be able to give a full and coherent picture and may consequently, albeit inadvertently, present the Court with skewed or inaccurate information. It is also difficult to reconcile the satisfactory discharge of the duty of candour with a constable who has a limited working knowledge of a case.

22. Further, we suggest the Law Commission should think in slightly broader terms as¹ there are non-government agencies such as the Financial Conduct Authority (body corporate) that have the power to apply for search warrants (the FCA's power is under s.176 Financial Services & Markets Act 2000). There may be a case for extending search warrant powers to incorporated bodies exercising public functions or duties designated by statute. Not all of the Code of Practice applicable to police forces will be relevant to other agencies. We do however consider that similarly worded Codes of Practice with provisions applicable to those other government agencies / incorporated bodies exercising public functions or duties should apply.

Q9: We invite consultees' views on whether the lack of prescribed application forms causes problems in practice. If so, for which search warrant provisions?

23. We have no direct experience of applying for warrants outside the 8 search warrant provisions that use a prescribed form under the Criminal Procedure Rules. The applicability

of the prescribed form (r.47.26 Crim PR) to warrants to which the ss.15 & 16 PACE safeguards apply means that many applicants are required to use that form.

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.**

24. We agree that all search warrant applications should be in a prescribed form. It would be undesirable to have a mixed system whereby the more common applications were dealt with in one form but that the rarer applications had no form. Moreover, whilst we recognise the benefit in having specific application forms for each search warrant provision, we incline to the view that generic forms are to be preferred. Whilst specific forms would assist those who are filling them out to address the specific legal requirements of the warrant they seek, it is incumbent on the applicant to ensure that submissions are accurate and contain the necessary information. We do not think that the feared greater risk that is perceived to exist around warrants that are rarely used will emerge in practice, for it is likely that officers utilising those powers would have greater levels of expertise and may seek legal advice before submitting an application.

25. An example of a generic form that addresses a wide range of different scenarios across a wide spectrum of practice areas is the European Investigation Order (EIO). The need for consistency across a range of jurisdictions has resulted in a simple document that caters for all scenarios and allows the applicant to add such particulars as are necessary to demonstrate the legal basis of the order. It is incumbent on the applicant to demonstrate that the EIO meets the criteria contained in the Directive.

26. The search warrant template forms under Pt 47 Crim PR are useful but it is not always clear what forms are used and by which agencies across the enforcement sector. A standardised application form that applies (where possible) to all search warrants would assist applicants and the Court.

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.

27. We agree that online application forms would be beneficial but caution against drifting into an online application procedure. The latter course would need very careful consideration to ensure security of information and sufficient flexibility within the form to enable all relevant information to be included. The structured document currently available on the MoJ website for applications for non-s.8 PACE warrants that are still subject to the ss.15 & 16 statutory safeguards (iw003) contains specific boxes requiring the input of information about the subjects, the alleged offences, the facts relied on, the property to be searched, the material that is thought to be present and any facts that may support a Court rejecting the application ('full and frank disclosure') such as the subjects' good character. If this was available online to securely populate there may be some merit in tracking the application through the court system.

Q10: 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?

28. Yes. Given the criticism of the procedure in *Newcastle United Football Club Ltd and Ors v HMRC [2017] EWHC 2402 (Admin)* we think that it would be wise for there to a minimum number of hours between service of papers on the Court and the application itself (assuming the Court listing officers are able to protect judicial reading time) to ensure that applications are properly considered. This of course could be waived in emergency situations (see answer to Q14)

Q11: 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?

29. We agree that steps should be taken to ensure that applicants understand and comply with their duty of full and frank disclosure when applying for a search warrant. In an *ex parte* application it is essential that the applicant presents the information in a fair and balanced way and presents a full and clear picture of what lay behind the application.

We invite consultees' views on whether the scope of the duty of candour ought to be enshrined in:

- (a) Primary legislation;**
- (b) Rules of Court; or**
- (c) Code B of the PACE 1984.**

30. We doubt the need for primary legislation, for the Court will have to consider factors both for and against the granting of the warrant in relation to each of the statutory criteria. The duty of the applicant to inform the Court and not to mislead, thereby presenting a fair

and balanced picture, would encompass the presentation of information that might undermine as well as that which would assist the request. Moreover, we envisage scenarios where the viewpoints of different individuals may differ on whether information might undermine a case and there will be cases where information not disclosed would have undermined the application but would not have made a material difference to the outcome (for example, the fact that a suspect in a serious organised crime network has no previous convictions). It would be disproportionate to render the warrant obtained as a result of such an application unlawful and, consequently, deem the material seized following execution unlawfully obtained (which would in turn give rise to admissibility arguments at trial). We therefore conclude that the duty of full and frank disclosure should be contained within a Code of Practice. This approach also reflects the fact that there are a range of sanctions within the context of a criminal trial to address bad faith, negligence, incompetence or mistake and any resulting unfairness to a defendant and allows the Court to impose a sanction that is proportionate to the wrong done.

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.

31. A non-exhaustive list of information which should always be disclosed should be incorporated within a Code of Practice.

Q12: 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 might 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?

32. We agree with the theoretical basis for disclosing any previous search warrant applications relating to the same premises or suspects but doubt whether such a reform is necessary in practice. The Law Commission consultation concedes that 'forum shopping' is not an issue in England and Wales which begs the question as to the mischief that this change would address. The general duty of full and frank disclosure would oblige an applicant to disclose if an identical application had been recently refused. Moreover, we are also concerned that such a requirement could prove unduly onerous and could create practical difficulties. For example, an investigation into ongoing multi-handed organised crime or terrorism might

involve the need for a number of inter-related warrants at short notice for nomadic suspects that flit between different premises. This concern is in addition to the other reservations expressed in the consultation paper which we share.

33. We anticipate that applications for warrants under section 8 PACE will already address whether privileged material might be found on premises. We see no reason why this requirement should not be extended to other warrant applications.

34. We see no harm in indicating the agency that is expected to prosecute a case if charges result. However, the mischief that this particular provision seems intended to address is where applications are made by constables that might result in private prosecutions. We envisage increasing numbers of private prosecutions, particularly for fraud-related offences, where large multi-national corporations might conclude that their best interests are served by hiring the services of private legal representatives rather than reporting to the police. This is particularly the case where publicly funded investigation and prosecution services are perceived to lack resources or the necessary expertise. We therefore advise that this concern could be properly addressed in the application procedure by an indication of whether there has been early engagement with a prosecution service (which is now routine in large or complex cases) and whether it is envisaged that the case will result in a private prosecution.

35. We agree that applicants should be required to disclose “any known circumstances which might weigh against the warrant being issued”.

Q13: We provisionally propose that the Criminal Procedure Rules Committee should prescribe a standard search warrant template to ensure compliance with section 15(5) to (6) of the PACE 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?

36. We agree that a standard form that can be adapted to the particular circumstances of a case is the answer to the problems outlined in the consultation paper.

Q14: We invite consultees to share their experience of how search warrant hearings are arranged.

37. Our members have vastly differing experiences of this. Those instructed by the FCA and SFO will make applications in front of Crown Court Judges (sitting at DJs under s66) at hearings where a full set of papers has been served at least 24 hours in advance of the hearing, and call the senior investigator to swear to the application’s truth and deal in broad terms with each section of the form (the subject, the offence, the facts, full and frank disclosure etc). These hearings are almost always transcribed by an external stenographer so that there is an immediate record. For the vast majority of warrant applications though the police officer will simply attend either the Magistrates’ Court or Crown Court and make the application on their

own and there will be no instant record of the exchange between Judge and officer nor record of the time that the judge has had to read the application in advance (if there has been any). Clearly there will be many good practical reasons why the police operate in this way but some thinking may be needed into ensuring they adopt the FCA/SFO approach more often in non-emergency situations: not necessarily instructing counsel but putting the Court in a better position to make a more informed judgment of the merits of the application.

Q15: We invite consultees' views on whether problems commonly arise because applicants for search warrants do not have sufficient knowledge to answer 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 PACE 1984 on what is required from an applicant at a hearing for a search warrant.

38. The concern is that someone with insufficient knowledge swears to the application and is unable to answer judicial questions. The individual making the application should therefore have sufficient knowledge of the investigation to answer questions from the bench. Any applicant must understand their responsibility to give a fair and balanced presentation of the circumstances on the basis of which a warrant is sought. Adopting a uniform term to identify such an individual is problematic. Requiring an application to be sworn by someone of a certain rank would not work because of the different structures across the multitude of organisations able to apply for warrants. The most senior investigator leading a large investigation may not know the most detailed parts of the evidence but the court should have before them an individual who is able to explain and take responsibility for decisions made in the investigation.

39. It is our view that the safeguard is the judiciary. The judiciary should scrutinise the application and if questions asked are not answered then they can (and should) adjourn the application until such information is available or refuse to grant the warrant. Judicial scrutiny should reveal if someone is unable to fulfil their obligations. In large investigations it will often be the case that more than one investigator will attend the application; this can be very useful if technical or specialised knowledge is needed to explain certain parts of the application.

Q16: We provisionally propose that the intended search of premises under section 18 of the PACE 1984 should, absent other intentions, be capable of constituting lawful grounds for arrest under section 24(5)(e) of PACE 1984 provided there are reasonable grounds for believing that it is not practicable to obtain the evidence through other means. Do consultees' agree?

40. Yes. We agree but caution that the power to arrest in order to conduct a search, followed by the power to search premises occupied or controlled by a person who is under arrest for an indictable offence, could mean that fewer applications need to be made for a search warrant to a judge (with the ensuing safeguards). The current structure outlined in section 18 PACE 1984- that search may follow arrest- strikes the right balance. A reform of the nature currently proposed could reverse that sequence because the need to search could prompt an arrest. Moreover, the proposed safeguard –“there are reasonable grounds for believing that it is not practicable to obtain the evidence through other means”- may be of limited effect because constables utilising a power of this nature will often be acting reactively and under pressure of time.

41. In passing, we query how this reform would sit along other powers of search such as the power to stop and search a person or vehicle for stolen or prohibited articles: section 1 PACE 1984. The section 1 power is accompanied by a power to detain but not a power of arrest (unless the search is obstructed, which is a separate criminal offence). Parliament has concluded that the need to search a person in certain circumstances does not require a power of arrest; it may seem disjointed if the need to search premises, despite the existence of other powers to conduct a search, did confer such a power.

CHAPTER 5: ISSUING A SEARCH WARRANT

Q17: 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.**

42. The Bar recognises the important role played by the lay magistracy and that it is before their jurisdiction that most applications for searches are determined. Save for one possible exception (when restraint applications are also being sought) we do not consider that it is necessary to make it a rule that certain applications should have to be made to the Crown Court or a District Judge. We consider that the better approach is to ensure that the lay magistracy are receive adequate training and that they are afforded adequate time to consider applications and are assisted by a legal adviser to make all relevant inquiries of the applicant. A compulsory rule that applications must be heard in the Crown Court based upon factors such as the nature of the offences being investigated, volume of material already obtained or nature of material sought could be too restrictive. We would prefer applicants to be responsible and ensure that they are applying to the appropriate tribunal for their investigation. Applicants know best the complexity of their application and whether an application to a Crown Court Judge is more appropriate.

Q18: 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?

43. Yes. They should sit with a legal adviser.

Q19: 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)?

44. "No. A District Judge is legally qualified. In cases where counsel are not instructed, problems arise if a legally-qualified decision maker (whomever they are) is unfamiliar with the legislation and has insufficient time to prepare. As with Crown Court Judge's determining applications without the assistance of a legal advice, a District Judge should be afforded sufficient time to research the legislative provisions and consider the papers.

Q20: 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.

45. No. Whilst more than one lay person scrutinising an application is always preferable, we do not consider it necessary if proper training is given, and legal advice available. Consideration could be given to providing detailed guidance in the Adult Court Bench Book.

Q21: 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.

46. We have no direct experience of this.

Q22: 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.**

47. We agree with both of those proposals. With secure email / conference telephone & video facilities applications should be capable of being considered remotely. Submitting applications (and underlying material) to the court should be via a dedicated secure email address which is monitored.

48. Our view is that, a legally qualified Judge should be available to determine out of hours applications. If that proposal is not adopted then we would urge the necessity of legal advice being available to a lay magistrate out of court hours. It should be relatively simple to ensure that the on-duty legal adviser has the information they need about the application and can listen to the application. Out of court emergency applications work well in the High Court and a similar model could be adopted.

Q23: 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;**

49. We agree that applications should be submitted electronically. An application for a search warrant is often one of the most sensitive stages in an investigation and control of the

information at all stages (including through the court system) is essential to avoid jeopardising the investigation. We therefore propose a dedicated secure email address that is monitored as opposed to applications being sent to the standard Crown Court or Magistrates Court general office address.

Q23(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.**

Q23(2) (a): We question whether returning applications that do not comply with statutory criteria is in fact creating an additional layer of unnecessary bureaucracy and delay. Errors could be brought to the Judge's attention and a hearing listed in order for any mistakes to be rectified. We suspect that most applications for search warrants are made relatively shortly before it is intended to execute them, the process will become prolonged if time is to be set aside for a legal adviser to read all applications and return those that do not comply so that they can be re-submitted and the process repeated. The current application form includes a box for the applicant to tick whether they request a hearing. We agree that a legal adviser should be able to review the papers to provide an initial filter on those applications that require a hearing. The lay magistrate or District Judge should always be able to order a hearing if they are unable to determine the application on the papers.

Q24: 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.**

50. We are not aware of Crown Courts being burdened by straight-forward warrant applications. As set out above at paragraph 41 we consider it to be the applicant's responsibility to recognise whether their application is sufficiently complex to be better suited to the Crown Court or to request a District Judge. Sensibly, the Pt. 47 application form requires applicants to provide a time estimate for reading and the hearing itself. This requirement is essential and provides some indication as to the case complexity. We consider

that triage by a legal adviser in the magistrates' court would over burden an already busy magistrates court system, whilst adding an unnecessary layer of bureaucracy and delay.

Q25: 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?

51. Yes, we would welcome this although note that it would result in increased costs. Moreover, as the magistrates' court is not a court of record we consider that this could open the door to other proceedings being recorded.

Q26: 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.

52. Yes. Increasingly it is the practice for reasons to be provided for rulings in both the magistrates and Crown Courts. It assists all parties to understand the reasoning for the issuing authority's decision which is another reason why it would be beneficial for proceedings related to search warrants to be recorded.

Q27: 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.

53. This is not a matter of law reform but we can see the benefit of obtaining such data. Such data could be used to analyse whether certain statutory powers to obtain search warrants are being used and therefore whether such powers continue to be necessary.

CHAPTER 6: CONDUCT OF A SEARCH UNDER A WARRANT

Q28: 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.

54. We do not have experience of this in practice but a police force may be unable to assist an investigatory authority to execute a warrant.

55. The police are not under a duty to assist and so their co-operation is a matter of good will.

Q29: 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?

56. Yes.

Q30: 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.

57. At present the 3 month time period applies to all warrants within section 16 of PACE. We see no reason to change such period from 3 months.

We consider it important that between the warrant being issued and the execution of the warrant there is an ongoing duty to bring any undermining material to the attention of the court. However other statutes such as the Psychoactive Substances Act maintains one month periods for search warrants- specifically provided for by Parliament and respondees have some concerns that uniformity would lead to a substantial increase in the length of time for which some search warrants are valid. .

Q31: 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?

58. The amendment post SOCPA 2005 of section 8 and section 15(5) of PACE allows the authorisation of entry and search on more than one occasion.

The main concern about extending the power to apply for multiple entries across other acts is to ensure the same stringent test is applied throughout – namely that the court must be satisfied that ‘it is necessary to authorise multiple entries in order to achieve the purpose of the warrant.’

It is fully accepted that sometimes the size of a premises to be searched might necessitate this, such as a farmyard or large warehouse.

However, where the premises is a residential one, particularly for example where children reside and is a small home, it is critical that the test of ‘necessity’ is not diluted, nor that applications are made for multiple entries ‘just in case.’ The test for ensuring it is necessary to authorise multiple entries must be carefully considered should there be an extension and with specific reference and consideration to balance Article 8 rights and UN convention of the rights of the child.

It is agreed that an important way the above multiple entry warrant could be tempered and guided in its use is by requiring a police officer of at least the rank of inspector to authorise in writing entry or search for the second or subsequent time (this would also thereby ensure consistent application of safeguards of section 16(3B) to all areas of extension of multiple entry).

If it is the instance that multiple entry warrants are seldom used in practice because of seize and sift procedures- then pragmatically an extension of such powers might not be of practical benefit at all.

If an extension of power to authorise multiple searches were to be adopted, then it might be useful in determining and applying the test of ‘is it necessary’ to ask the question first as to whether or not the seize and sift procedure could be used instead of multiple entry warrant at first being issued.

It is of important that any search is undertaken expeditiously and we would not want the availability of multiple searches to encourage the sluggish execution of warrants. This is particularly so if it has been shown in practice that multiple entry warrants are seldom used in practice.

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.

59. It is agreed that there ought to be prior judicial authorisation before the execution of a search warrant in hours such as between 10pm-6am. Should the applicant have information that suggests an occupant may leave the house before 6am (e.g. for shift work, commuting or to attend the gym) then this can be referenced in the application and permission sought to execute the warrant before 6am.

60. We share the concern voiced by academics such as Helen Fenwick that there needs to be clarity as to what could be viewed as reasonable, particularly to ensure protection of individuals from the non-urgent entry and search of property at night by state agents.

61. This is particularly so in relation to ensuring the protection of the rights of children who may reside at property being searched (both in relation to Article 8 of ECHR as incorporated by HRA 1998 and the UN Convention on the rights of the child, Article 3). There are real concerns that a differing approach needs to be adopted in relation to residential property, as opposed to commercial premises.

62. For example, in considering the search of a business premises there may in fact be less collateral intrusion between 10pm & 6am (i.e. a search of a business premises in shared offices before others arrive at work). It might in some instances be of hindrance to provide a cut-off time. The entry should not be between 10pm and 6am but once on the premises investigators must be entitled to remain until the search is complete (or secure the premises and return the next day under the multiple search provisions).

63. We would agree with the considerations at 6.48 of the consultation. This is particularly in terms of the impact that night and early morning searches could have upon children in a household and it may be considered that the times when most children leave for school for

example may be more reflective of a 'reasonable hour.' We would agree with approach adopted by Viscount Dilhorne in *Inland Revenue Commissioners v Rossmeister* [1980] AC 952).

Q33: 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?

64. Yes we agree with the above proposals.

Q34: 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?

We agree that an occupier and individuals in that property be provided with in simple terms a lay guide to search powers and their rights. In addition where possible this should be provided to them in a language they understand.

PACE Code B currently sets out that such a notice should specify if a search is made under warrant, the extent of powers of search and seizure conferred, the rights of the occupier and owner of property and compensation payable in appropriate cases for damage caused in entering and searching premises.

It would be useful to also provide a website link to an online guide for individuals, rather than stating individuals can attend a police station to find a copy of Code B.

Such a guide ought to include for those present at the time of execution of the warrant, that an individual can request to have a legal adviser present at the search.

It ought to also set out in easily understood wording how a search should be conducted and if multiple visits/entries have been authorised.

Q35: 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?

65.

Yes. We agree that a search warrant should state an individual's rights include an entitlement to information sworn in the warrant, and further explain in basic terms how they can apply for a copy.

66. It is of course noted, that in practical terms, where there is sensitive material or items concerning issues relating to a third party, that this may well involve redaction.

Q36: 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?

67. It is critical if the power relating to the execution of search warrants be extended to other bodies that the underlying principles within Code B apply to all agencies. Some of the provisions of Code B are specific to police or law enforcement agencies and as such care should be taken to ensure that the Code is sufficiently flexible to be adapted for use by other agencies.

68. We do agree that Code B be amended to state that if an occupier asks for a legal adviser to be present during the search then this should be allowed. It is appreciated that the caveat is that this should be allowed if it can be done without unduly delaying the search and that entry into the premises should not be delayed in relation to the above at all.

69. One school of thought may be that there should not be delay in the execution of the warrant in order to await the attendance of a legal adviser. It is vital that those executing search warrants are able to enter and secure the premises swiftly. Searches (even of relatively modest residential premises) can regularly take 12 hours; any delay whilst awaiting legal advice could result in the search not being completed within the day or means that the search would still be being executed into the evening. It is not known though currently in practice,

in what proportion of searches currently undertaken if any delays result whilst awaiting a legal adviser and what difficulties this might have caused to the searching investigating authorities.

70. It is also fully appreciated that the increased usage of body worn cameras for example by many police officers has now somewhat altered the landscape somewhat as searches could well be video recorded.

71. It is noted that currently a blanket 'entitlement' to have a legal adviser present is not considered appropriate. However a real concern arises in terms of the lack of knowledge individuals have as to their ability to seek/request for a legal adviser to be present. We note the reasoning at 6.72 of the consultation paper that this might create a different approach as between stop and search powers. However it may be that individuals in residential premises simply are unaware of the ability to request a legal adviser to be present.

72. We very much endorse the use of interpreters where needed, for example as given in the illustration at 6.76 in terms of the use of British Sign Language interpreters.

73. We would also endorse the additional inclusion in PACE Code B of guidance as to what legal advisers are allowed to do at the search itself, namely being allowed to observe officers in the act of seizure, to make their own notes and advise clients accordingly. We believe this may enhance consistency in approach and clarity for legal advisers.

CHAPTER 7: CHALLENGING A SEARCH WARRANT

74. Before dealing with the specific questions under this chapter heading, we make one overarching observation in relation to the proposals for reform set out in Chapter 7.

75. One of the problems identified by the Law Commission with the current processes for challenging search warrants is that the two discrete routes of challenge – *i.e.* judicial review and applications under s.59 of the Criminal Justice and Police Act 2001 - can be used tactically, and in tandem, at least by those with the resources to do so: *“The current means of challenging search warrants, when used in combination, are far too complex.”*²

76. We agree. In particular, it is noteworthy that, because of the lack of significant overlap between the routes of challenge, there is no requirement that other routes of challenge be exhausted before judicial review can be commenced.³ The tactical use of both procedures contributes to the slowing down of investigations, meaning that potential lines of enquiry may be frustrated.

77. We are concerned that the introduction of a third procedure, to sit alongside, rather than replace, existing routes of challenge, is likely to exacerbate, rather than mitigate, this problem. A similar risk – that of judicial review merely being *“pushed back a step”* is identified by the Law Commission at para. 7.120.

78. While the proposed new route of challenge has much to commend it, we would view it as preferable if it were to replace the current section 59 procedure for material obtained pursuant to search warrants to which s.15 of PACE applies. Judicial review would remain as an available route of remedy, in line with paras. 7.68 and 7.69 of the consultation. Accordingly, while there would remain two routes of challenge, the cheaper and more accessible Crown Court route would be expanded, to absorb some cases that would otherwise need to be brought in the High Court, without adding to the complexity and resultant delay of the current law.

Q37: 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).**

² Para. 7.56 of the consultation paper.

³ See para. 7.47 and footnotes 627 & 628 of the consultation paper.

Do consultees agree?

79. Yes, with the caveat that we are concerned about any increase in the volume of applications to an already overstretched Crown Court estate. We have some concern that the issues reported at paras. 7.41 and 7.42 of the consultation paper would be unlikely to disappear with the introduction of proposed new procedure.

Q38: 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?

(underlining added)

80. Subject to the caveat expressed in the overview, above, we agree that there should be such a procedure in relation to material seized pursuant to a search warrant.

81. We agree with the detail of the proposal set out above. In particular:

- i) we agree with the proposed powers of the court, explained at para. 7.90 of the consultation, including the return or destruction of copies;
- ii) we agree that the High Court should have all the powers of the Crown Court, in order to reduce the risk of multiplication of litigation;
- iii) we agree that Legal Aid funding ought to be made available for such a procedure. Given the need for expedition on both the part of the investigator and the individual whose material has been seized, it is to be hoped that an expedited (or, better, automatic) procedure for the granting of Legal Aid could be introduced for such matters.

82. We do not, however, consider the proposal (at para. 7.77) to extend the new power of challenge to material obtained in response to production orders to be necessary or appropriate. There is a fundamental difference between search warrants and production

orders, in that the former can be – and typically are – given effect to without the knowledge of the individual under investigation. In the case of production orders, the recipient of the order will generally have the opportunity to challenge the making of the order prior to the material being delivered up to the investigators. For example, application may be made to vary or set aside a POCA production order under s.351(3) of the Proceeds of Crime Act 2002. Similarly, there are a number of potential routes of challenge to a section 2 CJA notice issued by the SFO, from a simple refusal to produce the required material, to the seeking of a declaration that the material sought is protected by privilege.⁴ Accordingly, there is not the same need for a broad mechanism of challenge.

83. We make one further observation, in relation to the proposed “non-exhaustive list of factors” (see para. 7.89) intended to assist in identifying when it is in the interests of justice to allow the retention of material despite non-compliance with either ss.15 or 16. We consider such a checklist to be both unnecessary and fraught with difficulty, as is perhaps demonstrated by the different responses of stakeholders to this issue. (para. 7.88). What is in the interests of justice in a particular case will inevitably be determined in light of the discrete factual matrix under consideration, and to introduce a checklist that – however expressed – may suggest that at least some of its contents amount to required criteria risks fettering the ability of the judge to decide what is required by the interests of justice in that particular case. If, contrary to our preference, such a list were to be adopted, we would suggest that the value of the material to the investigation might properly fall to be considered when the interests of justice are evaluated.

84. Particular care needs to be taken with legally privileged material. Unlawfully seized LPP material (*i.e.* that which does not fall within the iniquity exception) cannot be subject to an interest of justice proviso justifying its retention. It is an absolute right. This Consultation is not seeking by implication to extend the very few circumstances in which statute permits the absolute right to be abrogated (e.g. as with RIPA and IPA).

Q39: 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.**

85. We consider that the introduction of a paper-based permission filter would, on balance, be beneficial in filtering out entirely unmeritorious applications. The caveat is

⁴⁴⁴ See, for example, the procedures adopted in *Re: Arrows Ltd. (No. 4)* [1995] 2 A.C. 75 and *Price Waterhouse v. BCCI Holdings (Luxembourg) SA* [1992] B.C.L.C. 583.

however that rather than streamlining the procedure, there is a risk that the introduction of a separate stage in the process of challenge might in certain cases actually increase delay.

86. As to damages, we agree that the Crown Court is ill suited to determine questions of loss and to award compensation. If a damages regime were introduced into the Crown Court procedure, we would also be concerned about diverting the resources of Crown Courts from their core business (see para. 7.117 of the consultation paper for an echo of this concern). The introduction of a damages regime might also lead to a risk of proliferation of speculative applications.

Q40: 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?

87. We consider that, if (contrary to our preference) the section 59 procedure is to be retained, there would be merit in expanding its remit by introducing a costs regime, essentially for the reasons given at para. 7.57 in the consultation paper. We reiterate, however, our concern that an additional route of challenge – rather than a replacement for section 59 – could exacerbate the very problems of complexity and tactical delay that it is intended to solve.

CHAPTER 8: SENSITIVE INFORMATION AND PUBLIC INTEREST IMMUNITY

88. The person subject to the warrant should be able to comprehend (if need be with access to reasonably available legal advice) whether to object, and whether certain items clearly fall outside the warrant but the execution of the warrant should not be delayed for legal advice to be obtained.

89. When the application for a warrant involves material subject to public interest immunity (PII), the question arises whether that material should be provided to the issuing authority (court, magistrate or authorised official) or whether such a procedure would defeat the need for urgency which exists in most cases. We agree that, as recommended in para 8.31, whatever is disclosed to the issuing authority must be endorsed and stored by the investigator for future examination if an issue arises. This may be a summary of the sensitive PII material rather than the entirety which would take a disproportionate amount of time for issuing authority to consider with the necessary detail to make a determination on what can be disclosed and what can be withheld. That process should be reserved for whenever there is a subsequent challenge to the legality of the warrant or the execution of it.

Q41: 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.

90. No. The current procedure is adequate.

CHAPTER 9: MATERIAL EXEMPTED FROM SEARCH AND SEIZURE

91. We agree “that the treatment of exempted material should be rationalised to render the law more accessible” [para 9.2].

92. Paragraphs 9.4 to 9.24 deal with material subject to legal professional privilege (LPP). It adopts the definition of LPP in s.10 of PACE, including what is known as the iniquity exception, i.e. “items held with the intention of furthering a criminal purpose”. While this definition is well-known and generally causes little problem in practice, it does beg the question “held by who?” For example, should a client’s privilege be lost if a lawyer is holding LPP material which he intends to use as part of a fraudulent claim under a representation order? We invite consideration of whether we should develop the principle of limited waiver which applies in cases of investigations into a lawyer’s conduct by a professional disciplinary body.

93. We agree that LPP attracts the strongest protection of all exempted material and that this exemption should remain (para. 9.6). The Bar Council has taken this stance consistently e.g. on the Investigatory Powers Act 2016.

Q42: 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**

94. We agree with the proposal for secondary legislation and that option (2) should apply. We consider that consistency is necessary. When searches involve large volumes of material, some of which is subject to an LPP claim, the current practice is for the questioned items to be quarantined and examined by independent lawyers to determine its status. This practice has been approved by the courts and guidance has been issued by the Bar Council and the Attorney-General. It makes sense for the procedure to be enshrined in secondary legislation or Criminal Procedure Rules.

Q43: 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.

95. We agree with (1) but not (2). There is some concern that history has shown that some circuit judges may be too quick to make such an order. (2) also appears to be a litigator's paradise with huge potential for satellite litigation which would delay the investigation to no one's benefit. Any additional procedure would of course require more court time and we suspect that HMCTS may have something to say about whether such resource will be available. The wasted costs procedure should be adequate to deal with unjustified tactical obstruction. In addition in many instances the subject claiming privilege will be restrained and thus any costs order would be unenforceable because there are no available funds to satisfy it. (1) could be incorporated into the text of the warrant application as an additional part which the applicant agency would be seeking and if granted then the text of the warrant could then specify the length of time in which the owner has to identify privileged material.

Q44: 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?

96. In principle we agree with the three proposals. We would have concerns if the uniformity of approach in any way fettered current rights of an investigator to obtain such material under non section 8 PACE warrants. We also have concerns as to how “central to the issues investigated” is defined and would prefer the test to be where “there are reasonable grounds to believe that medical and counselling records would provide evidence relevant to an important issue in the investigation”. It would then be for the applicant to satisfy the tribunal that the medical records of a non-suspect are relevant to an important matter.

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.*

97. We foresee a significant risk of tipping-off and destruction of relevant material were a non-suspect to have the right to be informed of the warrant prior to its execution.

Q45: 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.

98. We agree in principle, though there is an argument that such material should be subject to a proportionality test, to be applied by a circuit judge rather than a magistrate. It is also inconsistent to retain the powers under Sch. 5 of the Terrorism Act but not allow similar powers in cases of murder, rape or serious offences against children.

Q46: 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.

99. Yes.

Q47: 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.

100. Yes. Subject to consideration on the iniquity exception and/or public interest.

Q48: 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.

101. We do not think this is a practical or sensible approach. PACE warrants are but one, albeit the most common, method used by law enforcement agencies to obtain information. Some investigating authorities have specific powers to obtain business records (CMA for one) which is directly applicable to the crimes they investigate. The ability to obtain confidential business records under such warrants should be preserved. Their remit means that confidential business records are a necessary and important category of information that will be seized when exercising warrant powers. We therefore do not agree with any amendment that would not preserve the specific powers of certain organisations to obtain confidential business records, which are often the crux of their case. We suspect that Police regional economic squads/directorates and the City of London Police would probably prefer that the exemption in s.9(2) PACE be dis-applied to their investigations and would urge that the status quo remains but that the exemption be removed (rather than extended) where the applying agency/police directorate is conducting an economic crime investigation.

102. Applying our interpretation set out above we would advise that the procedure be reserved for criminal investigations that are primarily non-economic crime in nature.

103. Exception is unnecessary assuming our proposals on (1) & (2) are adopted.

Q49: 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 do not think this is appropriate for the reasons set out above in answer to Q49. Whilst the question focusses on PACE it has to be remembered that other law enforcement agencies are sometimes only able to progress their investigations when the Police exercise PACE powers on their behalf, such as search (and seizure) of individuals upon arrest (s19/32), in circumstances where the investigating agency does not have grounds to apply for a search warrant under another statutory power. If this exemption applied, the CMA for instance, might be seriously hampered in a cartel investigation, where the 'doctored' company accounts only existed as an attachment to an email that was saved on a suspect's phone.

Exclusions for material subject to LPP should be protected and remain distinct from other types of material.

CHAPTER 10: ELECTRONIC MATERIAL

Q50. 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.

104. Types of material sought:

- Accountancy packages
- Backups (e.g. tape drives, servers, macOS Time Machine)
- Call recordings and logs
- CCTV systems
- Cloud storage (e.g. phone backups, file storage, Microsoft OneDrive, Google Drive)
- Computer watches (e.g. Apple)
- Customer relationship management (CRM) systems
- Devices with dual/multi-factor authentication
- E-mails, mail servers and web-based e-mails
- Fitness trackers
- Home automation devices (e.g. Amazon Alexa, Google Echo)
- Internet of Things (IoT)
- Logs (e.g. web server, firewall, proxy, events)
- Mobile app cloud storage records
- Portable scanners
- Remote desktop and VPN login records
- User records stored on active directory or domain controller
- Vehicle telematics
- Wireless routers and access points

Q51. Where warrants are drafted in terms of “devices” rather than specifying electronic information on devices, 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.

Q52. 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.

105. We recognise the importance of warrants that are clear and practicable to execute, and therefore see the good sense in warrants specifying devices rather than information. However, the law does not adequately address the consequences of seizure, namely the fact that once

seized a public authority will have access to private, privileged or irrelevant information. In our view the time has come for the law to address more clearly the *treatment* of information stored in digital devices, once seized. Seizure of a device containing terabytes of data is only one step towards exploitation of the data, which requires the extraction of relevant information usually through keyword searches where huge amounts of information may never be considered. How that extraction is performed is what matters.

106. The focus of the protection therefore cannot rest merely on the correctness of seizure. This might result in an inability to seize a device because of the prospect of for example LPP material being present. We are aware of a judicial review (*Fisher v SFO*) in which the Claimant, a solicitor, challenged the seizure of an iPhone under a s2 CJA 1987 'here and now' order on the basis that the device was bound to contain LPP material. The matter settled at court on the basis that the device would be considered by independent counsel, and no judgment was given. On the other hand, it might result in the court having to reach a strained interpretation of PACE, as the Consultation Paper recognises at paras 10.48 et seq., as to which the paradox of a 'single item' containing LPP material but not itself being 'subject to LPP' is obvious.

107. One solution may be for warrants to contain two parts: one part specifying the device that may be seized; the other part specifying the way in which the information contained on the device should be treated (on the assumption that the whole device will be seized).

53. We invite consultees' views on:

- (1) the current operation of Part 2 of the Criminal Justice and Police Act 2001 (CJPA) in relation to electronic material;**
- (2) whether the CJPA 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.**

108. We agree that for the time being the protections in Part 2 should be extended to cover: (i) seizure of a device specified in a s.8 PACE warrant which does not specify excluded material; and (ii) material/devices received in answer to a production order/notice including under s2 CJA 1987.

109. As set out above, the true focus in respect of electronic devices containing vast amounts of information must be on the way in which the data is treated. In relation to LPP material that has come into the possession of a public body, the Divisional Court has recognised a duty on such bodies "...to devise and operate a system to isolate potential LPP material from bulk material lawfully in its possession": *R. (on the application of McKenzie) v Director SFO* [2016] 1 WLR 1308 at para 34 (per Burnett LJ). The same duty might be identified in relation to other types of material that the authority ought not to be considering as part of its investigation. Seizing authorities should be encouraged to set out transparently how they intend to deal with the data, and the Crown Court should have the power to adjudicate on relevant disputes. We recognise that the Crown Court cannot be drawn into every dispute, especially if the need for a ruling has suspensory effect over consideration of the material.

Most disputes should be capable of agreement, especially if there were a clear and open Code of Practice which authorities are obliged to take into account.

Q54. We invite consultees' views on the operation of sections 19(4) and 20(1) of PACE in respect of electronic information when searching premises under a search warrant. In particular, whether reform of sections 19(4) and 20(1) of PACE 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).**

110. In light of the Administrative Court's decision on the SFO's powers of production in *KBR v SFO* [2018] EWHC 2368 (Admin), it is more than arguable that s19(4) extends to information held remotely and in other jurisdictions. We note that s19(4) PACE was amended in 2001 from 'contained in a computer' to 'stored in any electronic form'. In *KBR*, the court decided that the Criminal Justice Act 1987, s.2(3), 'extends extraterritoriality to foreign companies in respect of documents held outside the jurisdiction where there is a sufficient connection between the company and the jurisdiction' (para. 71). The 'control' against exorbitant jurisdiction is the need for the material to be accessible from the premises, although we recognise that more certainty is required about what 'accessible' actually means – it suggests at the very least a substantial connection between the device on the premises and the material held remotely.

111. We note that the Crime (Overseas Production Orders) Bill will give prosecutors and law enforcement officers the ability to obtain data needed in a criminal investigation from overseas providers - where an international arrangement exists - by means of an application to a UK judge for an Overseas Production Order ("OPO"). If granted, the order must be served by the Secretary of State within 3 months. Mutual Legal Assistance ("MLA") will remain available where there is non-compliance or a risk of the provider concealing, destroying, disposing or altering the data. This Bill - together with the transnational retention power in section 97 of the Investigatory Powers Act 2016 - mirrors developments in the US and EU, all of which are identified in the consultation paper, namely:

- a. The European Investigation Order by which the Secretary of State may request evidence from another state's central authority, effectively requiring it to apply for a search warrant or production order, and vice versa, pursuant to the Criminal Justice (European Investigation Order) Regulations 2017, regs. 38-41.
- b. The CLOUD Act, signed into US law in March 2018, which authorises the USA to conclude international agreements through which foreign governments can seek data directly from US companies and vice versa.
- c. The European Commission's proposals in April 2018 for a 'European Production Order' which will allow a judicial authority in one member state to request electronic evidence directly from a service provider established or represented in another

member state, regardless of the location of the data *quaere* whether this will be extended to the UK after Brexit.

- d. A second protocol to the European Council's Cybercrime Convention which will widen the powers of transnational search and seizure.

112. However, it is clear that the OPO Act will not be a solution for the routine access that investigators will need.

113. We do not agree that there is any in principle objection to the s19(4) power being used to compel the surrendering of passwords. It does not appear that RIPA Part III, with its significant maximum sentence for non-compliance, provides the only means by which passwords may be required.

Q55. 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.**

114. See above. In our experience there has been a risk averse approach to obtaining access to material held overseas, as to which *KBR v SFO* represents a significant and common sense step forward. We suggest that the significance of international law concerns may have been overstated in the past. The risk with attempting to reform the law in this field 'top-down', that is, starting with general international law principles and then working downwards, is (a) that those principles are not clear in the cyber-field (b) to the extent that attempts have been made to formulate them, they appear to be routinely ignored in practice because in day to day life people access information online without regard to where it may be stored (c) it risks ignoring the scope of existing legislation which may already (see *KBR*) authorise investigations with extraterritorial impact. It is suggested that until the true scope of the current law is properly understood, it may be dangerous to attempt to reform the law, in particular if the hunt for international law 'purity' results in greater reliance on MLA which, as will be obvious, may not be practicable or, with respect to certain jurisdictions, available.

Q56. 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.**

115. We agree to some extent. The single item theory works best and it may be too difficult to anticipate exempted material or the proportionality of seizing a device. There is considerable merit in investigators being required to formulate protocols, or demonstrating an ability to comply with a new Code of Practice, as the price of seizing certain devices. We note that the academic literature in the US is divided as to the value and practicality of judges sanctioning and overseeing ex ante protocols and suggest that further work may be required taking account, for example, of the role played by judges in England and Wales in scrutinizing draft Anton Piller orders. We are particularly concerned that the standards should be published, so that affected individuals know what to expect and if necessary to seek legal advice on non-compliance.

Q57. 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.

116. We agree. See answer to Q53 above.

CHAPTER 11: CONSOLIDATING SEARCH WARRANTS

Q58: We invite consultees' views on whether there are any search warrant provisions that are unnecessary and therefore ought to be repealed.

117. We have not undertaken an exhaustive analysis of the multitude of search warrant provisions. We consider that this question is better answered by individual agencies who apply for warrants. We agree that HMCTS should collect statistics on the types of search warrants applied for and that consideration could be given in due course to the repeal of powers which are not used or exist in duplicate. The individual investigative agencies are best placed to identify powers they do not use and are no longer required.

Q59: We provisionally conclude that there should not be a single statute consolidating all search warrant provisions. Do consultees agree?

118. Yes.

Q60: 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.

Q61: 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.

Q62: 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.

119. We answer consultation questions 60 to 62 together. Our preliminary view is that there is no advantage to this and the different powers available to different agencies who seek warrants to search for evidence relevant to suspected criminal offences makes consolidation unwelcome.

Q63: Do consultees favour any schemes of consolidation of search warrants other than those described in the previous consultation questions, and if so what?

120. No.

Q64: 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.**

121. We have concerns that a uniform set of access conditions would not cater for every available access condition available under current legislation which are currently deemed necessary. The standard set of access conditions may still require a number of bespoke variations for individual statutory regimes. The preferred course is for the access conditions to remain within the legislation creating the particular search power.

General Council of the Bar Law Reform Committee

Criminal Bar Association

2 November 2018