

SEARCH WARRANTS: A CONSULTATION

THE CURRENT LAW

A search warrant is a written authorisation that allows an investigator to enter premises to search for material or individuals. Search warrants are usually issued by a court application by a police officer or other investigator. Most search warrants authorise the investigator to seize and retain relevant material found during the search.

There are 176 different powers to issue search warrants. Some, like the general power under section 8 of the Police and Criminal Evidence Act 1984 (“PACE”), are used to look for evidence of a criminal offence. Some more specific powers allow the searcher to remove stolen goods, drugs, firearms or other dangerous materials or to rescue people or animals in danger or distress. Other powers relate to complex financial or specialised investigations.

PROBLEMS WITH THE LAW

Comments made by members of the senior judiciary indicate that the law governing search warrants is unnecessarily complex, liable to give rise to challenges and in need of reform. Search warrants are among the most intrusive powers that investigators can exercise. The cost of a defective search warrant can be significant, with entire investigations collapsing and potentially millions incurred by public bodies. Since 2010, there have been over 50 reported judicial reviews relating to the issue of a search warrant or the conduct of the search.

In response to these problems, the Home Office invited the Law Commission to conduct a review to identify and address pressing problems with the law and to produce reform that will clarify and rationalise the law governing search warrants.

Following extensive engagement with academics, lawyers, judges, court organisations, law enforcement agencies, government departments and interest groups, we have identified several problems with the law, which indicate that it is in need of reform.

Complexity

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

Inconsistency

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

Outdated

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

Costly

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

OUR PROPOSALS

We have undertaken a rigorous review of the current law and engaged in an extensive fact-finding exercise to identify pressing problems. We have now published a Consultation Paper (available online at <https://www.lawcom.gov.uk/project/search-warrants/>) which asks a series of questions about our provisional reform options and seeks to gather further evidence to inform our final recommendations.

Search warrants serve an important purpose and are vital to criminal investigations. They also raise important constitutional issues concerning the rule of law and the proper balance between the powers of the state and the rights and freedoms of the citizen. The overarching aim of the proposals in our Consultation Paper has been to balance these important interests. We summarise our proposals here.

Simplifying the law

We want to simplify the law and procedure by rendering it more rational and accessible at all stages of the search warrant process. We invite comment on our proposals to:

- clarify when statutory safeguards apply and Code B of PACE must be followed;
- clarify the relationship between search warrants and the power to search premises following arrest, so that investigators are confident which powers are the most appropriate;
- clarify forms and guidance documents and enshrine common law duties in legislation to ensure greater compliance with legal duties, in particular the duty of full and frank disclosure by those applying for warrants;
- clarify when applications should be made to professional judges rather than lay magistrates; and
- possibly effect a wider consolidation of the different powers and harmonise some provisions to bring about a more accessible and coherent statute book.

Our aim with these proposals is to ensure adequate protections are provided, reduce the scope for error and make the law operate more efficiently.

Making the law fairer

We want to make the law fairer by extending protections, improving judicial scrutiny and making the law more transparent. We invite comment on our proposals to:

- extend safeguards by expanding the application of statutory safeguards under PACE and CJPA; reinforce the importance of being able to obtain legal advice; and strengthen the protection afforded to exempted categories of material, including confidential journalistic material and medical records;
- improve judicial scrutiny by introducing a triage system whereby applications are screened; require magistrates to undergo special training in order to issue search warrants, be assisted by

a legal adviser and sit as a bench of two; and require judicial authorisation for late night or early morning searches; and

- make the law more transparent by requiring the issuing authority to record the time taken to consider an application; enshrine the duty to give reasons for issuing or refusing a search warrant in statute; require that occupiers are provided with more information to understand their rights; and introduce a requirement to record and publish statistics to monitor the use of search warrants.

Together, these proposals seek to ensure that human rights are protected and that a search under a warrant is necessary and proportionate.

Modernising the law

We want to modernise the law to ensure that it reflects the changing nature of investigations and is equipped to deal with current technology. We invite comment on our proposals to:

- provide greater consistency across search warrant provisions in relation to who may apply for a warrant, conduct a search and accompany a person during a search; the duration in which a search warrant remains valid; and the availability of multiple entry warrants;
- formalise the recording of additional information supplied to the issuing authority during an application hearing; the procedure by which applications are granted out of court hours and the use of independent counsel; and
- introduce a new mechanism to prevent claims of privilege being used as a delaying tactic, particularly in large-scale investigations.

These proposals seek to ensure that investigative agencies can tackle criminal conduct as it is carried out in a digital world, whilst maintaining robust and effective safeguards.

We also ask a series of consultation questions in order to gather evidence to clarify the scope of investigators' powers to search for and seize electronic evidence. We highlight the importance of achieving a statutory framework, reflecting the reality and complexities of the digital age, that facilitates the investigation of cybercrime and protects individual rights.

Making the law cost-effective

We want to make the law more cost-effective by introducing a streamlined way to obtain a search warrant and a new procedure to challenge and correct procedural deficiencies. We invite comment on our proposals to:

- save police time and resources by making search warrant procedures more efficient whilst ensuring that applications are properly screened to ensure that they are not defective;
- introduce a new procedure to challenge defective search warrants, which would avoid the cost and delay of judicial review, and a new procedure to prevent privilege being used as a delaying tactic. Both these procedures would allow investigators to recover costs in particular instances.

These proposals, in addition to simplifying the law, aim to decrease the high number of judicial reviews and their associated cost.

YOUR RESPONSE

We invite views on the proposals contained in our Consultation Paper during this open public consultation. The consultation began on 5 June 2018 and will run until 5 September 2018. Once the consultation has closed, we will begin to draw up our final recommendations, which we aim to publish later in the year.