



Response to the Law Commission's Public Consultation on Reforming the Law of Search Warrants

September 2018

Introduction

Birmingham Law Society is the largest provincial local law society with a membership of some 5,000. It represents solicitors, barristers and paralegals working in the West Midlands area. It is currently celebrating its bicentenary.

The Society is responding to the Law Commission's public consultation on reforming the law of search warrants.

This response is prepared by members of its Criminal Law Sub-Committee. The members of that committee are drawn from experienced defence and prosecution practitioners; solicitors, and the bar. Our co-opted members include representatives from the Crown Prosecution Service, Birmingham City Council, the Probation Service, the Legal Aid Agency and HMCTS.

Consultation Question 1

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

Yes. It is appropriate for these safeguards to apply to all applicants / agencies, since all such applications are equally intrusive.

Consultation Question 2

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

Yes. We can see no reason for anyone to be exempt from this requirement.

Consultation Question 3

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

- (1) a criminal offence has been, is being or is about to be committed; or**
- (2) there is to be found on the premises:**
 - (a) evidence of the commission of a criminal offence;**
 - (b) material which it is a criminal offence to possess;**
 - (c) material obtained by means of a criminal offence or representing the proceeds of crime;**
 - (d) material which has been, is being or is about to be used in connection with a criminal offence; or**
 - (e) material connected to an ongoing criminal investigation.**

Do consultees agree?

Broadly, yes. We suggest that (2)(b) & (d) are not necessary as those circumstances are encompassed by (1).

Consultation Question 4

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

We suggest that the safeguards should apply in their entirety. It is only taken together that they add up to a sufficient safeguard on this intrusion of privacy.

Consultation Question 5

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

Yes. This seems a simple method of bringing about the change.

Consultation Question 6

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

Yes. This seems a simple method of bringing about the change.

Consultation Question 7

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

- (1) Section 15(6) of the Police and Criminal Evidence Act 1984; and**
- (2) Section 16(9) to (12) of the Police and Criminal Evidence Act 1984.**

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

We prefer a simpler approach. All breaches of sections 15 & 16 should render a subsequent search and seizure unlawful.

Consultation Question 8

We invite consultees' views on whether the power to apply for a search warrant should be extended to government agencies currently unable to apply

for a search warrant but which are charged with the duty of investigating offences.

If so, we invite consultees' views on:

- (1) which agencies ought to be able to apply for a search warrant; and**
- (2) for which types of investigations the agency ought to be able to apply for a search warrant.**

We support the proposal that all government agencies charged with investigating criminal offences should be able to apply for a search warrant, but only in relation to those offences they are charged with investigating. In addition, we propose that that this power should be extended only to imprisonable offences.

Consultation Question 9

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

We also invite consultees' views on whether:

- (1) in principle, application forms should be prescribed for all search warrant provisions;**
- (2) application forms should be prescribed for only the most common types of warrant;**
- (3) there should be generic application forms not linked to particular types of warrant; or**
- (4) there should be no prescribed forms, and applicants should simply set out all the relevant information in narrative form.**

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

In principle, application forms should be prescribed for all search warrant provisions. Some will need to be specific to the particular provisions and some can be generic. Having such forms will help steer magistrates and judges as well as those making the applications, to ensure that the relevant requirements have been complied with.

Consultation Question 10

We provisionally propose that all search warrant application forms should be amended to require the issuing authority to record the time taken to consider the application.

This should be divided into time for pre-reading and the hearing itself. Do consultees agree?

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

We have no representations in relation to this proposal.

Consultation Question 11

We provisionally propose that the duty of candour ought to be made more accessible and comprehensible to ensure that investigators comply with the legal duty. Do consultees agree?

Yes.

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

- (1) primary legislation;**
- (2) rules of court; or**
- (3) Code B of the Police and Criminal Evidence Act 1984.**

We also invite consultees' views on whether any amendments ought to include a list of the information which must always, if it exists, be disclosed?

The duty of candour should be enshrined in primary legislation. This duty is so important that applicants and courts should be in no doubt that it is an absolute duty. Further, we should not wish to see it 'watered down' by secondary legislation.

Consultation Question 12

We provisionally propose that search warrant application forms should include the following questions to assist with the duty of full and frank disclosure, namely that the applicant should be required to specify on the application form:

- (1) any previous search warrant applications for the same premises of which he or she is aware which concern the same investigation;**
- (2) whether any reason exists to suspect that legally privileged material may be on the premises;**
- (3) the agency which it is intended will be responsible for prosecuting the suspected offence; and**
- (4) any known circumstances which might weigh against the warrant being issued?**

Do consultees agree?

Yes. However, (4) is too subjective. It would be better to ask an applicant whether all relevant information has been disclosed.

We propose a further requirement: whether the applicant is aware of any children or other vulnerable persons on the premises and, if so, what steps have been taken to address their presence during the execution of the warrant?

Consultation Question 13

We provisionally propose that the Criminal Procedure Rule Committee should prescribe a standard search warrant template to ensure compliance with section 15(5) to (6) of the Police and Criminal Evidence Act 1984. Do consultees agree?

If so, should this be accompanied by non-statutory guidance about the level of detail required on the actual search warrant?

Yes.

Yes.

Consultation Question 14

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

We have no representations in relation to this question.

Consultation Question 15

We invite consultees' views on whether problems commonly arise because applicants for search warrants do not have sufficient knowledge to answer the questions on oath.

If so, do consultees consider that reform is needed to increase the likelihood that a person will have sufficient knowledge to answer questions asked?

We also invite consultees' views on whether there ought to be more detail in rules of court or Code B of the Police and Criminal Evidence Act 1984 on what is required from an applicant at a hearing for a search warrant.

We have no representations in relation to this question.

Consultation Question 16

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

We neither agree nor disagree.

Consultation Question 17

We invite consultees' views on whether, in certain cases, it ought to be compulsory for a search warrant application to be made to the Crown Court or District Judges (Magistrates' Courts) rather than the lay magistracy.

If so, we welcome views on:

- (1) to which types of cases this rule ought to apply; and**
- (2) whether the distinction between such cases and routine cases requires to be in legislation.**

We do not believe that a distinction should be drawn between District Judges (Magistrates' Courts) and the lay magistracy. JPs are assisted by legal advisers, even when dealing with 'out of hours' applications. Their decisions are subject to the same right of review as DJ(MC)'s.

However, we are aware of examples of lay magistrates and legal advisers not being as robust as D/DJs. We suggest that further and additional training may be appropriate, as set out below.

We can see a strong argument for continuing the existing requirements for the types of applications that should be made before a Circuit Judge.

Consultation Question 18

We provisionally propose that only those lay magistrates who have undergone specialist training should have the power to issue a search warrant. Do consultees agree?

Yes.

Consultation Question 19

We invite consultees' views on whether, when a search warrant application is made in court, there should be a requirement for a magistrate to be advised by a legal adviser. If so, should this requirement also apply to a magistrate who is a District Judge (Magistrates' Courts)?

Yes. It is essential that lay magistrates are advised by a legal adviser whether in court, or out of court. We see no need for a DJ(MC) to be required to be advised in this way.

Consultation Question 20

We invite consultees' views on whether, when a search warrant application is made in court to a lay magistrate, there ought to be a minimum of two lay magistrates on a bench to consider the application.

We suggest that the requirement should be for at least 2 lay justices during office hours but only 1 out of office hours, coupled with a requirement that all such applications should be made during office hours, unless there are exceptional circumstances.

Consultation Question 21

We invite consultees' views on whether, when applications for search warrants are made to magistrates out of court sitting hours, the magistrates are able to obtain the legal advice they need.

Lay magistrates should not be able to grant warrants without being advised by legal advisers.

Consultation Question 22

We invite consultees' views on the desirability of formalising the magistrates' courts' out of hours procedure for hearing search warrant applications. In particular, should applications for warrants be:

- (1) submitted and heard remotely, unless otherwise directed; and**
- (2) always made to a legally qualified judge on a regional rota system.**

There is considerable merit in applications being heard by magistrates who are based locally to the site of a potential search. This local knowledge enables them to ask pertinent questions of applicants, and speeds the process. In our view it is regrettable that in many areas, arrangements for considering search warrant applications are now centralised. Accordingly, we advocate allowing local courts to make their own appropriate arrangements.

We believe that the current requirement for a personal signature should be maintained, as it focuses the mind.

It is also our experience that officers who give evidence in proximity to a magistrate are more likely to be candid. In Birmingham there have been examples of police officers being caught attempting to coach each other's evidence when appearing over a live link. Simply put, having to look someone in the eye focuses a witness' mind.

Consultation Question 23

We provisionally propose formalising the following application process to improve judicial scrutiny:

(1) applications for a search warrant to a magistrates' court or the Crown Court should be submitted electronically, unless it is not practicable in the circumstances to do so; and

(2) applications to a magistrates' court should be filtered by legal advisers who would:

(a) return applications that do not comply with statutory criteria;

(b) forward simple applications to the magistrate or judge, to be decided on the documents alone; or

(c) list other cases for a hearing by video link, telephone, or in court, to be arranged with sufficient notice to read the documents in advance and sufficient time at the hearing for adequate scrutiny.

Do consultees agree?

We agree with the above proposals, except (2)(b). We believe that such applications should be sworn. In addition, it must always remain open to the person deciding the application to require the applicant to attend to be asked questions on oath.

Consultation Question 24

We invite consultees' views on whether all search warrant applications should in the first instance be sent to a magistrates' court legal adviser who would:

(1) determine whether the application meets the statutory criteria; and

(2) send on those which do comply to a Circuit judge or District Judge (Magistrates' Courts) or lay justices as appropriate given the complexity of the case.

We agree with this suggestion.

Consultation Question 25

We provisionally propose that:

(1) there ought to be a standard procedure for audio recording search warrant hearings; and

(2) this should only be transcribed and made available to the occupier in the same way, and on the same conditions, as the Information sworn in support of the warrant under the Criminal Procedure Rules.

Do consultees agree?

Yes.

Consultation Question 26

We provisionally propose that the requirement for the issuing authority to provide written reasons for issuing or refusing a search warrant should be enshrined in statute.

This should not displace the current position in law that a failure to give reasons does not necessarily invalidate a search warrant if it is clear that the court was presented with evidence of sufficient grounds to issue the warrant.

Do consultees agree?

If not, we invite consultees' views on by which other means the issuing authority ought to be encouraged to give reasons.

We agree.

Consultation Question 27

We provisionally propose that data on the number of search warrant applications received under each statutory basis, together with the number of warrants granted and refused should be gathered for each court centre. Do consultees agree?

If so, we invite consultees' views on what other data ought to be collected.

Yes.

We suggest that data are collected in relation to the number of refused applications which are later renewed. We also suggest that data are collected in relation to the number of applications which are subsequently overturned together with the reasons for the decision.

Consultation Question 28

We invite consultees' views on whether, in light of their experiences in practice, there are investigative agencies whose investigatory or enforcement powers are unnecessarily hindered because they are unable to execute a search warrant.

In our experience those agencies are generally assisted by the police in such circumstances. This is perhaps not a sensible use of police resources.

Consultation Question 29

We provisionally propose that section 16(2) of the Police and Criminal Evidence Act 1984 should permit a search warrant relating to a criminal investigation to authorize 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?

We agree.

Consultation Question 30

We invite consultees' views on whether there should be uniformity in relation to the period for which a search warrant remains valid. If so, what should this period be?

If consultees do not consider that it is necessary to have complete uniformity, we invite views on whether the period of validity for any particular search warrant provision ought to be altered.

We do not agree that there should be uniformity, since operational requirements will vary.

Consultation Question 31

We invite consultees' views on whether the issuing authority should have the power to authorise multiple searches for all search warrants relating to a criminal investigation.

If not, are there particular search warrant provisions that should allow for multiple entry warrants?

We agree with this proposal, subject to the caveat that all searches should be specifically authorised, and the premises easily identifiable.

Consultation Question 32

We provisionally propose that:

- (1) where an investigator seeks to execute a search warrant between the hours of 10pm and 6am, prior judicial authorisation to do so should be required;**
- (2) the existing rule, that searches under warrant must take place at a reasonable hour unless it appears to the constable that the purpose of a search may otherwise be frustrated, should continue to apply; and**
- (3) a search warrant should be required to state whether it authorises a search only between 6am and 10pm or at any time.**

Do consultees agree?

We also invite consultees' views on whether further guidance should be provided on what is likely to constitute a reasonable hour in the case of residential and commercial premises

We agree with the proposal, and the suggestion that further guidance should be issued.

Consultation Question 33

We provisionally propose that section 16(5) of the Police and Criminal Evidence Act 1984 ought to be amended to take account of developments in case law, namely to specify that:

- (1) a copy of the full warrant must be supplied, including any schedule appended to it;**
- (2) a warrant is 'produced' where the occupier is given a chance to inspect it;**
- (3) non-compliance with section 16(5)(a) and (b) of the Police and Criminal Evidence Act 1984 may be justified where it appears to the officer, once lawful entry is effected, that the search may be frustrated; and**
- (4) it is permissible for all premises warrants to be redacted to omit the identity of other premises to be searched.**

Do consultees agree?

Yes.

Consultation Question 34

We provisionally propose that a person carrying out a search should provide the occupier with an authoritative guide to search powers, written in plain English for nonlawyers and available in other languages. Do consultees agree?

Yes. We submit that arrangements should also be made where the premises are known to contain non-English speakers.

Consultation Question 35

We provisionally propose that a search warrant should be required to state that the person is entitled to the information sworn in support of the warrant and how to apply for a copy. Do consultees agree?

Yes.

Consultation Question 36

We provisionally propose that Code B of the Police and Criminal Evidence Act 1984 be amended to state that:

- (1) if the occupier asks for a legal adviser or support to be present during the search, this should be allowed if it can be done without unduly delaying the search; and**
- (2) if present, a legal adviser or assistant has the right to observe the search and seizure of material in order to make their own notes.**

Code B of the Police and Criminal Evidence Act 1984 should also provide guidance on how far it is reasonable to delay a search to wait for a legal representative to attend. Do consultees agree?

Yes. This would formalise what has become common procedure.

Consultation Question 37

We provisionally propose that the Crown Court be able to review the issue and execution of search warrants relating to a criminal investigation, to examine:

- (1) whether the procedure for applying for or issuing the warrant was defective; and/or**
- (2) whether the search was properly conducted (for example, whether items seized were within the powers of seizure).**

Do consultees agree?

Yes, without prejudicing the right to apply for Judicial Review of the grant.

Consultation Question 38

We provisionally propose the following new procedure:

Anyone with a relevant interest in property which has been seized or produced in response to a search warrant to which section 15(1) of the Police and Criminal Evidence Act 1984 applies (as defined in Consultation Question 3) should be able to apply to a judge of the Crown Court for either:

- (1) the warrant to be set aside (resulting in the return of material seized or produced); or**
 - (2) the return of material seized or produced, without setting aside the warrant.**
- The grounds on which the Court must be satisfied before setting aside a warrant and ordering the return of the material are that:**
- (1) the applicant for the warrant did not provide the information necessary for the issuing court to be satisfied that the conditions for issuing the warrant were fulfilled; or**
 - (2) the provisions of section 15 of the Police and Criminal Evidence Act 1984 were not followed.**

The grounds on which the Court must be satisfied before ordering the return of material seized or obtained by production, without setting aside the warrant, are that:

- (1) the materials were unlawfully seized (for example because they were legally privileged, or because they were special procedure or excluded material and the warrant did not confer power to seize such materials); or**
- (2) the provisions of section 16 were not followed.**

However, neither of these orders would be made if the investigator satisfied the Crown Court judge to the civil standard of proof that:

- (1) the conditions for issuing a warrant are fulfilled, so far as they concern the subject matter of the investigation and the nature and relevance of the materials in question; and**
- (2) it is in the interests of justice for material to be retained (having regard to a nonexhaustive 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?

Yes, without prejudicing the right to apply for Judicial Review of the grant.

Do consultees agree with the detail of the procedure described above?

Yes. We would add that it ought to be specified that the existing powers under the Police Property Act are not restricted by the above.

Consultation Question 39

We invite consultees' views on whether the proposed new procedure set out in Consultation Question 38 ought to include:

- (1) a permission filter whereby an applicant must obtain permission to proceed to a full hearing; and**
- (2) a power for the Crown Court judge to award damages.**

- (1) No. It would be better to have the application heard at the earliest opportunity, and arguments about this heard at that hearing;
- (2) Yes. In the interests of balance, there ought also to be a power to award costs against an applicant if the court holds that the application was without merit.

Consultation Question 40

We invite consultees' views on whether there are any aspects of the proposed new procedure set out in Consultation Question 39 that ought to be transposed into section 59 of the Criminal Justice and Police Act 2001. In particular, should a judge hearing an application under section 59 have the power to order for costs between parties?

Yes. See above.

Consultation Question 41

We invite consultees' views on whether the current procedure for dealing with sensitive information and public interest immunity in relation to search warrants requires reform.

We agree with the proposals set out in the consultation document.

Consultation Question 42

We provisionally propose that the current procedures for instructing independent lawyers (independent counsel) or other experts to resolve issues of legal privilege ought to be enshrined in secondary legislation. Do consultees agree?

Yes.

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.**

The use of independent lawyers ought to be mandatory in the circumstances set out. We submit that the rules ought to allow for both applicants and those who allege privilege, to provide written submissions to the independent lawyer, who should be obliged to take account of them.

Consultation Question 43

To enable the swift segregation, return and deletion of legally privileged material, and examination of non-privileged material, we provisionally propose that a person claiming legal privilege in respect of material seized following the execution of a search warrant should be required to make all reasonable efforts to assist the investigators in identifying what is legally privileged. Do consultees agree?

Yes, but this should not be held to be determinative, since the person claiming legal privilege may themselves need to take legal advice on the matter.

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.

We agree with this proposal.

Consultation Question 44

We provisionally propose that:

- (1) there should be a uniform rule for the availability of search warrants in respect of medical and counselling records, irrespective of the particular power under which the warrant is sought and the identity of the person applying for or executing the warrant;**
- (2) that rule should provide that medical and counselling records are excluded from the scope of search warrants in all cases, whatever the statutory source of the power to issue a search warrant; and**
- (3) there should be a tightly circumscribed exceptions to this exclusion in the case of investigations where medical and counselling records are central to the issues investigated.**

Do consultees agree?

Yes.

We invite consultees' views on whether:

- (1) if medical records are to remain within the scope of search warrants, then in those instances where the patient is not the suspect, they should have the right to be informed and make representations before a warrant is issued or a production order is made; and**
- (2) a similar uniform rule ought to exist in respect of human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence under section 11(1)(b) of the Police and Criminal Evidence Act 1984.**

We submit that in these circumstances, the patient ought to be consulted, unless the applicant can satisfy the issuer that there are compelling reasons not to do so.

Consultation Question 45

We provisionally propose that:

- (1) there should be a uniform rule for the availability of search warrants in respect of confidential journalistic material, irrespective of the particular power under which the warrant is sought and the identity of the person applying for or executing the warrant; and**
- (2) that rule should provide that confidential journalistic material should be excluded from the scope of search warrants in all cases, whatever the statutory source of the power to issue a search warrant.**
- (3) The statutory regime under Schedule 5 to the Terrorism Act 2000 ought not to be amended.**

Do consultees agree?

We invite consultees' views on whether there should be any exceptions to this exclusion and, if so, what those exceptions should be.

We agree broadly. However, a complete exclusion would fail to cater for potential unforeseeable circumstances. We submit that such material should be made subject

to a warrant only after a High Court Judge has been satisfied that this is in the interests of (wider) justice, and the journalist(s) has been given an opportunity to make representations.

Consultation Question 46

We invite consultees' views as to whether the second set of access conditions under Schedule 1 to the Police and Criminal Evidence Act 1984 ought to be abolished.

It should be abolished if the proposed replacement is enacted.

Consultation Question 47

We invite consultees' views on whether there are particular difficulties in practice in searches which relate to special procedure material and in particular whether greater clarity needs to be introduced in defining searches for special procedure material held with the intention of furthering a criminal purpose.

We have no examples to provide.

Consultation Question 48

We invite consultees' views on whether:

- (1) the exemption of confidential business records from search warrant powers under section 9(2) of the Police and Criminal Evidence Act 1984 ought to apply to all criminal investigations, irrespective of whether the investigation is carried out by the police;**
- (2) the special procedure for applying for production orders and search warrants in respect of confidential business records and non-confidential journalistic material under Schedule 1 of the Police and Criminal Evidence Act 1984 ought to be available in all cases in which those records are exempted from the power to issue a search warrant under (1) above; and**
- (3) there ought to be an exception to (1) above in the case of search powers for the purposes of specialist investigation where production orders, information requirements or similar procedures are available.**

We agree that the confidential business records should be exempted in this way.

Consultation Question 49

We invite consultees' views on whether excluded and special procedure material ought to be exempted from seizure under sections 18, 19, 20 and 32 of the Police and Criminal Evidence Act 1984.

We agree that this material should be exempted from seizure, for the reasons set out in the consultation document.

Consultation Question 50

We invite consultees to share examples of the types of electronic material that investigators may seek under a search warrant. We are particularly interested in any examples of search warrants granted in relation to intangible material stored remotely in electronic form.

We have no examples to provide.

Consultation Question 51

We invite consultees' views on the operation of the search warrants regime where warrants are drafted in terms of "devices" rather than specifying electronic information on devices.

In particular, we invite views on whether:

- (1) exempted material is adequately protected where search warrants are drafted to authorise the search for, and seizure of, electronic devices as distinct from specified electronic information; and**
- (2) the single item theory, which treats electronic devices as a single item, works effectively and fairly in practice.**

As electronic material may be held on several synchronised devices, or in the 'cloud', or elsewhere, there may be some merit in specifically referring in statute to the need to protect exempted material.

Consultation Question 52

We invite consultees' views on the operation of the search warrants regime where warrants are drafted in terms of "information" rather than specifying devices. In particular, we are interested to hear of experiences where searches under warrant for information stored in electronic form have created difficulties.

We have no examples to provide.

Consultation Question 53

We invite consultees' views on:

- (1) the current operation of Part 2 of the Criminal Justice and Police Act 2001 in relation to electronic material;**
- (2) whether the Criminal Justice and Police Act 2001 contains adequate safeguards where there is a search and seizure of electronic devices containing large volumes of data; and**
- (3) how, if the current safeguards are inadequate, consultees propose the scheme should be amended.**

We do not believe that the current safeguards are adequate where devices containing large amounts of data are seized. We suggest that it may be appropriate for a further warrant to be obtained where, for example, a device contains files

shared via cloud storage, that the investigators did not expect to find. We also raise our concern that the commonplace seizure of items capable of holding any form of data may result in significant disruption to legitimate business interests and harm third parties not subject of the search or investigation. At present there is little onus on investigators to accept calls to provide copies of innocuous but important material seized in the course of a lawful search. We suggest that the commission considers adding a statutory framework to enable the subject of the search warrant to request the review and provision of copies of specified material. The applicant in such circumstances would no doubt be in a position to provide detailed information as to the storage location within a device (for instance enabling the return of client lists, business to business data or accounting records required for taxation purposes).

Consultation Question 54

We invite consultees' views on the operation of sections 19(4) and 20(1) of the Police and Criminal Evidence Act 1984 in respect of electronic information when searching premises under a search warrant. In particular, we invite consultees' views on whether reform of sections 19(4) and 20(1) of the Police and Criminal Evidence Act 1984 is needed. If so, we invite further views on:

- (1) how these provisions ought to be reformed; and**
- (2) whether there is a need to reform these provisions beyond the context of searches of premises (which is the extent of the scope of this project).**

The concerns expressed in the consultation document are well founded. We submit that there should simply be an amendment to create certainty. This information is likely to be obtainable by other means, and so we take no firm view about whether it should fall within the remit of sections 19(4) and 20(1).

Consultation Question 55

We invite consultees' views on whether existing search warrant powers provide law enforcement agencies with sufficient powers to ensure the effective investigation of crime in the digital age. In particular, we invite views on:

- (1) whether law enforcement agencies require powers of extraterritorial search, seizure and production under warrant;**
- (2) if so, when in practice there may be a need to engage in the extraterritorial search, seizure or production of electronic information under warrant; and**
- (3) whether reform to the Police and Criminal Evidence Act 1984 is required to permit any such investigative measures.**

We have no observations in relation to this question.

Consultation Question 56

We provisionally propose that additional steps should be introduced to require investigators and issuing authorities to consider the necessity and proportionality of the seizure of electronic devices. Do consultees agree?

Yes.

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;

It should.

(2) additional criteria ought to be satisfied during the application stage and, if so, what; and

Judges and magistrates should be obliged to consider the impact of the seizure of these items in the same way that they are currently obliged to consider the impact of a search warrant upon the suspect, and occupants of a property. We refer to our response to question 53 above and suggest that means to apply for return or copying of items seized with judicial oversight is provided.

(3) investigators should have to present search protocols to the issuing authority in relation to electronic devices to be seized.

We support this suggestion.

Consultation Question 57

We provisionally propose that, in principle, the procedures and safeguards in the Criminal Justice and Police Act 2001 ought to apply whenever electronic devices are seized pursuant to a search warrant. Do consultees agree? If so, we invite consultees' views on which procedures and safeguards ought to apply.

We agree. We suggest that there is no reason that all of Chapter 2 of that Act ought to apply in such circumstances. This would treat the property in the same way as any other property seized.

Consultation Question 58

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

We agree with Professor Stone's stance. Simply put, any power that is duplicated by that contained in section 8 PACE should be repealed.

Consultation Question 59

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

No. We agree with those who argue that consolidation would be a sensible step. In particular, we reject the notion that separate statutory powers for separate authorities focuses them on their remit. There are many examples of separate powers being set out in different chapters of legislation. For example, the Proceeds of Crime Act 2002 achieves this very clearly.

Consultation Question 60

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with finding evidence relevant to suspected criminal offences. If so, we invite consultees' views on the extent to which consolidation ought to take place.

We prefer to re-state that there should be overall consolidation.

Consultation Question 61

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with preventing or remedying dangerous or unlawful situations. If so, we invite consultees' views on the extent to which consolidation ought to take place.

We prefer to re-state that there should be overall consolidation.

Consultation Question 62

We invite consultees' views on whether there would be advantages in pursuing some degree of consolidation of those search warrant provisions concerned with investigations in which production orders or similar procedures are available. If so, we invite consultees' views on the extent to which consolidation ought to take place.

We prefer to re-state that there should be overall consolidation.

Consultation Question 63

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

No.

Consultation Question 64

We provisionally propose that there should be a standard set of accessibility conditions for all search warrant provisions. Do consultees agree?

Yes.

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.

Yes. We agree with the reasoning set out in the consultation document. We suggest that the reason cited is further supported by the evidence underlying the belief. It is our experience that otherwise the police and other investigating authorities fall into the habit of stating reasons rather than applying appropriate analysis. This has been a key difficulty arising with the necessity provisions as they are applied to review of an arrest.

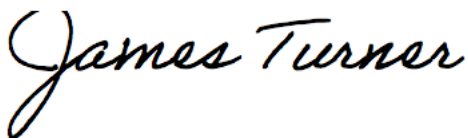
We also invite consultees' views on whether, in appropriate cases, there should be further alternatives, depending on the purpose of the power, such as that:

(1) a production order has been made and not complied with; or

(2) there are reasonable grounds for suspecting that immediate access to the premises or the materials is required to prevent a dangerous situation or rescue a person or animal in pain or danger.

We anticipate that it would be impossible to foresee all possible alternatives. We suggest a general condition to be used in 'other compelling circumstances'.

31 August 2018

A handwritten signature in black ink that reads "James Turner". The signature is written in a cursive, flowing style.

James Turner
President
Birmingham Law Society