



**Law
Commission**
Reforming the law

Search Warrants

Consultation Paper Summary

Contents

	Paragraph	Page
SEARCH WARRANTS: SUMMARY	1.1	1
Purpose of this project	1.1	1
Scope of this project	1.6	2
Methodology	1.10	2
Current law	1.12	3
What is a search warrant	1.12	3
Obtaining a search warrant	1.15	3
Material subject to a search under warrant	1.20	4
Associated powers	1.23	5
Challenging a search warrant	1.24	6
Problems with the law	1.25	6
Complexity	1.25	6
Inconsistency	1.26	6
Outdated	1.27	7
Costly	1.28	7
Reforming the law	1.29	7
Operation of the statutory safeguards	1.31	8
Applying for a search warrant	1.36	8
Issuing a search warrant	1.43	9
Conduct of a search under warrant	1.50	10
Challenging a search warrant	1.56	11
Sensitive information and public interest immunity	1.63	12
Material exempted from search and seizure	1.64	12
Electronic material	1.70	13
Consolidating search warrant legislation	1.77	14
Next steps	1.80	14

Search warrants: summary

PURPOSE OF THIS PROJECT

- 1.1 In this project we review the law and practice governing search warrants. We examine the procedure when applying for, issuing, carrying out a search under warrant and challenging a search warrant. We also examine the treatment of sensitive, exempted and electronic material. Finally, we consider the extent to which search warrant provisions can be consolidated.
- 1.2 We undertook this project at the request of the Home Office, starting in January 2017. This request followed from comments made by senior members of the judiciary suggesting that the law governing search warrants is unnecessarily complex, liable to give rise to challenges and in need of reform. This is evidenced by the number of cases in recent years in which search warrants have been challenged and quashed on judicial review: in the reported cases alone, there have been some 50 judicial reviews concerning search warrants since 2010. Search warrants are among the most intrusive powers that investigators can exercise. The cost of a defective search warrant can be significant, with entire investigations collapsing and potentially millions incurred by public bodies on legal fees and damages.
- 1.3 Our purpose is to consider ways in which the law of search warrants can be simplified, clarified and rationalised. This is in order to reduce the number of errors and challenges and to assist both those applying for search warrants and those against whom search warrants are sought in understanding and using the system.
- 1.4 The terms of reference of the project, as agreed in a memorandum of understanding between the Law Commission and the Home Office signed on 11 January 2017, are as follows:

The law reform objectives of the review encompass elements of rationalisation and streamlining of the current law, as well as identifying and addressing pressing problems.

The focus of this review is on making search warrants legislation more transparent and accessible, thus reducing the scope for errors, which in turn can lead to substantive injustice and wasted costs.

The review will include consideration of reform by legislative change, as well as non-statutory guidance, Criminal Procedure Rules and other initiatives.
- 1.5 This document summarises the contents of our Consultation Paper, which sets out in detail our proposals for reform. The Consultation Paper is available online at <https://www.lawcom.gov.uk/project/search-warrants/>. A full list of our consultation questions and provisional proposals can be found in Chapter 12 of the Consultation Paper. We invite responses to these consultation questions. The deadline for responses is 5 September 2018.

Comments may be sent:

By email to search_warrants@lawcommission.gov.uk

OR

By post to Criminal Law Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

Tel: 020 3334 3100 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

SCOPE OF THIS PROJECT

- 1.6 We have identified 176 search warrant provisions, which are listed in Appendix 1 to the consultation paper. This list does not include warrants to enter premises ("entry warrants") and warrants to enter and inspect premises ("inspection warrants"). Ancillary statutory powers are contained in the Police and Criminal Evidence Act 1984 ("PACE") and Part 2 of the Criminal Justice and Police Act 2001 ("CJPA").
- 1.7 Beyond the primary legislation, there are supplementary provisions in Code B of PACE, the Home Office Powers of Entry Code of Practice and the Criminal Procedure Rules 2015 (as amended).
- 1.8 This consultation paper focuses on those problems that have been identified during our pre-consultation analysis as the most pressing problems. During this open public consultation, we invite consultees' comments on these, and any other issues within the terms of reference, surrounding the law of search warrants.
- 1.9 This project does not concern powers of stop and search or police powers more generally.

METHODOLOGY

- 1.10 In preparing this consultation paper, we have conducted an extensive literature review and made efforts to engage with stakeholders by organising meetings and roundtable discussions. We have discussed the law with academics, lawyers, judges, court organisations, law enforcement agencies, government departments and special interest groups. This iterative discussion process has been invaluable in helping to understand how the current law operates, its deficiencies and potential avenues for reform. In addition to examining the law of England and Wales, we have examined the law in other jurisdictions and have liaised, in particular, with the New Zealand Law Commission.
- 1.11 It is important to make clear from the outset that the proposals contained in this consultation paper are only provisional. We do not make any recommendations for law reform at this stage. It is during this open public consultation that we invite all views on our provisional proposals. All comments provided during the consultation period will be taken into account when forming our final recommendations. Our recommendations will be published in a subsequent report.

CURRENT LAW

What is a search warrant

- 1.12 A search warrant is a written authorisation issued by a court, tribunal or other body (“issuing authority”) to a police officer or other investigator, allowing that person to enter one or more sets of premises specified in the warrant and search for persons or materials on those premises. Most search warrants contain associated powers, authorising the investigator to take away materials found during the search and to use reasonable force where necessary.
- 1.13 As noted above, we have identified 176 search warrant provisions. Roughly speaking, search warrant powers may be divided into the following categories:
- (1) powers primarily concerned with obtaining evidence of criminal offences;
 - (2) powers for the purpose of wider specialised investigations, in fields such as financial services and copyright; and
 - (3) powers enabling entry for the purpose of removing people or animals in danger or distress, taking away dangerous or unlawfully possessed materials or otherwise preventing or remedying a dangerous situation.
- 1.14 Under section 8 of PACE, the most commonly used search warrant provision, a justice of the peace may issue a search warrant on the information of a police constable if satisfied that there are reasonable grounds for believing that:
- (1) an indictable offence has been committed;
 - (2) there are materials on the premises which are likely to be of substantial value to the investigation of the offence and likely to be relevant evidence; and
 - (3) one of a number of accessibility conditions is satisfied, showing that it would not be practicable to gain entry to the premises or access to the materials without a search warrant.

Other search warrant powers have broadly similar conditions of issue.

Obtaining a search warrant

- 1.15 Search warrants under PACE and some other powers are normally applied for and executed by the police. Some investigators, such as designated National Crime Agency officers, have some or all of the same powers as the police. Other investigators, such as HMRC officers, have had the power to apply for a search warrant under PACE extended to them. There are also search warrant provisions providing for warrants to be applied for or executed by officials other than the police, such as specialised financial or other investigators.
- 1.16 The person applying for a warrant has a duty to provide all the necessary information to satisfy the court that the statutory conditions are met. In particular, he or she must be in a position to satisfy the court that the material sought is not exempt from search for any reason,¹ and that there are no other reasons why a warrant ought not to be issued. The information on which

¹ See para 1.20 below.

the application is based is normally set out in an application form, though the applicant may give additional details in the course of the oral hearing of the application.

- 1.17 The occupier of the premises or other person against whom the warrant is issued has the right to know this information and may apply to the court for it to be provided.² There are, however, cases where the applicant believes that some of the information is too sensitive to disclose, for example if it was obtained by covert surveillance or supplied by an informant. In these cases, the sensitive information is generally supplied to the court in a separate document.³ If the occupier applies to the court for full disclosure of the information, the court must then form its own view on whether the public interest requires the information marked as sensitive to be kept confidential.⁴ This procedure has recently been discussed by the Supreme Court.⁵
- 1.18 Section 8 of PACE provides that a warrant is issued by a “justice of the peace”. This includes both lay magistrates and District Judges (Magistrates’ Courts). In addition, both High Court judges and Circuit Judges have the powers of a justice of the peace in criminal matters, and may therefore issue search warrants under PACE. Some search powers under other statutes are similar, while others confine the power to issue search warrants to a Circuit Judge, a High Court judge or a specialist tribunal.
- 1.19 Section 15 of PACE contains provisions about the way in which a warrant is applied for and issued: in particular, the information which must be provided to the court and the information which must be stated on the warrant. Section 16 of PACE contains provisions about the way in which search under the warrant is to be carried out, for example the time within which the search must take place and the information to be provided to the occupier. Both these sections apply to all search warrants issued to police constables and people to whom the provisions have been extended:⁶ they are not confined to warrants under PACE itself. Section 15(1) provides that any search that does not comply with the requirements of these two sections is unlawful.

Material subject to a search under warrant

- 1.20 Some kinds of materials may not be searched for under section 8 of PACE or most other powers. These are:
 - (1) materials subject to legal privilege, meaning communications between a lawyer and a client, or between a lawyer and a third party when they concern litigation;
 - (2) excluded material, meaning medical and counselling records and confidential journalistic material; and
 - (3) special procedure material, meaning confidential business records and non-confidential journalistic material.

² Criminal Procedure Rules, r 5.7(6).

³ Criminal Procedure Rules, r 47.26(4).

⁴ Criminal Procedure Rules, r 15.3(3)(b).

⁵ *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1, [2018] 2 WLR 357 at [27].

⁶ Including National Crime Agency officers, accredited financial investigators, SFO officers, officers of Revenue and Customs, immigration officers and designated customs officials. See SI 2015 No 1783, sch 1; SI 2015 No 759 (as modified by SI 2017 No 1222), art 2; and SI 2013 No 1542, schs 1 and 2.

- 1.21 We refer to these three categories of material collectively as “exempted material”. There is a procedure under Schedule 1 to PACE, in which a Circuit Judge or a District Judge (Magistrates’ Courts) can allow access to special procedure material, and in a very few cases to excluded material. Normally the judge makes a “production order”, meaning that the person against whom the order is made must produce the specified material within a given period. If a production order is made and disobeyed, or it is not practicable to make one for various reasons, a warrant can be issued instead.⁷
- 1.22 Special considerations arise in the case of material stored in electronic form, either on or off the premises being searched:
- (1) a search warrant can authorise the search for, and seizure of, an electronic device with information stored on it; but if there is reason to believe any of this may be subject to legal privilege or otherwise exempt from search, the warrant must specifically exclude the exempted material; and
 - (2) there is no power to search for remotely held material, such as material kept on the cloud or a remote server.⁸

Associated powers

- 1.23 There are numerous other powers that are relevant to whether and how premises can be searched. For example:
- (1) there are statutory powers to search the premises of a person who is arrested;⁹ there is also a common law power to this effect;
 - (2) where a police officer is lawfully on any premises, whether under a search warrant or not, he or she may seize any materials which there are reasonable grounds for believing to be evidence of an offence (not necessarily the offence being investigated), if there are also reasonable grounds for believing that it is necessary to seize them in order to prevent the evidence being concealed, lost, altered or destroyed;¹⁰
 - (3) there is power to require a person on the premises to produce in visible and legible form any information accessible from the premises, if:
 - (a) there are reasonable grounds for believing that it is evidence relevant to an offence and might otherwise be concealed, lost, tampered with or destroyed;¹¹ or
 - (b) it would be liable to seizure under the terms of the warrant or certain other statutory powers if it were on the premises in tangible form.¹²

⁷ Some of the specialised investigation regimes concerning fields such as copyright and financial services also include a procedure for making production orders in preference to issuing a search warrant.

⁸ This enables electronic files to be edited and shared whilst potentially hosted in another jurisdiction. Accessibility of material will rely on a connection from a device, which could be suddenly terminated.

⁹ PACE, ss 18 and 32.

¹⁰ PACE, s 19.

¹¹ PACE, s 19(4).

¹² PACE, s 20.

however, both these powers are only available to police or people with similar powers, and only apply to material that is in plain view at the time of the search. They do not allow the investigator to search a device or to require passwords or access details; and

- (4) in some cases, it is not practicable to determine there and then at the site of the search whether material found on the premises is of a kind which can lawfully be seized or not. There is a procedure known as “seize and sift” which applies in such cases to allow for the material to be taken away as a whole to be sorted at a later date.¹³ Where some of the material may be subject to legal privilege, this may involve instructing independent lawyers to oversee the search or the sorting.

Challenging a search warrant

- 1.24 The issue of a warrant can be challenged by judicial review: if the challenge is successful the High Court can quash the warrant and order that any materials taken must be returned. If a search is held to be unlawful for any reason the occupier can bring a civil action for trespass to land or to goods. In addition, there is a procedure for applying to the Crown Court for the materials taken to be returned. This procedure is used if, for example, the materials were taken under the “seize and sift” procedures and turn out on inspection to be material which there was no power to seize.¹⁴ Conversely, the investigator can apply to retain the material if there would be grounds for immediately issuing a new warrant if the materials were returned.¹⁵

PROBLEMS WITH THE LAW

Complexity

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

Inconsistency

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

¹³ CJPA, ss 50 and 51.

¹⁴ CJPA, s 59.

¹⁵ CJPA, s 59(6).

Outdated

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

Costly

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

REFORMING THE LAW

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

- (1) simplify the law – we want to simplify the law by rendering it more rational and comprehensible at all stages of the search warrant process. Our provisionally proposals seek to reduce the scope for error and make the law more efficient;
- (2) make the law fairer – we want to make the law fairer by extending protections, making it easier to challenge defective search warrants and making the law more transparent. Our proposals seek to ensure that human rights are protected and that a search under a warrant is necessary and proportionate;
- (3) modernise the law – we want to modernise the law to ensure that it reflects the changing nature of investigations and is equipped to deal with electronic material. Our proposals seek to ensure that investigative agencies can tackle criminal conduct as it is carried out in a digital world, whilst maintaining robust and effective safeguards; and
- (4) make the law cost-effective – we want to make the law more cost-efficient by introducing a streamlined way to obtain a search warrant and a new procedure to challenge and correct procedural deficiencies. Our provisional proposals, in addition to simplifying the law, seek to reduce the high number of expensive judicial reviews.

1.30 We outline our provisional proposals below.

Operation of the statutory safeguards

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

1.32 In 2018 it is no longer appropriate to regard the police as the sole agency applying for and executing search warrants. Increasingly frequently, investigations are undertaken by other agencies, or by the police and other agencies in cooperation. Accordingly, many types of search warrant may be applied for by agencies other than the police. Also, many warrants,

regardless of who applies for them, may be executed by the police, by other agencies or by the two acting together. Accordingly, the agency applying for a warrant and the agency executing it need not be the same.

- 1.33 We therefore consider that it is anomalous that the protections in sections 15 and 16 of PACE are limited to warrants “issued to” police constables and people to whom the provisions have been extended. In Chapter 3 of the consultation paper we provisionally propose that sections 15 and 16 of PACE should apply to all search warrants that relate to a criminal investigation irrespective of who is making the application and who is carrying out the search. The sections should not be confined to investigations carried out by police constables and people to whom the provisions have currently been extended.
- 1.34 Further rules about the conduct of a search are contained in the code of practice (“Code B”), made under the powers of PACE. There is an ambiguity in PACE and in the terms of Code B as to whether these rules should be followed where the investigation is not carried out by the police. We therefore provisionally propose that they too should apply to all search warrants relating to a criminal investigation.
- 1.35 We also provisionally propose amending section 15(1) of PACE to clarify what conduct must comply with the search and the effect of non-compliance.

Applying for a search warrant

- 1.36 In Chapter 4 of the consultation paper we consider potential reform to the procedure by which investigators apply for a warrant. As observed recently by the Supreme Court, the statutory search warrants scheme is designed to be operated speedily at an early stage in a police investigation.¹⁶ We consider that the procedure governing the granting of search warrants ought to be reformed in order to improve procedural efficiency and reduce the scope for serious errors. At the same time, we consider that the law ought to be made more comprehensible by clarifying and amending forms, guidance and enshrining common law duties and judicial observations in legislation. Our intention is to promote greater compliance with statutory criteria and the duty of candour.
- 1.37 A substantial proportion of search warrant types, including warrants under section 8 of PACE, can only be applied for by a constable. An increasing number of agencies now have the power to apply for a search warrant, or authorise an individual to apply on their behalf. We invite consultees’ views on whether the power to apply for a search warrant should be extended to agencies currently unable to apply for a search warrant who are charged with the duty of investigating offences.
- 1.38 We also consider the application forms prescribed by the Criminal Procedure Rules to be prepared by investigators in support of a search warrant application. We invite consultees’ views on amending the available types and content of application forms to improve their ease of use and ensure compliance with statutory criteria.
- 1.39 Chapter 4 of the consultation paper also deals with the duty of candour. When applying for a warrant, the applicant must make full and frank disclosure. This includes mentioning any circumstances that might count against the search warrant being issued. This is referred to as the “duty of candour”. As a common law duty, the duty of candour derives from a large body of case law but is not to be found on the face of a statute. We provisionally propose that the

¹⁶ *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, [2018] 2 WLR 357 at [15]. Discussed in *R (Hafeez) v Southwark Crown Court* [2018] EWHC 954 (Admin) at [13].

duty of candour ought to be stated more clearly to ensure that investigators comply with it. We invite consultees' views on both the form in which the duty of candour ought to be enshrined and the content of the duty.

- 1.40 Section 15 of PACE provides detailed requirements for what a search warrant must contain. We provisionally propose that the Criminal Procedure Rule Committee should prescribe a standard form for search warrants to ensure compliance with section 15 of PACE.
- 1.41 The rules regarding how an investigator arranges a hearing to make an application for a warrant and how that hearing is conducted are contained in section 15 of PACE, Code B of PACE and the Criminal Procedure Rules. We ask a series of questions about this procedure and invite consultees' views on whether there ought to be more detail in rules of court or PACE guidance on what is required from an applicant at a hearing for a search warrant.
- 1.42 Not all searches require a warrant. Section 18 of PACE provides that a constable may enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence. Stakeholders have reported concern that there may be a tendency to sidestep the warrant procedure by means of arrests without warrant. We invite consultees' views on the merits of clarifying the relationship between search warrants and the search of premises following arrest under PACE.

Issuing a search warrant

- 1.43 In Chapter 5 of the consultation paper we discuss the procedure for issuing a search warrant. Our focus is on how procedures can be improved, to ensure that the legal requirements are fully respected and the number of challenges can be kept to those strictly necessary. Several stakeholders have reported a tendency for courts to treat applications for search warrants as a rubber-stamping exercise to be got out of the way before the real work of the day starts. We therefore consider ways of improving judicial scrutiny of warrant applications.
- 1.44 By simplifying the procedure by which a search warrant is issued, we seek to reduce the scope for error and make the law more efficient. We also consider a uniform procedure to screen search warrant applications to ensure they are in a suitable state to be considered by the issuing authority, thereby making the law more cost-efficient and heightening judicial scrutiny. At the same time, we consider that the law ought to be more transparent and propose a requirement to record and publish statistics to monitor the use of search warrants.
- 1.45 We examine who may issue a search warrant and seek views on whether there should be general guidance or a requirement that, in certain cases, search warrant applications should be made to the Crown Court or District Judges (Magistrates' Courts) rather than to lay magistrates. We also invite consultees' views on whether the power of the justice of the peace to issue a search warrant should be restricted to those who have undergone special training.
- 1.46 When a search warrant is applied for in the magistrates' court during the normal working day, we ask whether there should be a requirement for a lay magistrate to be assisted by a legal adviser. We also ask whether there ought to be a minimum of two lay magistrates on a bench to consider the application.
- 1.47 For applications made out of court hours, we consider whether the procedure ought to be more formalised. In particular, we ask whether search warrant applications out of hours should always be made to a legally qualified judge.

- 1.48 To improve judicial scrutiny, we ask whether there should be a triage arrangement, in which a judge or legal adviser decides whether the application is in a satisfactory state for a judge to decide the application, and if so whether an oral hearing is required. This would involve revised listing arrangements, connected with a requirement to submit applications in electronic form.
- 1.49 We provisionally propose that there should be a standard procedure for recording additional information provided by the investigator to the court during the hearing. Additionally, we provisionally propose a statutory duty on the issuing authority to provide written reasons for issuing or refusing a search warrant. Finally, we provisionally propose that there ought to be arrangements for keeping statistics on search warrant applications.

Conduct of a search under warrant

- 1.50 In Chapter 6 of the consultation paper we discuss the rules about how a search under a warrant should be carried out. Statutes providing for different types of search warrant differ in several of these areas. We consider that there ought to be greater consistency in the powers available to the investigators under the warrant whilst ensuring that occupiers' rights are respected.
- 1.51 We examine who may carry out a search under a warrant and ask whether there are investigative agencies whose investigatory or enforcement powers are unnecessarily hindered because they are unable to execute a search warrant. We provisionally propose clarifying in statute who may accompany the person conducting a search under a warrant.
- 1.52 We discuss how long search warrants should remain valid. We ask whether there should be uniformity in relation to the period for which a search warrant remains valid or whether the period of validity for any particular provisions ought to be altered. We also ask whether the current power to authorise searches on multiple occasions should be extended to all search warrants for the purpose of criminal investigations.
- 1.53 We consider the time of day at which a search must take place. We provisionally propose that where a search under warrant is to be carried out between the hours of 10pm and 6am, prior judicial authorisation to do so at that time should be required. Further, a search warrant should be required to show on its face the times at which it can be executed.
- 1.54 We examine the provisions regulating what information should be provided to the occupier during the search. We provisionally propose that PACE should be amended to specify that a copy of the full warrant must be supplied to the occupier, including any schedule appended to it. This would reflect developments in case law. Additionally, we provisionally propose that a person carrying out a search should provide the occupier with an authoritative guide to search powers, written in plain English and available in other languages. We also provisionally propose that a search warrant should be required to state that the person is entitled to the information which the investigator supplied to the court in support of the warrant and explain how to apply for a copy.
- 1.55 Finally, we discuss whether the occupier should have the right to have a legal representative present at the search. We provisionally propose that Code B ought to be amended to state that, if the occupier asks for a legal adviser to be present during the search, this should be allowed if it can be done without unduly delaying the search. Further, if present, legal representatives should have the right to observe the search and seizure of materials in order to make their own notes.

Challenging a search warrant

- 1.56 At present, the main way of challenging a search warrant is by judicial review. An application may also be made under section 59 of CJPA for the return or retention of the materials taken. In Chapter 7 of the consultation paper we discuss whether the current avenues for challenging search warrants are satisfactory.
- 1.57 From discussions with stakeholders we are aware that the current means of challenging search warrants, especially when used in combination, are far too complex. The combination of judicial review and section 59 proceedings can result in long delays and disproportionate costs being incurred. The current system enables well-resourced claimants to bring tactical cases to delay the criminal justice process, while making it difficult for others to challenge unlawful behaviour. There is an urgent need to streamline the procedures so that the same court can consider all the issues in the case.
- 1.58 We provisionally propose the introduction of a new procedure, broadly based on section 59 of CJPA. Our aim is to enable the Crown Court to have a comprehensive power of judicial oversight of search warrants, looking both at whether the warrant was correctly issued and the search properly conducted.
- 1.59 If satisfied that insufficient information was provided to the issuing court or that there was a breach of section 15 or 16 of PACE, the court should have power to order the return of the materials taken and, where necessary, to set aside the warrant. This would not involve a finding that the warrant was invalid or unlawful, and the order setting it aside would not have retrospective effect.
- 1.60 The investigator would be entitled to oppose an application under the new procedure based on a two-limbed test: first, by establishing that, on the facts now known, there would be grounds to justify the issue of a warrant under which the same materials could have been taken. Secondly, by establishing that it is in the interests of justice to allow retention of the material. In deciding whether it would be in the interests of justice, the court would be required to have regard to a non-exhaustive list of factors.
- 1.61 In addition to the power to set aside the warrant and order the return of seized or produced material, we invite views on what other powers ought to be available under the proposed procedure. In particular, we consider powers to authorise the retention of seized or produced material; give directions as to the examination, retention, separation or return of the whole or any part of the seized property; order the return or destruction of copies; and order a party to pay another party's costs.
- 1.62 The new procedure would only be available in cases where materials were taken and would not include a power to award compensation. The option of applying for judicial review would remain available. Where there is judicial review of a warrant, the High Court should decide whether to order return of the materials taken, and would have all the powers and duties of the Crown Court under the new procedure. This should avoid duplication of proceedings.

Sensitive information and public interest immunity

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

Material exempted from search and seizure

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

- (1) material subject to legal privilege;
- (2) excluded material (medical and counselling records and confidential journalistic material); or
- (3) special procedure material (confidential business records and non-confidential journalistic material).

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

1.65 In Chapter 9 of the consultation paper we discuss some difficulties which stakeholders report in dealing with claims of legal privilege. We consider whether the procedure for instructing independent lawyers should be embodied in statute or rules of court, and the substance of any proposed legislative framework. We also discuss whether the Crown Court should have power to order a person making a claim for legal privilege to provide search terms or other indications for identifying the material likely to be privileged. In cases where a person makes a misleading claim for legal privilege, we ask whether there should be a sanction in costs, including the costs of the sift.

1.66 We also consider that the position in respect of special procedure material and exempted material is illogical. The availability of these categories of material depends on when the statute was enacted (before or after PACE) and whether the investigation is being carried out by the police or people with similar powers.¹⁷ We consider these to be arbitrary and unprincipled distinctions.

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

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

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

¹⁷ PACE, s 9.

Electronic material

- 1.70 Over the last few decades business records and other types of information have increasingly been kept in electronic form rather than on paper. Privacy International has recently highlighted that more information is now likely to be contained on a person's electronic devices than in their home.¹⁸ In more recent times, it has become common for material to be stored on a remote server or a cloud account. Electronic material raises particular problems for those executing search warrants. Professor Richard Stone, a leading expert on search powers, notes that offences from child pornography to fraud are likely to depend on evidence derived from computers, or web-based files, which raises particular challenges given the intangible nature of the evidence and cloud based storage.¹⁹
- 1.71 In Chapter 10 of the consultation paper, we examine section 8 of PACE; Part 2 of CJPA and sections 19(4) and 20(1) of PACE, which together provide a number of routes for obtaining electronic material. We begin the chapter by briefly setting out the various forms of electronic material that may be the subject of a search warrant and how they may be categorised. Secondly, we then discuss the advantages and disadvantages that flow from the two different ways in which search warrants may be drafted: specifying the electronic device or the information on the device.
- 1.72 Thirdly, we discuss several shortcomings of the CJPA regime: the inapplicability of the seizure powers where devices are specified on the face of the warrant; the limited reach of the statutory safeguards in CJPA; and the inability of CJPA to deal with complex investigations involving electronic material due to potential statutory ambiguity.
- 1.73 Fourthly, we discuss a number of interpretive challenges surrounding the ancillary powers of seizure in sections 19(4) and 20(1) of PACE: the fact that these are powers of seizure rather than search; the lack of clarity surrounding the consequences of non-compliance; and the lack of clarity surrounding the meaning of the word "accessible".
- 1.74 Fifthly, we discuss specific issues raised by the search for, and seizure of, material accessible from the premises but held abroad: the concept of jurisdiction in international law; the circumstances in which the Cybercrime Convention may be relevant to remote search and seizure of information; and recent state practice concerning extraterritorial enforcement powers.
- 1.75 Reform in this area could take many forms and, given the potential implications, will require rigorous scrutiny. Our overarching principle is that any statutory framework must, reflecting the reality and complexities of the digital age, facilitate the investigation of crime and safeguard the important public interest in protecting individual rights. We invite views on the form in which reform ought to take place.
- 1.76 Recognising in particular concerns about the right to privacy, we provisionally propose that additional steps are required for investigators and issuing authorities to consider the necessity and proportionality of the seizure of electronic devices. Additionally, we provisionally propose

¹⁸ Privacy International, *Digital stop and search* (March 2018). Available at <https://privacyinternational.org/sites/default/files/2018-03/Digital%20Stop%20and%20Search%20Report.pdf> (last visited XXX).

¹⁹ R Stone, *The Law of Entry, Search, and Seizure* (5th ed 2013) para 1.74.

that, in principle, the procedures and safeguards in the CJPA 2001 ought to apply whenever electronic devices are seized pursuant to a search warrant.

Consolidating search warrant legislation

- 1.77 Lord Justice Gross, in *Gittins*, referred to the legal framework of PACE and CJPA governing search warrants as an “unfortunate jumble of legislative provisions”.²⁰ This was in reference to just two regimes. In the course of this project we have identified 176 search warrant provisions, contained in a wide variety of legislation. Each power has its own grounds for issuing a warrant, its own conditions under which the search warrant can be executed and, in addition to search, may authorise associated powers (for example seizure).
- 1.78 The multiplicity of provisions puts a significant burden on issuing authorities and investigative agencies who deal with a wide range of warrants. Magistrates and judges must understand specific statutory provisions, and may only issue the warrant if they are satisfied that each ground set out in the statute has been met. Agencies must also ensure that they apply for a search warrant under the appropriate legislative scheme and abide strictly by the statutory criteria and common law duties.
- 1.79 In Chapter 11 of the consultation paper we ask a series of consultation questions about the advantages and disadvantages of consolidating search warrant powers, either in general or within particular groups. We also consider whether some details of the different powers could be harmonised without consolidation.

NEXT STEPS

- 1.80 The provisional proposals and consultation questions are listed in Chapter 12 of the consultation paper.
- 1.81 The open public consultation will run until 5 September 2018. All comments provided during the consultation period will be taken into account when forming our final recommendations. Our aim is to publish final recommendations in a report later this year.

²⁰ *Gittins v Central Criminal Court* [2011] EWHC 131 (Admin), [2011] Lloyd's Rep FC 219 at [36(1)] per Gross LJ.

