Rebuilding the Englishman's Castle:

Consolidating Powers of Entry and Associated Powers in English Law

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ABSTRACT

The current landscape of powers of entry and associated powers is complex, confusing, and overdue reform. This doctrinal study explores the possibility of consolidating the landscape into a single Act, making it more accessible and better able to protect the rights of individuals. Using Karl Llewellyn's law-jobs theory, Alan Gewirth's Principle of Generic Consistency, and Tom Bingham's exposition of the "thick" concept of the rule of law, it develops a framework of a rights-based conception of the rule of law with a grounding in an anthropological understanding of where law draws its legitimacy from, and what role law plays.

The framework is then used to provide guidance on how to reimagine the landscape of powers, refocussing the law-jobs different types of bodies undertake and the powers they need to effectively discharge those jobs. This new landscape is tested by drafting an "Act" creating the different types of agencies and their powers. The draft legislation also includes a set of safeguards and introduces a bespoke tribunal to oversee the use of the powers and the rights of those against whom the powers are exercised.

The thesis concludes that the landscape can be rationalised, and protections enhanced, but only if a radical reimagining such as that proposed in this research is undertaken.

ACKNOWLEDGEMENTS

This thesis is the culmination of a research project undertaken over a number of years alongside practising law full-time. Without the support, guidance, patience, and good humour of others I am certain I would not have stayed the course. For all that it will be me who becomes a Doctor of Legal Practice, this thesis, apart from any errors or omissions, is as much theirs as mine.

I am grateful to my supervisors, Professor Tom Lewis and Mr Simon Boyes, for their guidance and insight over the course of this thesis. Their interest and enthusiasm for my research, and constructive feedback, have without question shaped this thesis and my development throughout it. I hope for, and look forward to, many more rights-based debates over coffee in the "secret supervision room".

My heartfelt thanks go to three talented lawyers for their willingness to act as a sounding board as I developed my ideas, and for their comments on my drafting of the "legislation" for the substantive part of this thesis. Those lawyers are:

- Alex Davidson, former Law Commission search warrant consultation lawyer and current pupil barrister at 2 Bedford Row;
- Alison Hollis, barrister at Gough Square Chambers; and
- Tom Jaggar, barrister.

I would like to acknowledge Dr Phil Bielby of the University of Hull. He was responsible for introducing me to both Llewellyn and Gewirth and for setting me on the path which has ultimately ended with this thesis. Despite graduating many years ago, I have kept in touch with Phil and am still as awed by his grasp of legal and moral theory as I was then.

Of course, my deepest gratitude goes also to my family and friends. I have subjected them to endless discussion of powers of entry, expected them to be flexible around the demands of my research, and relied on them to boost my morale as it has inevitably flagged. Their support has carried me through.

The final furlong of this thesis has been run during the "Covid-19" pandemic, a global event that has led to an almost daily use of "these unprecedented times". Whilst undoubtedly true, the pandemic is not the only reason why one might choose to describe these times as unprecedented. If an Englishman's home is his castle, then the rule of law is its citadel, keeping at bay all manner of attacks against his liberties and freedoms.

In the last few years that citadel has found itself increasingly under siege.

We have had Supreme Court battles over the balance of power between the executive and the legislature. We have seen Parliament paralysed, incapable of agreeing a way forward but unable to be dissolved without bringing forward an Act to achieve that purpose. We have heard a Government Minister stand at the dispatch box and express a deliberate intent to breach international law.

A panel has been convened to consider reforms to judicial review. Judges have been branded "enemies of the people". We have witnessed an attack on the integrity and impartiality of the Civil Service. "Lefty lawyers" stand accused of abusing the law to frustrate the will of the people.

And now the evening rushes on; the night that follows threatens to be long, and dark, and full of terrors.

My final thanks go to those for whom upholding the rule of law is a calling, and I dedicate this thesis to them. The members of the law enforcement community who enforce the law without fear or favour. The judges who steadfastly do right to all manner of people. The campaign groups who give a voice to those who cannot speak. The lawyers who fight for the best interests of their client. The civil servants who tirelessly choose the right thing, rather than the right thing for their career.

These are the officers of the watch who dedicate their lives to ensuring we make it safely through the night.

As we slam shut the gates of the citadel against the impending darkness, perhaps the most important watch any of them will ever stand begins. And we should pray God they keep us safe until the light, defending the rule of law through these most dangerous of hours. For as John Locke warned us, "wherever law ends, tyranny begins".

The poorest man may in his cottage bid defiance to all the forces of the Crown.

It may be frail -

its roof may shake

the wind may blow through it

the storm may enter

the rain may enter

but the King of England cannot enter -

all his force dares not cross the threshold of the ruined tenement.

William Pitt (the Elder), 1st Earl of Chatham

CONTENTS

INTRODUCTION: LEVELLING THE LAND – PREPARING TO BUILD

INTRODUCING THE THESIS

"An Englishman's home is his castle" – a much loved, and often quoted, maxim of the common law, conjuring up an almost Arthurian image of a Lord and his knights defending their fiefdom from the trespass of all comers. Pitt the Elder's, perhaps more accurate, description of the poor man's cottage still evokes the image of a plucky freeman citizen defiantly refusing to let the State cross their threshold.

Such descriptions, however, are significantly more emotive than factual. The one thing an Englishman's home is most certainly not is his castle; the plucky freeman is merely shouting defiantly at the agents of the State who are already in his land.

The common law position only protects occupiers of premises from an entry at common law; this goes no further than requiring powers to be granted by Parliament. In the past, I have dismissed the castle analogy and instead proposed a different description. Rather than a castle, standing defiant against anyone wishing to breach its walls, an Englishman's home is much more like a small island in a lake. The land surrounding the lake is, essentially, the State. Connecting the island to the mainland are any number of bridges, each one operating like a toll bridge.[1]

This research project assesses the extent to which an Englishman's home really is his castle. Unsurprisingly, the research shows it is not; the vastness and complexity of the landscape of powers of entry (and associated powers) is such that a person cannot reasonably know or understand how, and by whom, their land can be entered legally. This thesis goes on to consider the extent to which, if at all, the castle can be rebuilt.

[1] James Mullen, 'Warrants and Information Notices - A New Approach. Chapter 1: Research Proposal' (Nottingham Trent University 2014); James Mullen, 'From Islands in the Stream to Castles in the Air', *Society of Legal Scholars, York, 4th September 2015*.

RESEARCH OVERVIEW

This thesis is the final piece of a research project which spans across this doctoral degree. It serves two main functions: first to plug the remaining research gaps in the project, and second to pull together the research and set out the answers to the questions posed by the project.[2] It demonstrates that it is possible to consolidate powers of entry and associated powers into a single Act which governs their use. Such a consolidation can be effectively achieved by redrawing the landscape using the types of agencies who conceivably could need powers as a guide. It also represents the opportunity to introduce consistency into the safeguards which apply to the use of powers, ensuring they comply with the rule of law.

Throughout this research I have relied on what Bingham refers to as a "thick" concept of the rule of law; this is a values-based concept which goes further than simply accepting compliance with procedural norms as the embodiment of the rule of law. In this thesis, I explain why I have done so. Using a combination of Llewellyn's anthropological law-jobs theory and Gewirth's Principle of Generic Consistency ("PGC") I argue there is a logical, anthropological, requirement that the rule of law is founded on a respect for the autonomy and rights of the individual. I then go on to combine Llewellyn, Gewirth and Bingham to create a set of principles for a rule of law framework which builds on the link between the anthropology of law-jobs and the rights-based approach of the PGC.[3]

I use the framework as a toolkit to underpin the redrawing of the landscape; it provides a guide for how to approach any redrawing, focussing our attention back on the fundamental questions of what types of jobs need to be undertaken to ensure a society is best able to function and ensure the highest wellbeing of its members and how best to facilitate that whilst limiting the intrusion into the lives of those members. In doing so, we are then able to rebuild the Englishman's castle.

In addition to the legislative landscape, the exercise of powers of entry and associated powers are also touched upon by various codes relating to their use and governance.[4] These are not considered by this thesis as to do so would have been to expand the remit of the research beyond the pure

[2] The research questions are set out in later in the introduction section of this thesis.
[3] KN Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 The Yale Law Journal 1355; Alan Gewirth, *Reason and Morality* (The University of Chicago Press 1978); Alan Gewirth, 'The Epistemology of Human Rights' (1984) 1 Social Philosophy and Policy 1; Tom Bingham, *The Rule of Law* (Penguin 2011).
[4] Current versions can be accessed at 'Police and Criminal Evidence Act 1984 (PACE) Codes of Practice' <https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice>; 'Powers of Entry: Code of Practice' <https://www.gov.uk/government/publications/powers-of-entry-code-of-practice>.

landscape. It is, nevertheless, acknowledged that any reforms to the legislative landscape would also require a reform of those codes.

My Identity

Before I set out why I think this research is important, I am going to briefly divert to say a little bit about my experience. This is relevant for three main reasons. First, I am relying on the Communities of Practice paradigm and so I establish the validity of my research expressly by reference to my experience.[5] Second, it will explain some of the choices made in this thesis, in particular in relation to the solution I propose provides a positive answer to the research questions. Third, it will help to head off criticism that I am too law enforcement focused in my work.

I am unusual, although almost certainly not unique, within the profession because of the experience I have and can draw upon. During my career I have advised operational officers on the use of their investigative or enforcement powers. I have defended challenges to those powers, including being the solicitor on the record in a reported case which deals with the seizure of computers.[6] I have also acted as the principal investigating officer, exercising a range of powers including obtaining information by way of a notice of compulsion, undertaking covert surveillance under the Regulation of Investigatory Powers Act 2000, and applying for and executing a warrant at a business premises. As a result, some of the solutions I have proposed in this thesis are drawn from operational experience of what does, and does not, work within an investigatory and law enforcement context.

I have also, at various points in my career, instructed the Office of Parliamentary Counsel to draft Bill clauses and have drafted technical secondary legislation. As will become clear later in the thesis, I have drawn on this drafting experience to discover whether it is practically possible to achieve a simpler, cleaner landscape.

Finally, of course, I am undertaking this research (and it is perhaps this additional element that pushes me more towards the extreme of "unusual"), and *because of* this research I was asked by the Law Commission to act as an expert consultant to their team.[7] Initially, I contacted them asking to be kept up to date on progress so that I could ensure anything they published was, if relevant,

[5] The paradigm centres claims of research validity on a researcher's identity and recognised research practices within their field. It is dealt with in more detail later in this thesis.
[6] *R (on the application of Glenn & Co (Essex) Ltd) v Commissioners of Her Majesty's Revenue and Customs [2010] EWHC 1469 (Admin)*.
[7] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (2018) 19; Law Commission of England and Wales, 'Search Warrants (Law Commission Report Number 396)' (2020) 24.

considered as part of this work. The team asked to meet with me and, as a consequence of the meeting, felt the combination of academic research and practical experience of both using and defending the use of powers could provide valuable insights to assist the thinking they were doing in relation to the consultation.

IMPORTANCE OF THE RESEARCH

When I first qualified as a solicitor, I spent two years litigating for Her Majesty's Revenue and Customs ("HMRC"). I was attached to a litigation team which dealt with the customs part of the department and I spent much of my time dealing with appeals against duty demands and challenges to the use of HMRC's powers; this included powers of entry, search and seizure both with and without a court warrant.

The challenges to the use of HMRC's powers with which I dealt were often made against the background of live investigations. They were almost always made in a tactical manner to disrupt the relevant investigation (although it is possible some claimants issued proceedings simply on a point of principle). Although such challenges are very much a part of "the game", and to be expected in a law enforcement context, they nevertheless caused me to look much more closely into this area of law.

PROBLEMS WITH THE LANDSCAPE

I found even that very narrow area to be complex and inaccessible, creating a number of possible eventualities, such as:

1. the powers were understood by both sides and exercised properly;
2. the powers were understood by both sides but exercised improperly anyway;
3. the powers were understood by the officers and exercised properly but not understood by the person against whom they were exercised;
4. the powers were understood by the officers and exercised improperly but not understood by the person against whom they were exercised;
5. the powers were not understood by the officers and were exercised improperly but were understood by the person against whom they were exercised;
6. the powers were not understood by either side and yet were exercised properly; or

7. the powers were not understood by either side and were exercised improperly.

The current landscape is complex and confusing, so much so that it is not possible to give an accurate picture of the number of powers available. Different pieces of research have identified vastly different numbers:

- Snook identified 266 powers of entry;[8]
- The Police and Criminal Evidence Act 1984 ("PACE") review response mentions 100 enactments in addition to PACE which provide a power for the Police to search;[9]
- HM Government identified around 1300 different powers (in around 700 pieces of legislation);[10]
- Using the results of HM Government's legislation trawl, I identified closer to 1500;[11] and
- The Law Commission identified 176 "search warrant provisions".[12]

Some of the difference in numbers can be accounted for by the scope of the respective work, and some of it by the different classifications researchers have decided to apply to the relevant sections of legislation. The fact that such vast differences, and differences in interpretation, are possible, however, just goes to show how complex the current landscape has become.

Landscape Anomalies, an Illustration

The complexity of the landscape also causes what might be thought of as anomalies; this can be illustrated by considering conduct which could amount to fraud.

Fraud can be investigated by the Police because it is a criminal offence. In doing so, the Police have powers of arrest, powers to enter and seize etc. It can also be investigated by the Serious Fraud Office ("SFO"). In doing so, the SFO does not have powers of arrest but does have a power of entry

[8] Harry Snook, 'Crossing the Threshold: 266 Ways the State Can Enter Your Home' (Centre for Policy Studies 2007).
[9] Home Office, 'PACE Review: Government Proposals in Response to the Review of the Police and Criminal Evidence Act 1984' 15 <http://library.college.police.uk/docs/homeoffice/cons-2008-pace-review.pdf>.
[10] Home Office, 'The Protection of Freedoms Act - Powers of Entry Review Guidance' 1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98385/powers-entry-review-guidance.pdf>.
[11] James Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (Nottingham Trent University 2015).
[12] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 6; Law Commission of England and Wales, 'Search Warrants (Law Commission Report Number 396)' (n 7) 1.

by virtue of accompanying a constable who is executing a warrant applied for by the SFO. Fraud cannot be investigated by Trading Standards services. However, they can investigate offences under the Consumer Protection from Unfair Trading Regulations 2008 ("CPUTs"). In doing so, they cannot arrest but can enter and search premises and seize evidence under the Consumer Rights Act 2015 ("CRA"). Many of the offences under CPUTs involve conduct which, if the evidence is found, is also fraud. Trading Standards can prosecute fraud even though they cannot investigate it. The Police can (at least in theory) investigate breaches of the CPUTs but the SFO cannot.

This means that the same conduct attracts two different sets of offences, which can be investigated by a combination of up to three different agencies, using a combination of three different sets of powers. The training each of the agencies will have gone through will be different. For example, the SFO employs civil servants who will not have had to undertake any general policing, whereas the Police require all Police Constables to serve two years as a probationer, much of which will be spent developing general policing experience which is unlikely to be helpful in the investigation of complex financial offences.

It may be that the general nature of the training Police Constables receive provides them with invaluable investigative skills. That being said, the other agencies manage to investigate and prosecute frauds perfectly well without that experience.

There does not seem, therefore, to be a rational or logical explanation why the employees of the different agencies are considered to hold different offices and given different powers when they are dealing with not only conduct that Parliament has criminalised but, in some cases, exactly the same conduct.

Importance of the Research

At the beginning of this introduction, I said that the landscape of powers is such that the Englishman's home is no longer his castle. The landscape of powers of entry is so vast and complicated that neither those using the powers, nor those against whom they are exercised, can be certain they are properly understanding them. It is also impossible for it to keep pace with developments, for example technology.

The complexity of the landscape, and lack of certainty as to whether the powers are properly understood, presents a real possibility that premises are regularly unlawfully accessed with individuals' rights to privacy being infringed and that those individuals are unable to properly (re)assert their rights and seek redress. The inability of the landscape to keep pace with

developments further exacerbates the problem because gaps in powers occur, and inventive yet unlawful solutions are often found to deal with the gaps.

One such example of gaps in powers is the ability for the Police to access remotely held data. Where a constable enters premises pursuant to a section 8 PACE warrant, they may only seize anything for which a search under section 8(1) has been authorised.[13] Section 8(1) only applies to material on the premises and so does not assist a constable in obtaining remotely held material. One of the respondents to the Law Commission's search warrant consultation, however, believes they have nevertheless identified a way to access the material.

The Norfolk and Suffolk joint Cyber, Intelligence and Serious Organised Crime Directorate told the Commission they consider that by using a combination of section 19 PACE and section 6(1)(c)(ii) of the Investigatory Powers Act 2016 ("IPA") they can overcome this problem.[14] This combination, they have told the Law Commission, allows them to:

- conduct a live examination of a seized device whilst on the premises, or at a Police station, for data stored remotely in the cloud;
- use subterfuge to access clouds from a seized device; or
- alter data such as passwords of cloud accounts.[15]

Perhaps unsurprisingly, the Law Commission are not persuaded.[16] As they rightly point out, section 19 of PACE is not a search power. Subsections (2) and (3) enable the seizure, assuming the conditions are met, of things which are on the premises. They do not, however, allow a constable to engage in a search. Subsection (4) allows a constable to require the production of information which is stored in electronic form and accessible from the premises. This means they must require a person on the premises to produce the information to them; it gives no lawful basis to operate a device or search a cloud account. Section 6 of IPA does not contain a power at all; it is merely a definition section setting out the circumstances in which a person is to be taken as having "lawful authority" within the meaning of IPA. Most crucially, it combines with section 3 in order prevent the criminal offence contained within that section from being engaged by certain behaviour. On the face of it, if these powers have been used in this way, criminal offences may have been committed by those purporting to use the powers.

[13] Section 8(2) Police and Criminal Evidence Act 1984.
[14] Law Commission of England and Wales, 'Search Warrants (Law Commission Report Number 396)' (n 7) 420–421.
[15] ibid.
[16] ibid 425.

This research project considers if it would be possible to redraw the landscape, removing the complexity and increasing the protection for those against whom the powers are used whilst ensuring the State is able to continue to function efficiently. This would reduce the risk of situations such as the one above occurring.

The thrust of the project is simple: to discover if the Englishman's castle can be rebuilt and, much like that poor man's plucky cottage, once again bid defiance to all the forces of the Crown. In the remainder of this thesis, we will do so by answering the following research questions.

RESEARCH QUESTIONS

1. To what extent, if at all, can powers of entry and access to information be rationalised?
2. To what extent, if at all, would a modified tribunal system be better placed to oversee a system of powers of entry and access to information than the combination of courts currently charged with that oversight?
3. Whether or not a rationalised system of entry powers, powers to access information, and oversight can be developed in such a manner as to ensure:
    - the rights of individuals are effectively protected;
    - the ability of the State to protect other individuals is not reduced by the rationalisation; and
    - a new system reduces the administrative burden for the State in the exercise of its powers?

Some of the questions have been answered, in part, earlier in the research project. Document three tentatively concluded it would be possible to consolidate and rationalise powers of entry and associated powers.[17] Document four, using the tests identified by Leggatt, concluded a tribunal would be a more appropriate venue.[18]

However, in order to fully answer if the powers can be rationalised and an effective system of safeguards and oversight developed, we need to go one step further. We need to understand

[17] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11) 60–61.

[18] Andrew Leggatt, 'Review of Tribunals Consultation Paper' <http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/cp14-06-00.htm#en>; Andrew Leggatt, 'Review of Tribunals Consultation Paper Responses' <http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/cpx15-11-00.htm>; James Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (Nottingham Trent University 2016) 59–61.

whether the castle remains a thing of legend, existing only in fantastical artwork, or whether we can actually build it. To do this, within the context of law, we need to see if it is possible to create a piece of legislation which:

- is based on a set of principles which strike the balance between the rights and liberties of individuals on the one hand and the necessary job of the Government (and organs of the State) to ensure society functions, protects individuals from the infringement of their rights by others, and that society as a whole is able to thrive;
- includes a set of clear, workable, powers; and
- has an independent, simple, system of oversight of those powers.

If it is not possible to craft such a piece of legislation, then the answer to the research questions would need to be in the negative even though the earlier research suggested otherwise. This thesis demonstrates it is possible to rationalise powers of entry and associated powers and provide a tribunal system to oversee their use.

In document two, I said this:

> *It would for example be possible to give the same power to a number of different officials but then we place restrictions on the exercise of power by reference to the class of individual. Taking a hypothetical situation for example, imagine there is a power that allows officials to enter and inspect premises for something that falls within their remit of regulation. If we use in this example officers of Revenue and Customs and trading standards officers it would be possible to have the power in the main body of the Act and tailor it to their needs in a Schedule. For example if the primary power stated:*
>
> > *1) A relevant officer may enter relevant premises without warrant for the purposes of carrying out an inspection in connection with a relevant function.*
> >
> > *2) A relevant officer may exercise associated powers in connection with the relevant function.*
> >
> > *3) When entering premises for the purposes of carrying out an inspection and exercising any associated power a relevant officer must comply with any relevant restrictions.*
> >
> > *4) For the purpose of this section-*

(a) a "relevant officer" is a person of a description or class within Column 1 of Part 1 of Schedule 1 to this Act;

(b) "relevant premises" are premises of a description or class within Column 2 of Part 1 of Schedule 1 to this Act

(c) a "relevant function" is a function within Column 3 of Part 1 of Schedule 1 to this Act and which corresponds with the relevant officer in Column 1;

(d) an "associated power" is a power within Column 4 of Part 1 of Schedule 1 to this Act and which corresponds with a relevant function; and

(e) a "relevant restriction" is a restriction within Column 5 of Part 1 of Schedule 1 to this Act and which corresponds to a relevant function or associated power.

The Part 1 of Schedule 1 entries could say (for simplicity I am merely describing the function and not referring to the Act which confers those functions on them):

Column 1	*Column 2*	*Column 3*	*Column 4*	*Column 5*
Officer of Revenue and Customs	*Business premises on which the officer has reason to suspect there may be a gaming machine.*	*The collection and management of gaming machine duty.*	*Remove or take copies of documents.* *Reasonable force may be used where an officer of Revenue and Customs has reasonable belief they will be obstructed in the course of their duties and such obstruction may lead to a loss of revenue.*	*Power to enter only to be exercised during the business hours of the premises in question.* *Power to remove documents only to be exercised where it is not reasonably practicable to take copies at the premises or where original documents are required to protect the revenue.* *Where power to remove documents is exercised copies must be taken and the original documents returned within 72 hours of being removed except where it is not reasonably practicable to do so or where retention of the documents is required to protect the revenue.*

				Reasonable force may only be used when accompanied by a Constable.
Trading Standards Officer	*Business premises used in the production, storage or sale of food*	*Protection of public health*	*Remove items which are hazardous to public health.* *Order the closure of premises to protect public health in circumstances where removal of hazardous items is impracticable.* *Where the officer has reasonable belief that there is an immediate risk to public health, power to break open premises and any containers found upon those premises.*	*Power to enter only to be exercised during the normal business hours of the premises in question.* *Power to break open only to be exercised when accompanied by a Constable.*

> *It should be stated that the entries above are not based on the analysis of any current powers but are mainly used to illustrate how a general power of entry to inspect can be kept within one piece of legislation and yet moulded to meet the needs of the particular people who are exercising them.*[19]

As we will see, this approach does not work when extrapolated. Although it would remove the problem of the powers being scattered across hundreds of pieces of legislation, simply re-enacting the current powers into a consolidating statute very quickly becomes complicated, so much so that I did not complete the draft of that legislation.

Instead, a more radical approach is needed, reforming not by consolidating the existing legislation but by applying a new framework as the foundation of the landscape.[20] The framework in question is developed in this thesis by combining the work of Llewellyn, Gewirth, and Bingham.[21] Originally, the framework was intended to provide a grounding for using Bingham's "thick" concept of the rule of law beyond simply that it reflects the current understanding of the rule of law within legal practice. As I have written, thought, rewritten and rethought, however, the framework has taken on a much more central role to this thesis. It has become a toolkit with which the more radical solution can be designed.

The framework provides us with a defensible grounding from which to deal with anomalies such as the fraud example above. The framework, and its application, are dealt with in the later parts of this thesis. To help guide us there, the thesis follows the structure set out below.

Structure of the Thesis

After this introduction the thesis is divided into four parts, each one serving a different function.

Part one frames the research in this thesis. It begins by recapping the previous pieces of research so that this final document can be read and understood as a standalone piece of work. It then goes on to update the siting of this work within other relevant research by discussing a Law Commission consultation on search warrants which impacts on the research project. Once the consultation has been discussed, Bingham's "thick" concept of the rule of law is reintroduced and discussed. Two further theories are discussed, completing the framing of the research. Llewellyn's law-jobs theory is explored, providing us with an anthropologically supported reason for the need for powers to exist. Gewirth's PGC is then dovetailed with the law-jobs theory to

[19] James Mullen, 'Warrants and Information Notices - A New Approach. Chapter 2: Epistemology and Identity' (Nottingham Trent University 2015) 60–62.
[20] Practical rule of law framework developed in part one of this thesis.
[21] Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (n 3); Gewirth, *Reason and Morality* (n 3); Gewirth, 'The Epistemology of Human Rights' (n 3); Bingham (n 3).

provide an ethical justification for interfering with the rights of individuals where it is necessary. Taken together, law-jobs and the PGC provide a basis for preferring a rights-based formulation of the rule of law (such as that advanced by Bingham) over some of the theories which contemplate the possibility of totalitarian regimes being compliant with the rule of law.

Part one finishes with the development of a concept of a practical framework of the rule of law, setting out a number of principles which can be distilled from the law-jobs theory and Gewirth's PGC. The framework contains five principles: two "core" principles which fundamentally describe the interaction between the individual and the State, and three "operational" principles which carry forward the core principles into action.

Part two sets out a high-level overview of the research paradigm, ethics and methodology which have been applied to the research. Detailed discussion is not included, because it has been dealt with in earlier pieces of work and it is not necessary to re-engage in detailed discussion in order to complete this thesis. It then goes on to set out the research method used for this final piece of research. The method used is to draft legislation in order to assess on a more practical level if consolidation is possible.

Part three contains the discussion of the results of the research. The first attempt to draft legislation was abandoned when it became clear it would produce a significant amount of complexity rather than improve the situation. The practical framework developed using the law-jobs theory and PGC is then used as a grounding to reimagine the landscape, creating a new one from a blank canvas by focusing on the types of law-jobs functions different types of agencies fulfil. This informed the drafting of a second piece of legislation which is then analysed against the framework and Bingham's rule of law principles to demonstrate how it improves compliance with the rule of law.

Part four sets out the conclusions reached in this research: that it is possible to rationalise powers in a way which would effectively balance the rights of individuals and the ability of the State to protect and enhance the rights of others, but to do so would need the landscape to be completely redesigned. The part identifies the strengths and weaknesses of the research before setting out some thoughts on avenues for increasing the impact of the research and further research which could be conducted.

VALIDITY OF THE RESEARCH

In this research I have used the Communities of Practice paradigm. It recognises the validity of research by reference to the acceptability of the research methodology and method within the communities of practice of the researcher. This research uses predominantly doctrinal research with an element of empirical "real world" research when it comes to the drafting of the legislation

and the use of my professional experience. Doctrinal research informed by the experience of the individual is recognised within both legal academia and legal practice and so I am able to claim the validity of the research.

Original Contribution to Knowledge

This research provides an original contribution to knowledge by:

- demonstrating the scale and complexity of the landscape of powers of entry and associated powers which exist within England and Wales;
- evidencing that consolidation into one Act without changing the conditions and safeguards applied to the use of powers would likely not improve the landscape;
- showing that a new landscape can be developed, using an anthropological understanding of the rule of law and powers, which would improve the protection of rights; and
- providing a fully-drafted piece of legislation which can be used to advance academic and practitioner debate.

Final Thoughts

Before moving onto the substantive part of this thesis, there are some preliminary matters which are worth expressly dealing with here.

Where legislation is specifically referred to in this thesis it is correct as at the time of submission. I have not updated the survey of powers, because, as we will see, it is not needed in order to prove whether or not consolidation is possible.

When considering powers of entry and associated powers within a real-world practitioner setting, consideration and protection of the rights of individuals is usually undertaken within the framework of the Human Rights Act 1998 ("HRA") and the Convention rights it brings into domestic law; in this thesis, however, I have elected not to do so.[22] There are two main, complimentary, reasons for making this decision.

First, the HRA does not require the law to be coherent or, in any meaningful sense, simple to understand, nor for powers to be subject to any particular level of scrutiny or control. For example, Article 8 may be interfered with so long as such interference is in accordance with law and is necessary for one of a number of wide-ranging justifications. The current landscape of powers, assuming they are used lawfully, undoubtedly ensures compliance with the HRA. As

[22] The relevant Articles are set out, and briefly discussed, in the discussion of Bingham's principles later in the thesis.

Costigan and Stone note, most powers of entry, search, and seizure under English law will likely meet the standards of Article 8.[23] They are also generally in compliance with Article 1 of the First Protocol.[24] The impact of Article 6 is more likely to be felt, at least in a criminal context, where evidence obtained using powers of entry and search is deployed in a trial rather than in relation to the powers themselves.[25]

Second, to use the HRA as a framework would be to follow a "thin" formulation of the rule of law which I am bound to reject because of the impact of the law-jobs theory. As we will see, the law-jobs theory pushes us to a conclusion that law draws its legitimacy from sufficient members of a group acquiescing to the legal system. This is further supported by the indirect application of the PGC. In turn, following the logic of those arguments, rights must exist as a species which is distinct from any provided for by legislation rather than as a result of the legislation, and so compliance with the rule of law falls to be assessed against a framework which is independent of the legislative whims of the State.

The structure of the professional doctorate envisages a final thesis which is much shorter than a traditional PhD, causing researchers to make tough choices about the number of words they dedicate to any particular part of the thesis and the breadth and depth of the sources in which they rely and the discussion they enter into.

[23] Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights* (11th edn, 2017) 272.
[24] ibid.
[25] Richard Stone, *The Law of Entry, Search, and Seizure* (5th edn, Oxford University Press 2013) paras 2.52-2.53.

PART ONE: MARKING OUT THE BUILDING PLOT – FRAMING THE THESIS

INTRODUCING THIS PART OF THE THESIS

In this part I will site the thesis within the overarching research project, providing a synopsis of the earlier work and the conclusions that they reached. In doing so, I will enable this thesis to be read as a standalone document, providing assurance that the research and critical thought has been undertaken elsewhere without needing to repeat it here just to show that it has been done. It will also allow us to focus on which of the research questions remain to be answered.

Once I have set out the previous research, I will discuss the Law Commission's research paper on search warrants. This is necessary because it was not published at the time of the earlier work, and it has a bearing on this final piece of research. As we will see, I think the consultation has missed a vital opportunity to consider powers (and the landscape in which they are used) more widely. This is not a criticism of those (including me) who worked on the consultation, the remit simply did not allow them to bring into scope the wider issues.

I will then set out an overview of the "thick" concept of the rule of law, describing why it differs from a "thin" concept and the principles which Bingham says make up the concept. I elected to use the "thick" concept of the rule of law in the previous parts of this research for two reasons: first, it represents a summary of the concept as I think it would be understood by most legal practitioners, and second, it is the concept which fits most readily with Gewirth's work.

When embarking on this research, and the writing of this thesis, I could not have foreseen the controversy as to the extent of the "rule of law" and its content which has been laid bare by the introduction into Parliament of the United Kingdom Internal Markets Bill. If I am to maintain the first reason, then I must fairly engage with the debate and defend a continued assertion that the concept of the rule of law, as understood by practitioners, is the one advanced by Bingham. I am unable, because of the various ethical codes which bind me, to engage in a discussion in relation to it and I hope, to the extent people think it would have been useful to engage with it, I am forgiven for not doing so.

Instead, as we will see, I am able to claim there is an anthropologically supported basis for preferring the "thick" concept of the rule of law; using the work of Llewellyn and Gewirth it is possible to conclude that sovereignty lies with individual members of society and that they cede some of this by giving agency to the State to make certain decisions and take certain actions. As

all individuals, including those who act on behalf of the State, are compelled by dialectal reasoning to hold they, and all other individuals, have a right to freedom and well-being, the logical starting point is that they are the sovereign. Llewellyn recognises that a group may fracture and, in order to survive, it will need to have mechanisms in place to manage the tension between individuals and the group.

Where the State fails to recognise the rights of the individual members, this tension is increased and the survival of the State is put at increased risk. From a purely practical perspective, therefore, the rule of law must recognise, and protect, individual rights and freedoms in order to ensure the maximum possibility of group survival.

After setting out the law-jobs theory and the PGC, I use them to develop the concept of a practical framework for the rule of law. The framework cannot, for reasons of word count and focus of this document, be set out in the depth of thought or argument necessary to mount a defence of what is contained within it. That would require either a thesis in itself or a body of post-doctoral research.

Before setting out those theories, I will first site this thesis within the research project.

The Previous Work

As I set out above, this research project spans four documents. Work in each of the documents contributes to this thesis in some way, from setting the scene to incorporating preliminary findings which inform this final research.

Document one acts as an introductory piece to the project, setting out why this research is being undertaken and a high-level research plan.[26] Originally, I intended to publish draft legislation and consult on it, in order to replicate the process that happens when legislative change is proposed. This has not been possible, on ethical grounds, due to a clarificatory change in the application of the Civil Service Code which restricts contact with published media.

Document two is a framing piece, dealing with the main foundations of the research project.[27] It discusses research paradigms, concluding that the appropriate paradigm for my research is the Communities of Practice paradigm. It then goes on to set out and discuss my identity, identifying the communities of practice of which I am a member; this provides the basis for claims about the validity of my research. It then goes on to briefly introduce the conceptual framework used to assess the landscape. Finally, it assesses two existing proposals for reform and concludes they do

[26] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 1: Research Proposal' (n 1).
[27] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 2: Epistemology and Identity' (n 19).

not provide full answers to the research questions which are the subject of this work. Since this was written, the Law Commission consultation mentioned earlier has been launched; I discuss this more in the next section of this part.

Document three is the first piece of substantive research in this project.[28] It is a documentary survey, looking at all the powers of entry identified in the Home Office review. It classifies each one of them by reference to what they can be used for (for example, to enter and search or to enter and make safe). The survey found that there were 1493 different powers identified in the powers review, spanning almost 700 pieces of legislation. It concluded there were 24 categories. It tentatively concluded that powers could be consolidated into one piece of legislation without substantially re-writing them. As we will see in this thesis, that conclusion does not provide a complete answer. Whilst it would be possible to consolidate the powers into one Act, keeping the exact same conditions and safeguards, it becomes quickly obvious when trying to draft the legislation it does not simplify the landscape in a way which would make it more accessible to those against whom powers are exercised.

Document four is the second piece of substantive research in the project.[29] It is a doctrinal analysis of the system of oversight of these powers, considering whether the appropriate system is a court based one or a tribunal. There is little literature available on how to determine which system is the correct one, however the literature that is available suggests a tribunal system is more appropriate to the types of decisions which relate to the exercise of these types of powers.

In this thesis, where I refer to "previous research" I am referring to the research which threads throughout the project.

Law Commission Search Warrant Consultation

Since undertaking the literature review in document two, the Law Commission has consulted and reported on the area of search warrants. In order to ensure any potential impact of the Commission's work on this thesis is identified and acknowledged, it is important for us to consider the work. Over the next few pages of the thesis, I will discuss both the consultation paper and the report.

As we will see, the Commission's remit was limited to issues relating to PACE warrants and to the difficulties law enforcement agencies face in accessing electronically held material. The Commission's research does not, therefore, "occupy the field"; the research project which this thesis concludes looks across the entire landscape of powers of entry and is able to go further

[28] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11).
[29] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18).

than the Law Commission could. Consequently, this thesis is still able to contribute new knowledge and make a contribution to the study of powers.

Nevertheless, there are still useful elements within the Law Commission's research which can help to inform this thesis. The issues arising in relation to electronically held information, in particular remotely held, are something that a proper consolidation of powers would need to engage with. The Commission's work has helped to inform the research undertaken for this thesis, highlighting areas of the law which would benefit from updating as part of a more radical consolidation.

THE CONSULTATION PAPER

In 2018 the Law Commission published a consultation paper as part of its research into the reform of search warrants.[30] The consultation was requested by the Home Office following

> *comments made by senior members of the judiciary that the law governing search warrants is unnecessarily complex, liable to give rise to challenges and in need of reform.*[31]

The Law Commission identified 50 reported cases relating to challenges to search warrants between 2010 and 2018.[32] This, they say, evidences what the senior members of the judiciary have observed.

Purpose and Overview of the Commission's Research

The Commission's research purpose is

> *to consider ways in which the law of search warrants can be simplified, clarified and rationalised […] 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.*[33]

The consultation focuses on 176 powers the Commission has identified as search warrant powers; it excludes what they term "entry warrants" and "inspection warrants".[34] It has been undertaken using a mixed-methods approach. In developing the consultation paper, the Commission undertook a literature review and met with a number of different stakeholders.[35] The consultation itself was undertaken through a mixture of documentary survey (the consultation

[30] Law Commission of England and Wales (n 6) this is reported on in Law Commision of England and Wales (n 6).
[31] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 5.
[32] ibid.
[33] ibid .
[34] ibid 6.
[35] ibid.

document sets out a number of questions and invites comment) and stakeholder interviews and discussion groups.

The Commission identifies, broadly, four problems with the landscape they are considering. The problems are:

- Complexity – the number of provisions coupled with the complexity of them leads to "a confusing legislative landscape". This gives rise to a range of issues, from drafting errors to ineffective scrutiny by the judicial authority and a lack of understanding by occupiers of their rights.[36]
- Inconsistency – the statutory provisions contain differences in who can apply for a warrant and carry out a search. This leads to inconsistency in availability of evidence and of the procedure which must be followed.[37]
- Outdated – the provisions, particularly in PACE, predate the advent of electronic material and are not flexible enough to keep pace with digital technology and how criminality now takes place.[38]
- Costly – the procedures do not operate efficiently and the number and scope of challenges create costs for all parties.[39]

The Commission sets out a number of reform proposals which, they say, will help to address the problems set out above.[40]

Contribution of the Research to the Body of Literature

The consultation adds a further perspective to the body of literature; it is not a dry trawl of existing powers coupled with arguments to keep them, nor is it an assessment of the landscape from a particular ideology.[41] It shines a light on some areas which do need to be considered in any reform: in particular the complexity of the landscape, the inability of the legislation to keep pace with technological developments, and the lack of a clear, efficient and cheap method to settle disputes arising out of the application for and execution of search warrant powers.

The in-depth literature review, and the extensive stakeholder engagement undertaken evidences a genuine attempt to engage with the landscape and the need to reform it. However, the scope of the request from the Home Office meant the Commission was unable to look at the wider landscape of entry to premises against the wishes of the occupier. The Commission has then

[36] ibid 10.
[37] ibid 11.
[38] ibid.
[39] ibid.
[40] These are summarised at ibid 12–19.
[41] In contrast to Snook (n 8); and Home Office, 'Powers of Entry Review: Final Report' <https://www.gov.uk/government/publications/powers-of-entry-review-final-report>.

further restricted this by artificially separating powers such as search warrants and entry warrants after which a search can be undertaken.

The review has been heavily informed by the provisions of PACE and influenced by a focus on privacy and safeguards. For example, the Commission considers the application of the safeguards in sections 15 and 16 to be anomalous because they only apply to constables; the safeguards should, they say, be extended to all those applying for and executing search warrants which may result in a prosecution.[42]

Consolidation

The scope of the consultation was narrow, with the intended focus of the remit given to the Commission being PACE. Nevertheless, the Commission has undertaken some preliminary engagement with stakeholders on the issue of the wider landscape and the consultation touches on the idea of consolidation.[43] The work the Commission has done on this area is clearly tentative and is necessarily undermined by the narrow remit they have been given and, as such, does not engage in an in-depth consideration or start from first principles.

The Commission mentions three different types of consolidation:

- consolidating into a single act;
- consolidating groups of powers; and
- standardising the accessibility conditions.

Of those three types, the idea of consolidating into a single act is the most relevant to this thesis. It is fair to say stakeholders offer mixed views, with those in favour and those against; the Commission's provisional conclusion is that the "disadvantages of consolidating all search warrant provisions outweigh the benefits".[44]

It is also worth noting that the Commission claims that

> *[s]tructural reform by consolidating powers of search and seizure would, in effect, lead to the creation of a Search Warrants Act"*[45]

Referring to the *PACE Review: Government proposals in response to the Review of the Police and Criminal Evidence Act 1984* and Snook, *Crossing the Threshold:266 ways the state can enter your home*, they say that

[42] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) ch 3.
[43] See Chapter 11 of Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7).
[44] ibid 249–250.
[45] ibid 249.

> *the case has been made to provide a general framework for search warrants and single, over-arching power of entry.*[46]

I depart slightly from this assessment in two main regards. First, I would not characterise Snook's proposal as a "single, over-arching power of entry". Second, I do not consider the PACE review to make a case for a general framework for search warrants.

Snook proposed that a common form for powers is contained within an Act, with future Bills then referring to the Act with wording similar to:

> *A person authorised in writing by the Secretary of State shall, for the purposes of discharging his responsibilities under this Act, be entitled to exercise a power of entry in the form specified by Section 4 of the Entry Powers Act 2007.*[47]

He goes on to claim that a citizen would then only need to read a single piece of legislation to be "familiar with the procedure under which his home may be entered and his rights to object to that entry".[48]

In my view it would be wrong to classify this as an over-arching power of entry; the power of the person to enter would be in the Act which included the wording above. Whatever Snook intends to be in section 4 of the Entry Powers Act it could only function in a way that is similar to sections 15 and 16 of PACE, creating a set of "safeguards". In document two I commented that because section 4 of the Entry Powers Act would be applied by other legislation it would be possible to apply it with modifications.[49] One further point needs to be made in respect of Snook's claim that citizens would only need to look in one place to find what rights to object to entry they have. The question as to whether someone has a right to refuse entry is not answered wholly by reference to the safeguards. Before considering procedural safeguards, the question as to right to refuse entry must first be answered by considering if there is a power of entry at all. Key to deciding if a power of entry is in play is knowing the purposes for which it may be exercised and assessing if the entry is for that purpose. At the very least, therefore, a person would need to consider the Act which refers to the Entry Powers Act.

The PACE review response makes a number of proposals, found in chapter nine of the document.[50] These are made as a result of the changes to powers of arrest in 2005, and seek to capitalise on those.[51] By introducing necessity criteria it would, the Government response

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[46] ibid.
[47] Snook (n 8) 54–55; it should be noted the 'Entry Powers Act 2007' is a fictitious Act.
[48] ibid 55.
[49] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 66.
[50] Home Office, 'PACE Review: Government Proposals in Response to the Review of the Police and Criminal Evidence Act 1984' (n 9).
[51] ibid.

suggests, be possible to move all the search warrant powers into PACE and repeal other statutory provisions.[52] The review states

> *[w]e do not propose that all non-police investigative agencies should apply to all offences. Their warrant powers would remain focussed on specific offences and those would be set out in a Schedule to the Act.*[53]

The statement is not as clear in meaning as it could be, but I think it is likely to be saying that other agencies which currently use PACE would still be able to do so but in order to avoid inadvertently expanding their remit they would be constrained by a specific reference to the offences they are able to investigate rather than allowing them to apply for a warrant to investigate any offence.

This suggests the more accurate reading of the PACE review response is that it is proposing a single search warrant power for the Police (and those who are deemed as constables for limited purposes, such as officers of Revenue and Customs) rather than proposing a framework for all search powers. The PACE review response also seeks to preserve the power of a constable to search premises without warrant after an arrest. This particular power provides a way for Police to search premises with much less scrutiny than a warrant.[54]

The Commission moves on to considering whether it might be possible to consolidate warrants by type.[55] It identifies three categories of warrant: those for the purpose of finding evidence of a criminal offence; those concerned with dangerous or unlawful situations; and those in default of a production order. This version of consolidation is, essentially, the same type of consolidation as I conclude in this thesis does not work. In order to consolidate the powers but maintain the different situations in which they can be used and the different conditions which apply to that use, an unnecessarily complex and confusing statute is needed.

In looking at consolidation the Commission has not engaged in any consideration of the roles of the agencies who have powers and whether that presents a different opportunity for meaningful reform. This is, almost certainly, as a result of the remit they were set; if the Commission does want to push for meaningful wide-ranging reform, rather than making some small changes to how PACE operates, it will be necessary for them to seek a much more comprehensive remit and undertake a longer, more detailed, analysis of the entire landscape.

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[52] ibid.
[53] ibid 15.
[54] Of course, one of the problems with the current system of warrant oversight is that it is far from clear warrant applications are properly scrutinised so it is probably not a fair comparison to look at warrants.
[55] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 250–256.

Electronically Held Information

In respect of electronic information, the consultation raises a number of issues the Commission think warrant consideration, including whether the law as it currently stands strikes the correct balance in terms of access to the information. Electronic information, and access to it, seems to attract more controversy than access to premises. The Commission considers that any reform in the area of electronic information would "require rigorous scrutiny" because of the potential implications.[56] Referring to a report by Privacy International they note the amount of information often held on electronic devices; in particular they draw attention to Privacy International's assertion that searching a phone will provide much greater information than searching the person or the person's home could.[57]

One of the issues they identify with the current law is the "single item" theory – the term they have given to the idea that an electronic device is one thing for the purposes of search and seizure.[58] The underlying logic of the theory is, they claim, "far from watertight".[59] It gives, according to one of the consultees they refer to, "unfettered access to someone's life".[60]

The Commission do seem to accept, however, that access to devices is a necessary weapon in the armoury of law enforcement, acknowledging Professor Richard Stone's point that a range of offences are likely to rely on electronic evidence and that it presents a number of challenges given the nature of the evidence.[61] They are clear that any recommendation they will make will reflect the complexities of modern law enforcement and that investigations should not be unnecessarily hindered.[62]

It is correct that electronic devices are likely to hold, and yield, more information about a person than a search of their home. For example, it will be possible to glean from computers or phones who the person has been communicating with and, depending on the data available, where that person has been. However, I would take issue with a conclusion that this necessarily leads to a greater intrusion into their privacy in a practical sense. I have, as I mentioned earlier in this thesis, executed a warrant as an investigating officer. As part of that investigation a large amount of electronic data was seized and yet I saw very little of it. There is an operational necessity to limit the amount of data an investigative team reviews – put simply, there is not enough resource to manually trawl and assess every piece of electronic data. Instead, the information is subjected to a number of sifts designed to ensure the rights of the person under investigation are respected

[56] ibid 243.
[57] ibid 202.
[58] ibid 207.
[59] ibid 211.
[60] ibid 213.
[61] ibid 202 referencing Richard Stone, *The Law of Entry, Search, and Seizure* (5th edn, 2013) para 1.74.
[62] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 243.

and that the eventual manual evidence review is proportionate and manageable within the ambit of the investigation. The information sift, generally, involves the following stages:

1. key word searches relating to the potential that information is subject to legal professional privilege – this is then removed from the material which is available for further sift;

2. key word searches relating to the scope of the investigation in order to identify potentially relevant material – this is then separated off to create a package of material that is available for the manual review stage;

3. the items which are potentially relevant are then searched by the investigation team using more detailed Boolean search terms and only the items which return a positive result are viewed and assessed for relevance.

Many of the items that return a positive result at stage three will nevertheless be easily determined as "not relevant" on a very cursory inspection.

As a result, it is likely that detailed engagement with the information is going to be limited to a much smaller class of information than that which is seized and imaged when a device is taken. In practical terms, therefore, the officers are unlikely to know a significant amount about the person beyond that which is strictly necessary to inculpate or exculpate.

The consultation does, however, help to bring some focus to the issues around electronic evidence. For example, it is not obvious that there are powers to search devices in order to only seize the information that is relevant to the investigation. It is also far from clear that there is always a power to obtain information which is held on a remote server. There is a further complication relating to electronic information; where an investigator is seeking only information held remotely, it is unlikely they will be able to exercise a power of entry onto premises to access the information if the conditions of access refer to "on the premises".

THE CONSULTATION REPORT

In October 2020, during the writing of this thesis, the Law Commission published its report.[63] In light of my analysis of the consultation paper, it is not necessary to engage in an in-depth review of the full 528 pages (plus appendices) found in the report as the problems relating to the scope of the consultation will have necessarily impacted the conclusions which were available to the Law Commission. Nevertheless, there is some merit in engaging with some of the conclusions

[63] Law Commission of England and Wales, 'Search Warrants (Law Commission Report Number 396)' (n 7).

they have formed and assessing their impact on this research. I set out, at a high level, the relevant conclusions below. We can then briefly analyse their impact on this research.

Application of PACE Safeguards

The Law Commission concluded that it would be inappropriate to simply apply the safeguards found within sections 15 and 16 of PACE to all search warrants.[64] This would, they say, stray outside the terms of reference and lead to recommendations on which they have had no stakeholder input, and may lead to unintended consequences. Their conclusion is that safeguards should be assessed, and where necessary amended, on a case-by-case basis.

Applications for Warrants and Challenges to Warrants

The Law Commission recommends the creation of template warrants and applications, in order to reduce the risk of warrants not containing the information they should.[65] They consider it appropriate that magistrates continue to be able to hear applications (rather than, for example, making the granting of warrants the preserve of a particular level of judge), but it should be restricted only to those magistrates who have received specialist training and a justice's clerk should advise on the application.[66]

In their consultation paper, the Commission tentatively proposed introducing a new, additional, Crown Court procedure for challenging warrants; they have, on further reflection, concluded this would be problematic and that, on balance, a new procedure should not be introduced.[67]

Legally Privileged Material

The Commission concludes that no legislative changes are required in respect of items which may be subject to legal professional privilege; they favour the current approach of asking independent counsel to identify and sift privileged material and reject a more formal requirement in favour of a new Code of Practice to standardise the process.[68] They do, however, consider reforms are necessary within the sphere of electronically stored material, recommending that a Crown Court should be able to approve the protocols which will be applied to a legal professional privilege sift of electronically stored material.[69]

[64] ibid 8, 35, 39–40.
[65] ibid 10.
[66] ibid 11–12.
[67] ibid 14–15, 216–222.
[68] ibid 16.
[69] ibid 16–17, 463–464.

Electronically Held Information

The Law Commission devotes more chapters of the report to this particular issue than any other.[70] This is most likely for two reasons; first, because this is a complex area, which is controversial and where the law has failed to keep pace, and second, because this was part of the remit which the Home Office set the Commission when initiating the project.

The Commission concludes that, under certain current regimes, it is permissible to search for, and seize, electronically held material.[71] It goes on to recommend that where it is not, it should be. However, it goes on to recommend that on application for the warrant the applicant (as far as practicable) should specify what devices are sought and why they believe relevant information is held on the device.[72]

It also recommends that seizure or copying of the entire device should remain permissible, and that the law should be amended to explicitly provide a power to search any electronic device found on the premises.[73]

The Commission then turns its attention to electronically held material which is held remotely.[74] The first issue they consider is whether the ability of investigators to access data stored remotely in a foreign jurisdiction would be an extraterritorial exercise of power. They consider the issue to be finely balanced, but go on to conclude it is not necessary to take a view because "nothing will significantly turn on the answer either way".[75] This is because, even if the exercise of powers would be extraterritorial, the Commission considers there are compelling arguments that statutes allowing for the access of remotely stored information are extraterritorial in effect and so the exercise of the power would be lawful.[76] Further, after considering the relevant international law principles they conclude that they "cannot see another state would have a grievance" where a law enforcement agency accesses information in their territory because it is held remotely on behalf of a suspect who is located in the territory of the enforcement agency's jurisdiction.[77] Any infringement on the sovereignty of the state where the information is remotely held would be, they say, "*de minimis* and unlikely to offend state sovereignty and international comity".[78]

The second issue they devote attention to is the access conditions for warrants in circumstances where data is held remotely. The requirement that information be "on the premises" is, they

[70] ibid chapters 14-18.
[71] ibid 359.
[72] ibid 359–360.
[73] ibid 360.
[74] ibid chapter 16.
[75] ibid 403.
[76] ibid 408.
[77] ibid 418.
[78] ibid.

conclude, not met where data is exclusively held remotely.[79] Even if it would be possible to show there was some information on the premises, and so be able to enter under warrant, investigators could still struggle to access information which was stored remotely. Whilst there may be a power to require production of the information, this clearly relies on there being a person to require production from and them being willing to comply.[80] The Commission concludes that it is more likely than not that search warrants do not confer a power to operate electronic devices and search remotely held material.[81] They go on to consider a number of different models to improve the situation.[82] Ultimately, the Commission declines to make any recommendations; instead, they set out three conclusions at a very high level.[83]

Two further issues are addressed in the remainder of chapter 16 of the report: compelling access to information which is protected by encryption or password, and preventing interference with remotely held data.[84] Both of these issues have very real real-world practical implications; access to electronically held information, in particular where it can be accessed remotely, is a pointless tool in the toolkit of law enforcement if the data remains unreadable once obtained or if it can be remotely altered. As with the previous issues, the Commission declined to make any recommendations about reform.[85]

Chapter 17 of the report goes on to deal with the issue of the treatment of electronic material once it is in the possession of a law enforcement agency. The Commission treats electronic material stored on-site and remotely in the same way, noting that there should be no distinction in treatment based purely on where the information was first held.[86] The Commission recommends a number of reforms, placing duties on investigators to provide information about seized material, and to return or delete material as soon as is reasonably practicable. A right for a person with an interest in the material should exist, they suggest, to apply for the Crown Court to approve the way in which the investigator intends to examine the electronic information and to apply for it to be returned or deleted.[87] The Law Commission draws to a close its consideration of electronic material by recommending a wider review of the law on electronic material.[88]

[79] ibid 418–419.
[80] ibid 419.
[81] ibid.
[82] ibid 425–436.
[83] ibid 435–436.
[84] ibid 436–441.
[85] ibid 440–441, 444.
[86] ibid 445.
[87] ibid 445–446, 456–472.
[88] ibid chapter 18.

Consolidation

The final section of the Law Commission's report which has potential relevance to this research is chapter 19, consolidation. The Commission concludes, in line with the tentative conclusion expressed in the consultation paper, that consolidation should not be undertaken.[89] It would, they consider, be a disproportionate burden.

IMPACT OF THE RESEARCH

The work of the consultation team represents a significant, if somewhat narrow, contribution to the debate on powers of entry. They have undertaken an extensive literature review and stakeholder engagement in an attempt to understand both the academic research into the issues touched by powers of entry, and the practical reality for those engaging with the powers on a daily basis.

The main thing the research does is further highlight the complexity of powers of entry and associated powers, identifying, amongst other things, examples of where agencies exhibit a fundamental misunderstanding of their powers.[90] It shines a spotlight on the difficulties regarding electronically held information, in particular remotely held information. The research does not, however, propose any reforms which would meaningfully address the deficiencies across the entire landscape. The Commission does not make any significant reform recommendations relating to electronically held information; instead, they consider a wider reaching review needs to be undertaken.

In terms of consolidation, the Commission tentatively concluded against consolidation but nevertheless sought views of consultees on the issue. Having reviewed the consultee responses, they have concluded consolidation would not be preferable. The main reasons for rejecting consolidation are twofold. First, they consider search warrant provisions to be part of wider regimes and that they sit better within the relevant legislation pertaining to the law enforcement agency in question. Second, they consider consolidation to be a disproportionate amount of work.[91]

The Law Commission's conclusion is, arguably, a consequence of the narrow remit afforded to them by the Home Office at the beginning of the research. The first part of their conclusion is, in some ways, hard to disagree with. There is force in the conclusion that search powers should sit with the other powers which are available to a particular agency; this would make the legislation more accessible to legislation users by keeping all of an agency's powers together.

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[89] ibid 493–494.

[90] For example, the incorrect use section 19 PACE and section 6 IPA referred to earlier in the thesis.

[91] Law Commission of England and Wales, 'Search Warrants (Law Commission Report Number 396)' (n 7) chs 493–494.

However, it is already the case that an agency's powers can be spread across different legislation, both from the legislation they are enforcing and from legislation containing other powers of theirs. If a fuller consolidation of the type considered later in this thesis is undertaken, the Law Commission's objection to consolidation begins to lose some of its force. All agencies of a similar type would have access to the same powers, with the same processes, and the same safeguards. These would be easily accessible to legislation users and, when coupled with knowing the functions of the particular agency in question, would not lead to a disconnect between the investigatory powers and the legislation being enforced. There is already an example of this type of legislative interaction taking place; the CRA contains a single set of powers for consumer enforcement bodies which is then applied to the legislation they are obliged or able to enforce.

It is also not immediately obvious why a consolidation of the type considered in part three would be a disproportionate burden to enact. Admittedly, it has taken a significant amount of time for me to draft the legislation found in the appendices to this thesis but it must be borne in mind that I have done so as a team of one, whilst also developing the policy, researching, and juggling a demanding job. With the proper resourcing, it would be possible for a consolidation to take place relatively simply; the most intensive piece of work is likely to be identifying the consequential amendments which would be needed to remove the risk of legislative conflict.

At the heart of any debate around powers of entry is the rule of law. As the Law Commission notes, search warrants raise important constitutional issues around the proper balance between the power of the State and the rights of individuals.[92] A lack of clarity around the extent of their powers may lead to an agency "performing coercive acts which constitute a serious infringement of an individual's liberty without lawful basis"; this, the Commission concludes, is "antithetical to the rule of law".[93] It falls to us, then, to consider what is meant by "the rule of law" and what it encompasses. We will explore that further in the remainder of part one of this thesis.

THE "THICK" CONCEPT OF THE RULE OF LAW

In the previous documents in this research, I have used Bingham's "thick" concept of the rule of law as the benchmark against which I have assessed the landscape and as a touchstone for my tentative conclusions.[94] In part I elected to use the principles he sets out as being relevant to the concept because I recognised them as being a statement of how "the rule of law" is applied within the current legal system. Although within the confines of a professional (rather than traditional) doctorate that would probably have been a sufficient justification, I think it is possible for us to go

[92] ibid 6.
[93] ibid 354.
[94] Bingham (n 3).

further and to set out a basis for applying the "thick" concept which is independent from the legal system.

The main advantage of doing so is that it allows for an analysis which sits apart from the legal system to be undertaken. This, in turn, means the conclusions drawn as a result of this work would remain valid even if the Government or the courts decide to take a different path and redefine the "rule of law" within the jurisprudence of England and Wales.

As we will see, it is possible to ground the preference for a "thick" concept of the rule of law in the anthropology of Llewellyn and the framework of Gewirth.

Strictly, Bingham draws the distinction between thin and "thick" by reference to whether or not human rights are brought within the definition.[95] He quotes Raz as saying

> *A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies … It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law … The law may … institute slavery without violating the rule of law.*[96]

Before moving on to set out the work of Llewellyn and Gewirth, I will set out the eight principles which Bingham considers underpin the rule of law. They are useful to have in mind as we work through that Llewellyn and Gewirth because they provide a focus with which to read that section of this part.

Bingham's Rule of Law Principles

In previous documents in this research, I have indicated that the phrasing of the principles is sufficient to see why most would be relevant.[97] I did this partly because other elements of those documents warranted use of the available words more than digging into the detail of Bingham's principles and partly because my intention in those documents was not to establish a theory of law. In this thesis, however, it is necessary to set out the content of each principle in more detail in the same way as I will when discussing Llewellyn and Gewirth.

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[95] ibid 66–67.
[96] Joseph Raz, 'The Authority of Law: Essays on Law and Morality' 211 and 221 cited in Bingham.
[97] See, for example Mullen, 'Warrants and Information Notices - A New Approach. Chapter 2: Epistemology and Identity' (n 19) 34–35.

(1) The law must be accessible, and so far as possible, intelligible, clear and predictable

Bingham sets out three reasons why this is the case.[98]

First, and in relation to the criminal law, because people should, before taking a decision to act or refrain from acting, be able to know if they will be subject to some criminal penalty for that (in)action.[99] In part, he says, this is because what is criminal is not always obvious.[100] It is also crucial to one of the important functions of the criminal law; if it is to dissuade someone from doing something we have concluded is so unacceptable it should be punished they need to be aware of it in order for them to be dissuaded.[101]

Second, in relation to civil rights and obligations, similar considerations are in play.[102] In order to know what they are obliged to do, and what duties they owe to others, people need to be able to access and understand the law. Likewise, in order to enjoy and assert the protections afford to them, people need to know what they are.

Third, it is necessary for the functioning of business and trade.[103] This is something Bingham considers to be a longstanding point; he draws attention to two judgments of Lord Mansfield in which he gives the view that trade should be conducted on the basis of easily learned and remembered common sense rules which provide traders and investors with certainty.[104]

(2) Question of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion

The main thrust of Bingham's reasoning seems to relate to ensuring fairness between those affected by decisions.[105] He sets out a hypothetical scenario in which officials have been empowered to provide grants to people with a disability. The relevant statute does not set out eligibility criteria; rather it states eligibility will be decided by the officer and that it cannot be challenged in court. Two people, with very similar conditions make an application for the grant with one being successful and one being rejected. As there is no route of challenge the end result is that two people with almost identical characteristics have significantly different outcomes.

Bingham is careful to point out that applying the law does not necessarily mean the involvement of the courts and judiciary. What matters, he says, is that the "decisions should be based on

[98] Bingham (n 3) 37–39; the full discussion of the principle takes place at pages 37 - 47.
[99] ibid 37–38.
[100] ibid 37.
[101] ibid 37–38.
[102] ibid 38.
[103] ibid.
[104] *Hamilton v Mendes* (1761) 2 Burr 1198, 1214 and *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 cited in Bingham (n 6) 38.
[105] Bingham (n 3) 49–50; his full discussion of the principle can be found at 47-54.

stated criteria and that they should be amenable to legal challenge".[106] That is, however, not to say that discretion has no place within the application of the law. Bingham cites some examples, within the judicial sphere, where judges are able to exercise discretion.[107]

There is, however, a common theme throughout the examples he cites. In each one there are limits within which the discretion may be exercised and, in some cases, conditions which would need to be met before the discretion is available. These limits and conditions act to constrain discretion, ensuring that discretion can only be exercised by application of the law.

(3) The laws of the land should apply equally to all, save to the extent objective differences justify differentiation

In respect of this principle, Bingham provides more of a narrative account of how the principle of equality before the law has developed within the English law.[108] Unlike the second principle, which he supports by demonstrating the impact of its absence, he appears to treat this principle as almost self-evident. However, to leave it there would, perhaps, be unfair to Bingham. Equality before the law is, at its essence, about ensuring a fairness of treatment and opportunity.

(4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably

Bingham considers this principle to be at the heart of the rule of law.[109] The principle follows, he says, naturally from the preceding two.[110] Bingham appears to base this principle in the idea that authority to make and enforce laws ultimately comes from the people, via their representatives, and as such nothing can authorise the executive to do something they have not authorised.[111]

The remainder of Bingham's exposition is grounded very much in administrative law and principles which have grown up through judicial review. Although that is a valid grounding in a work which is intended to set out the rule of law as it applies in the current legal landscape of England and Wales, the reasoning is not sufficient for me to assert the principle is part of the "rule of law". To be valid, the principle must be capable of being justified by reference to something other than the current legal landscape of any particular jurisdiction; in the next section of this part, I justify the "thick" concept of the rule of law by siting it in an anthropological, rights-based framework.

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[106] ibid 50.
[107] See ibid 51–54; he identifies injunctions, exclusion of evidence in criminal trials, costs in civil trials, and the sentencing of convicted offenders.
[108] ibid 55–59.
[109] ibid 60; his full discussion of the principle can be found at 60 - 65.
[110] ibid.
[111] ibid.

(5) The law must afford adequate protection of fundamental human rights

Apart from one other principle, Bingham devotes more pages to this than the others.[112] Many of these pages are devoted to a description of the rights provided under the European Convention on Human Rights, which Bingham considers to "provide a convenient framework for [his] review".[113] Before delving into the Convention rights, however, he does provide some initial discussion of the principle in the abstract.

It is not, he says, a principle which would be universally accepted as part of the rule of law. Citing Raz, he points out that some people consider the rule of law to be narrow, acting only to guide on what is law by reference to whether or not the correct procedure had been followed.[114] Others, he claims, have found evidence of Dicey discussing civil liberties.[115]

Bingham rejects the idea that a state which "savagely represses or persecutes sections of its people" is a state which complies with the rule of law, even when they do so whilst scrupulously observing duly enacted laws.[116] He acknowledges that there is no universal consensus on which rights and freedoms are fundamental, and that it is for each state to decide which rights it will protect.[117] Nevertheless, he concludes that the rule of law requires the rights recognised in western countries as fundamental to be respected.[118]

As with the previous principle, the reasoning does seem to rely on the recognition by the law of England and Wales (or, in this case the UK) of the rights as fundamental as a starting point for them being fundamental rights. This has the same potential problem as I identified earlier; it is not a sufficient justification to ground the principle in the current legal landscape because the landscape can be changed.

Three of the Convention rights have particular relevance for powers of entry and associated powers: the right to respect for private and family life, home and correspondence; the right to a fair trial; and the right to peaceful enjoyment of possessions.[119] In a practitioner sense, the right

[112] ibid 66–89.
[113] ibid 68.
[114] ibid 66.
[115] ibid.
[116] ibid 67.
[117] ibid 68.
[118] ibid.
[119] Respectively, Article 8, Article 6 and Article 1 of the First Protocol.

to a private and family life does much of the heavy lifting in human rights analysis of the potential use of powers.[120]

Article 1 of the First Protocol provides that

> *(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principle of international law.*
>
> *(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

The types of seizures which arise following from the exercise of a power of entry are likely to relate to "control" of property.[121] This means the European Court of Human Rights limits its supervision to the lawfulness and purpose of the seizure, the States remain the "sole judges" of the necessity of interfering with the enjoyment of the property.[122] Stone notes the view that seizures relate to control is a "distinction with little practical difference" and that the approach taken to determining whether or not something breaches the Convention is similar to that of other qualified rights.[123] Interestingly, the temporary seizure of property does not engage the protection at all.[124] There is, therefore, an argument that whilst property taken pursuant to a power of entry remains liable to eventual return, and until such time as it is forfeited or destroyed, Article 1 of the First Protocol need not be considered.

Article 6 establishes a right to a fair trial, requiring a fair procedure for the determination of civil rights and obligations and criminal charges. There is unlikely to be an infringement where a person is able to challenge entries and seizures and obtain redress where those entries and seizures have been unlawful. It is also potentially engaged, in criminal trials, where unlawfully obtained evidence is relied on. Within the English law context, entries and seizures are powers which are subject to judicial review. Where unlawfully obtained evidence would have an adverse effect on the fairness of criminal proceedings the court has a discretion to refuse to admit it.[125]

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[120] The Law Commission consider Article 8 to be the right most likely to be engaged by search warrants: see Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 35.
[121] *Handyside v United Kingdom (Application number 5493/72)*.
[122] ibid.
[123] Stone (n 25) para 2.49.
[124] *Handyside v United Kingdom (Application number 5493/72)* (n 121); Costigan and Stone (n 23).
[125] Police and Criminal Evidence Act 1984 s 78.

Article 8 provides that

> *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protections of the rights and freedoms of others.*

The primary purpose of the article is to impose a negative obligation on the State to refrain from arbitrary interference with private and family life, home and correspondence.[126]

The word "home" is not to be construed as narrowly as it would be in English law and is not limited to where a person habitually resides.[127] As the Law Commission notes, Article 8 will be engaged at either private or business premises.[128] The European Court on Human Rights varies the lens through which it examines entry, search and seizure with some cases focussing on "private life", some on "family life" and some on "home".[129]

Any interference with the Article 8 right must be "in accordance with law"; it must be "clear, foreseeable and adequately accessible" but it need not be absolutely certain so as to cause the law to be excessively rigid and incapable of keeping pace with changing circumstances.[130] It is not sufficient simply for there to be domestic law which allows for the interference; the domestic law must comply with the rule of law and ensure adequate protections for citizens.[131]

It must also pursue a legitimate aim; in respect of powers of entry and associated powers, the particular aim in question will vary depending on the agency in question.[132] For example, law enforcement agencies will likely be acting for the purpose of preventing disorder or crime whereas a regulatory body may well be acting for public safety or the protection of health.

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[126] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights' 8 <https://www.echr.coe.int/documents/guide_art_8_eng.pdf> although it should also be recognised that it also imposes positive obligations to ensure interactions between private citizens also respect those rights.
[127] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights' 88–89.
[128] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 35; *Niemietz v Germany (Application number 13710/88)* [30].
[129] European Court of Human Rights (n 127).
[130] *Silver and others v The United Kingdom (Application numbers 5947/72, 6205/73, 7052/75, 7107/75, 7113/75, 7136/75)* [87]; *McLeod v The United Kingdom (Application number 24755/94)* [41]; European Court of Human Rights (n 127).
[131] *Halford v The United Kingdom (Application number 20605/92)* [49–51].
[132] The legitimate aims are listed in Article 8(2) of the Convention.

Even where an interference is in accordance with law and pursues a legitimate aim, it can still fail to be a lawful interference where it is not necessary within a democratic society. In order to be considered necessary, the action must be proportionate to the legitimate aim which is pursued.[133] The interference must correspond to a "pressing social need" and, when considering whether or not the action is proportionate, a fair balance must be struck between relevant competing interests.[134] There is some margin of appreciation afforded to domestic legislators to make these balances. However, the precise extent of the margin of appreciation seems to be determined on a case-by-case basis. Where an interference is on the grounds of national security a wide margin has been granted.[135] Where the ground for interference is the protection of health and morals, the margin is "broad".[136] However, where the ground is the prevention of crime, the margin is described as "variable" with the proportionality of the official's actions and the importance of the right within the context of a particular case leading to a collection of cases from which "few generalisations can be made".[137]

On one view, bringing the Convention rights into domestic law through the HRA could be said not to have altered the longstanding position under the common law; Helen Fenwick notes

> *Invasion of a person's home has traditionally been viewed as an infringement of liberty that should be allowed only under tightly controlled conditions and in the exercise of specific legal power. Article 8 ECHR under the HRA affords specific expression to these values.*[138]

However, as the Law Commission notes, the courts have suggested the introduction of the HRA has had an impact and caused powers of entry to be subject to a greater level of scrutiny.[139] According to the Law Commission, the HRA has had three significant effects on the law relating to search warrants. The two of relevance to this thesis are:

1. Creating standing for a person who is the victim of a public authority who has acted in a way which is incompatible with a Convention right to bring an action against the authority or to assert the rights in any legal proceedings.

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[133] *Dudgeon v The United Kingdom (Application number 7525/76)* [53]; *Z v Finland (Application number 22009/93)* [94].
[134] *Paradiso and Campanelli v Italy (Application number 25358/12)* [181].
[135] Steven Greer, 'The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights' 10.
[136] ibid.
[137] ibid 10–11.
[138] Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge 2017) 871.
[139] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 41 referring to; *R (Cronin) v Sheffield Magistrates' Court [2002] EWHC 2568 (Admin)* and; *Keegan v Chief Constable of Merseyside [2003] EWCA Civ 936*.

2. Creating a requirement to read legislation in a way which is compatible, so far as is possible, with Convention rights.[140]

Fenwick does, despite considering the HRA to be an expression of the traditional values which already existed, point to an extension of a liability of a public authority to pay compensation for breaching the Convention rights even if there would have been no liability in tort.[141]

The two effects identified by the Law Commission, and the increase in situations where compensation can be obtained, will have had an impact on powers of entry and associated powers. The need to read the powers compatibly with the Convention rights, in particular Article 8, adds a restraining gloss to the interpretation of them. It ensures those advising on the exercise of the powers, as well as those exercising them, consider whether the legitimate aim for which the intention is to exercise the powers could be achieved by some other, less intrusive means. It also ensures the protection of an individual's privacy is placed at the forefront of any judicial proceedings relating to the powers.

The Convention rights have, by virtue of being brought into the domestic sphere by the HRA, also generally had an impact on the rule of law as it is understood by practitioners within the English legal system. They no doubt play a part in Bingham's preference for a "thick" concept of the rule of law because he has first-hand experience of the need to read legislation compatibly with the Convention rights.

As we will see, the practical framework of the rule of law this thesis sets out and applies puts the rights of individuals, and the balancing of those rights between individuals, at its core. The research questions this thesis seeks to answer are framed by reference to the rule of law, rather than human rights, and so the assessment which is undertaken in part three of this thesis focuses on the practical rule of law framework rather than human rights. Nevertheless, compliance with the rule of law framework proposed at the end of part one of this thesis requires, because of its reliance on both the law-jobs theory and the PGC, the interference with an individual's freedom and well-being to be the least necessary to achieve a legitimate aim. The Convention rights and their application as practitioners understand them must, therefore, be upheld in order to ensure compliance with the rule of law.

(6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bone fide *civil disputes which the parties themselves are unable to resolve*

This principle would seem, according to Bingham, to be an obvious implication of the principle that everyone is bound equally by the law and entitled to the protection it affords.[142] A right is,

[140] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 41–42; Human Rights Act 1998 s 7 and 3 respectively.
[141] Fenwick (n 138).

he notes, of little value to anyone if there is no effective means of upholding it.[143] The remainder of his discussion is around the method of dispute resolution in England and Wales, and how the common law system contrasts with the civil law system in terms of complexity, cost and delay.

(7) Adjudicative procedures adopted by the state should be fair

Bingham devotes more pages to this principle than any of the others, including fundamental human rights, although this is possibly as a consequence of narrative considerations of criminal, civil, and hybrid procedures.[144] Bingham starts by reminding readers of the right to a fair trial, calling it a "cardinal requirement of the rule of law".[145] He goes on to underline the principle's application to other types of proceeding saying that although there is no requirement for them to follow the same pattern, some things should apply to all patterns of proceedings.[146]

First, he says, fairness should apply equally to all those involved.[147] The procedure must allow both parties, be they prosecutor and defendant, claimant and defendant, or appellant and respondent, an equal and fair opportunity to put a case or rebut it.[148]

Second, it should be accepted that fairness is a constantly evolving concept.[149] Citing a number of examples of historical unfairness and procedural evolution, Bingham demonstrates how the law constantly seeks to become fairer to those it touches.[150] He does, however, conclude his demonstration of the evolution of fairness with a warning:

> *A time is unlikely to come when anyone will ever be able to say that perfect fairness has been achieved once and for all, and in retrospect most legal systems operating today will be judged defective in respects not yet recognized.*[151]

Third, judicial decision makers should be independent and their ability to be independent should be guaranteed (be they judges, lay people such as magistrates or lay members of tribunals, or jurors empanelled to determine guilt).[152]

Fourth, the independence of members of the legal profession should be protected as effectively as the independence of the judicial decision makers.[153] Equally, they should be

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[142] Bingham (n 3) 85; he sets out the full principle at pages 85-89.
[143] ibid.
[144] ibid 90–109.
[145] ibid 90.
[146] ibid.
[147] ibid.
[148] ibid.
[149] ibid.
[150] ibid 90–91.
[151] ibid 91.
[152] ibid.
[153] ibid 92–93.

> *[…] fearless in [their] representation of those who cannot represent themselves, however unpopular or distasteful their case may be.*[154]

Fifth, decision makers should be impartial.[155] In his discussion, Bingham talks about tribunals. The requirement to be impartial, however, should extend further and reach into internal reviews/reconsiderations and appeals offered by organs of the State as part of their procedures.[156]

(8) Compliance by the state with its obligations in international law as in national law.

This principle is not of significant importance in respect of an analysis of the law of powers of entry.

Again, the space taken by Bingham to deal with this principle is largely occupied by a narrative account of how and why a nation should comply with the international legal order.[157] He treats the concept of a nation complying with the international legal order as analogous to individuals complying with domestic law.[158] Complying with the law is, he says, the necessary price to be paid for others to observe the law.[159] He notes that a society in which people are free to disregard the law "would not be a very congenial one".[160] In fact, he says, "there might be no such thing as society".[161]

Compliance by states with international law is, within the context of an ever more globalised world, key to ensuring rights of individuals are adequately protected. One such example is that of fugitives who cross national borders; bringing them to justice across borders requires an enforceable set of international rules.[162]

THE BASIS FOR USING BINGHAM'S FORMULATION

In the introduction to this thesis, I set out why I had chosen Bingham's "thick" concept of the rule of law; his formulation most closely resembles the concept as it is understood within the English legal system. It is possible, however, to justify the use of Bingham by reference to the work of Llewellyn and Gewirth. As we will see, both of these theories push us towards a conclusion that a

[154] ibid.
[155] ibid 93.
[156] For example, in respect of some decisions which can be appealed to the First-tier (Tax) Tribunal an internal review must have been undertaken by HMRC. The logic of this position is that it could alter the original determination without the need to tie up the time of the tribunal and legal representatives. As such, if impartiality is not observed the step is failing to achieve anything worthwhile other than perhaps giving the appearance of a fair decision to someone in a way that puts them off appealing further.
[157] Bingham (n 3) 110–129.
[158] ibid 112.
[159] ibid.
[160] ibid.
[161] ibid.
[162] ibid 115.

right-based conception of the rule of law is and would be the correct one, even if it was not recognised within the legal system of England and Wales.

LLEWELLYN - AN ANTHROPOLOGICAL GROUNDING FOR THE RULE OF LAW

Llewellyn's work is written, as Twining concedes, in such a way as to potentially prevent engagement with it and this has had a subsequent impact on its adoption within the UK.[163] He observes that Llewellyn "[…] managed to be even more quotable than he was unreadable".[164] At first, this could be taken to be damning with faint praise but, given Twining's work on Llewellyn it is more likely this is an astute observation on the value of the underlying work. What I think Twining is getting at here is that the key thesis of Llewellyn's work can be lost amongst his seeming love of inventing new and obscure jargon.

Indeed, Twining goes on to say

> *It would be most unfortunate if rigid criteria of stylistic propriety or narrow and dogmatic views of the ingredients of juristic excellence should deter the serious student of jurisprudence […]*[165]

Llewellyn's work is important because, when the jargon is looked beyond, it provides an account which explains the role and, to some extent, inevitability of law and legal systems.[166] It refocuses our attention as common law lawyers – it is easy for us to fall into the same trap as those who were sceptical of Hoebel and to think that law starts and ends with parliamentary statute and judicial precedent; the law-jobs theory forces us to at least consider that "the law" could be more widely defined and be more far reaching.[167]

According to Twining, Llewellyn's Yale Law Journal article most often associated with the law-jobs theory is, in fact, one of a number of texts from which the theory can be distilled.[168] In order to

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[163] William Twining, 'Two Works of Karl Llewellyn: "How To Make Known Teufelsdröckh And His Book To English Readers?" (Sartor Resartus)' (1967) 30 Modern Law Review 514, 516. Twining is still asserting in 1993 that Llewellyn's work is overlooked, although he seems to be suggesting it has found much more influence in Germany by then; see William Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (1993) 48 University of Miami Law Review 119, 123.

[164] Twining, 'Two Works of Karl Llewellyn: "How To Make Known Teufelsdröckh And His Book To English Readers?" (Sartor Resartus)' (n 163).

[165] ibid 516.

[166] A significant amount of Llewellyn's "jargon" seems to concentrate on expanding the meaning of law and legal systems without admitting that is what is happening. For example, he uses "Law-ways" to refer to anything "distinctively legal in character" which includes having and using "formulated rules of law" but not the actual rule itself; see Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (n 3) 1357–1358.

[167] KN Llewellyn and E Adamson Hoebel, *The Cheyenne Way. Conflict and Case Law in Primitive Jurisrudence.* (University of Oklahoma Press 1941) 273–276; Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163) 128–129.

[168] Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163) 126.

introduce the theory, I will rely on a combination of Llewellyn's work and Twining's analysis and restatement of the work.[169]

The theory originated in 1927 and was then clarified and restated in a couple of publications over the next 30 years.[170] There were, according to Twining, further summaries of the ideas continuing to appear in a number of published and unpublished essays and lectures until Llewellyn's death in 1962; these "represent only minor variants or particular applications" and the Yale Law Journal article represents a text in which the "main ideas had stabilized".[171]

Twining considers the most developed version of the law-jobs theory to be found in the teaching materials and transcripts of lectures entitled "Law in Our Society: A Horse-sense Theory of the Institution of Law" delivered at the University of Chicago.[172] In setting out the law-jobs theory, I am reliant on Twining's account of the course as the materials are held in Chicago. I do not consider this fatally undermines this exposition as Twining actually studied a course based on these materials and so had first-hand knowledge; however, it is worth noting I have been unable to critically analyse Twining's use of the work as I have not seen the original.[173]

THE CORE OF THE LAW-JOBS THEORY

At the core of the law-jobs theory is the notion that humans are always members of groups. These groups can range in size and complexity from the family unit, through groups, to nation

[169] Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (n 3); Karl N Llewellyn, 'My Philosophy of Law' in A Kocourek (ed), *My Philosophy of Law: Credos of Sixteen Scholars* (1941); Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163); William Twining, *Karl Llewellyn and the Realist Movement* (2nd edn, Cambridge University Press 2014); Twining, 'Two Works of Karl Llewellyn: "How To Make Known Teufelsdröckh And His Book To English Readers?" (Sartor Resartus)' (n 163).

[170] Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163) 126. According to Twining, the theory first appears in Karl N Llewellyn, 'Mechanisms of Group Control (Unpublished Manuscript, on File with the University of Chicago Law School as Part of Its Collection of the Karl Llewellyn Papers)' (1934) and then appears in Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930) and KN Llewellyn and E Adamson Hoebel, *The Cheyenne Way. Conflict and Case Law in Primitive Jurisrudence.* (University of Oklahoma Press 1941) before making its way into what Twining describes as "the most detailed and elaborate statement of the general ideas in print - Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (n 3). Llewellyn himself says the Yale Law Journal article is the 4th exposition of the theory; see the footnote in ibid 1335.

[171] Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163) 126.

[172] Karl N Llewellyn, 'Law in Our Society: A Horse-Sense Theory of the Institution of Law'; Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163); Twining, *Karl Llewellyn and the Realist Movement* (n 169).

[173] See Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 9) 125–126 for his statement that he attended the course.

states or humanity itself.[174] In order for those groups to survive and function effectively there are certain needs which must be met.[175] As Llewellyn puts it there are certain things

> *[…] whose sufficient doing goes to the very continued existence of a society as a society, of a group as a group.*[176]

These things are what he terms "law-jobs". The law-jobs are, according to Llewellyn

> *[…] in their bare bones fundamental, they are eternal. Perhaps they can all be summed up in a single formulation: such arrangement or adjustment of people's behavio[u]r that the society (or the group) remains a society (or a group) and gets enough energy unleashed and coordinated to keep on with its job as a society (or group).*[177]

What Llewellyn is driving at here is a potential for conflict between the goals/desires of individuals and the survival and thrive of the community at large; as Twining says

> *[…] human beings have drives, desires and interests which tend to be incompatible.*[178]

He goes on to say that

> *[in] so far as these 'divisive urges', as Lewellyn called them, are a source of actual or potential conflict and in so far as conflict is inimical to group-survival and to concerted effort to a common end, conflict-prevention and conflict-resolution are a necessary precondition of group-survival and group-effectiveness.*[179]

This does not, however, give the group unfettered power to ride roughshod over the interests of group members; Llewellyn further elucidates his position in relation to the fundamental nature of the law-jobs, saying

> *[…] to stay a group, you must manage to deal with centrifugal tendencies, when they break out, and you must manage, preventatively, to keep them from breaking out. And that you must effect organization, and that you must keep it effective.* ***And that you must do all this by means which do not choke off, but elicit, your necessary flow of human energy.***[180]

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[174] For the purposes of setting out Llewellyn's theory it is not necessary to consider the complexity of inter-group interaction.
[175] Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163) 129–130; Twining, *Karl Llewellyn and the Realist Movement* (n 169).
[176] Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (n 3) 1373.
[177] ibid.
[178] Twining, *Karl Llewellyn and the Realist Movement* (n 169) 175.
[179] ibid.
[180] Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (n 3) 1373. Bolded text is my added emphasis.

Clearly, Llewellyn is recognising that for a group to be successful it needs to function in a way that maximises the ability of the group members to achieve what is important to them whilst minimizing the damage that causes to the functioning of the group.

This is the key in helping us to evaluate which concept of the "rule of law" should be applied. Llewellyn is warning us that society needs to protect the rights and freedoms of individuals otherwise there is a risk the group will disintegrate. The "thick" concept of the rule of law provides that protection, lowering the risk of fracture.

THE LAW-JOBS

The jobs which the group needs to ensure are done in order to survive can be broken down, according to Twining citing Llewellyn, into five or six rough categories.[181] Three of these in one way or another deal with some form of dispute or what Llewellyn calls "trouble-case". The first is dealing with the dispute when it actually arises; the aim of this job is essentially to return the group back to a position where it will not break apart. The second is preventative channelling; the aim of this job is to try and prevent disharmony from occurring in the first place. The third is to ensure that the conduct and expectations of the group are re-channelled where the needs of the group or the conditions in which it operates have changed.

There are two further jobs which are essential to group survival. First, is the allocation of authority and regulation; this job is necessary in order to provide what is essentially an enforcement backstop to the "trouble-case" jobs. Second, is the provision of a net positive drive; this job is essentially the one which keeps the group striving towards whatever goals are necessary to meet their needs and expectations.

Taken together, these jobs provide an underlying framework that tells us what we need to consider when dealing with questions about the law and what it should be. Because these functions naturally appear in all groups, we can use them as a basis to analyse legal systems and, if it appears necessary, to propose changes.

In answering the research questions, and bringing this research to a successful conclusion, we will need to consider each of the law-jobs I have set out above. Any proposal which is made will need to be capable of being implemented without undermining one of the law-jobs and therefore causing disintegration of the groups in question.

Within the context of this research, therefore, we will need to consider how a system can be designed which enables powers of entry to be used in a manner which reduces the risk of conflict,

[181] Llewellyn, 'Law in Our Society: A Horse-Sense Theory of the Institution of Law' (n 172) 10; Twining, 'The Idea of Juristic Method: A Tribute to Karl Llewellyn' (n 163) 130.

can be kept under review in order to ensure it continues to reduce the risk of conflict, and which can ensure the society can continue with a net positive drive.

Llewellyn's theory usefully tells us the sorts of things that a group or society will need to do in order to survive, to achieve, and to thrive but it does not tell us how to evaluate which rules are likely to ensure success and which are likely to put the group at risk of disintegration. In order to do that we need to find a framework by which we can assess competing desires and goals and how those desires and goals can be managed in such a way that the law-job of delivering a net positive drive can be achieved. For that purpose, I propose using Gewirth's PGC which I set out in the next section.

GEWIRTH - A LOGIC BASED RIGHTS FRAMEWORK

In this section I set out Gewirth's PGC; in order to do so I draw on the work of Gewirth, Beyleveld, Kohen and Bielby.[182] For ease, as I go through this section, I cite Gewirth and Beyleveld; Bielby and Kohen both set out the same structure of the PGC albeit with slightly different narrative and so they are still useful in understanding the argument.

As we work through this section, I will first set out the PGC in its direct application and then go on to consider its indirect application.[183] In setting out the PGC, I do not intend to discuss the criticisms which have been levelled at it nor defend it against those criticism.[184] Rather, I intend to focus on how it can help us develop and understand a theory of law which is universally applicable.[185]

As a theory, it provides a compelling companion to the main thrust of the findings of Llewellyn's research. As we will see when we work through the PGC, it provides a mechanism for dealing with competing demands at any level of group Llewellyn could imagine. The PGC allows, in its direct application, an assessment of competing rights-claims between individuals; in its indirect application it deals with the interaction of those individual rights-claims and those of the groups of which they are members.

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[182] Gewirth, *Reason and Morality* (n 3); Gewirth, 'The Epistemology of Human Rights' (n 3); Deryck Beyleveld, *The Dialectical Necessity of Morality : An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (The University of Chicago Press 1991); Ari Kohen, 'The Possibility of Secular Human Rights: Alan Gewirth and the Principle of Generic Consistency' (2005) 7 Human Rights Review 49; Philip Bielby, *Competence and Vulnerability in Biomedical Research* (Springer 2008).

[183] The PGC is most often associated with medical ethics because it provides a useful mechanism for assessing proxy decision making.

[184] A comprehensive defence can be found in Beyleveld (n 182).

[185] Whilst I intend this theory to be universally applicable, I do not claim it will be universally applied. Much of the criticism of the PGC has, as Kohen acknowledges, been dealt with by Beyleveld in ibid; Kohen (n 182). Kohen levels further criticism, which I discussed and rejected in earlier documents in this degree.

The PGC is an attempt, by Gewirth, to set out a moral principle that everyone (that is every prospective purposive agent ("PPA")) must, logically, subscribe to.[186] His reasoning is, essentially, that a PPA cannot both claim to be a PPA and thus have rights-claims (or act in a manner consistent with a rights-claim) whilst at the same time failing to acknowledge the existence of the rights-claims of others. This is because the existence of those rights-claims arises as a result of the internal logic of the argument; by reasoning that certain rights are generic features of agency, the agent has to acknowledge all agents have those rights-claims.

Over the next few pages, we will work through the stages of the argument to the PGC. Beyleveld sets out the following as the main arguments to the PGC:

Stage 1

A PPA Claims

(1) I do (or intend to do) X voluntarily for some purpose E.

By virtue of making this claim, the PPA rationally must consider that (claim) in logical sequence

(2) E is good;

(3) My freedom and well-being are generically necessary conditions of my agency;

(4) My freedom and well-being are necessary goods.

Stage 2

By virtue of having to accept (4), the PPA must accept

(5) I (even if no one else) have a claim right (but not necessarily a moral one) to my freedom and well-being.

Stage 3

By virtue of having to accept (5) on the basis of (1), the PPA must accept

(9) Other PPAs have a (moral) claim right to their freedom and well-being.

If this is the case, then every PPA rationally must claim, by virtue of claiming to be a PPA,

(13) Every PPA has a (moral) claim right to its freedom and well-being,

[186] The PGC is framed in terms of purposive and prospective purposive agents. A purposive agent is one who acts for a freely chosen purpose, a prospective purposive agent is one who has, or may have, the capacity to do so.

which is a statement of the PGC[187]

As we work through the finer detail of the PGC, and discuss the implications of it, it will become clear the direct application pushes a PPA to rationally and logically conclude they ought to act in a way which promotes the freedom and well-being of other PPAs. As Beyleveld says

> *Alan Gewirth argues that purposive agents and prospective purposive agents (PPAs) are rationally committed, by virtue of conceiving of themselves as PPAs to assenting to a moral principle, "the principle of generic consistency" (PGC), which states that all PPAs have claim (or "strong") rights to their freedom and well-being.*[188]

An obvious criticism of the PGC is that it seems to ignore the possibility that an agent may be entirely comfortable in acting in a contradictory manner. The criticism, in light of Llewellyn's observations of which functions will always appear within groups, however, does not stand; the focus of three of the law-jobs is to manage the appearance and effects of discord within a group and at least some of that must come where a person has acted in a manner which fails to acknowledge the freedom and well-being of another.

Furthermore, the PGC acts, in common with any form of ethical framework, to provide a benchmark to assess what should happen rather than what will happen.

PGC: The argument

Gewirth claims that in all cases of an agent wanting to do something they must have a "pro-attitude" towards it.[189] This "pro-attitude" has, according to Gewirth, three main features:

- First, "selective attention" – the agent, in acting for that purpose, turns attention to it rather than other purposes;
- Second, "directive or vectorial" – the agent, other things being equal, moves towards attaining the purpose rather than other things they could possibly obtain;
- Third, "favo[u]rable interest" – the agent has some sort of positive mind-set towards achieving that purpose, and failing to achieve it would cause at least momentary annoyance or dissatisfaction.[190]

This universally applicable statement forms the basis of the first two steps of stage 1 of the argument to the PGC.

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[187] Beyleveld (n 182) 14.
[188] ibid 1.
[189] Gewirth, *Reason and Morality* (n 3) 40.
[190] ibid.

Let us consider the case of a PPA, Jude, who wants to do something. Gewirth suggests that when an agent, such as Jude, acts he performs a thought process and makes judgements which are capable of being expressed in words (even if they are not actually expressed).[191] Therefore, we can set out the thought process from the standpoint of Jude as he works through the logical progression towards the PGC.

Stage 1 of the argument

Jude chooses to do something for a reason; this can be expressed as

(1) Jude does X for purpose E.[192] *He does X voluntarily and E is freely chosen.*

As a "pro-attitude" is a logical necessity of wanting to do something, Jude must be logically committed to claiming

(2) E is good.

As Jude must claim *E* is good, he must also attach a positive value to it.[193] He must also claim to be positively motivated by *E* because he has taken steps to attain it by doing *X*. Therefore, Jude must, logically, claim that *E* has sufficient value for him to move to do *X*.[194] Beyleveld reminds us that Jude does not need to consider *E* to be *morally good*, in fact it may be possible for E to be *morally bad* and still be considered good by Jude in the terms set out above.[195]

Beyleveld suggests that step (2) can be explained as a component part of step (1), in that step (1) entails "*I wish (am motivated) to achieve E by my agency*".[196] He also claims this can be stated as "*I attach a positive value to E on some ground, which motivates me to pursue E*".[197] These are, essentially, different ways to voice the "pro-attitude".

Jude must, logically, recognize

(3) freedom and well-being are generically necessary conditions of agency.[198]

Beyleveld restates this, by claiming that an agent such as Jude needs their freedom and well-being in order to pursue, with any prospect of success, whatever purpose they choose to pursue.[199]

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[191] ibid 42.
[192] ibid 42–43; Gewirth, 'The Epistemology of Human Rights' (n 3) 14; Beyleveld (n 182) 21.
[193] Gewirth, *Reason and Morality* (n 3) 41; Gewirth, 'The Epistemology of Human Rights' (n 3) 15; Beyleveld (n 182) 21.
[194] Gewirth, *Reason and Morality* (n 3) 49; Gewirth, 'The Epistemology of Human Rights' (n 3) 15; Beyleveld (n 182) 21.
[195] Beyleveld (n 182) 21–22.
[196] ibid 22.
[197] ibid.
[198] ibid 23.
[199] ibid.

Some resources Jude needs in order to achieve *E* will vary depending on what *E* is. For example, if Jude is seeking to build a dry-stone wall, he will need stone, if he is seeking to make a model spitfire, he will need wood, glue and paint (or an Airfix kit). However, he will always need freedom and well-being in order to achieve *E* as they are necessary features of action.

Jude must, logically, regard anything needed to achieve *E* by his agency as good because he must regard *E* as good (see step 2). As freedom and well-being are required to achieve *E*, regardless of what *E* is, Jude must hold

> *(4) freedom and well-being are necessary goods.*[200]

As the judgement of what is good is not a moral judgement, rather it is a functional deductive judgement, it is not open to Jude (or any other PPA) to claim freedom and well-being have an inherent value which must be respected as a matter of moral absolute.

Instead, freedom and well-being obtain a value by being necessary as a direct result of being necessary steps in achieving, by an agent's agency, any purpose the agent chooses to pursue.

Stage 2 of the argument

Gewirth tells us that because Jude

> *regards as necessary goods the freedom and well-being that constitute the generic features of his successful action, he logically must also hold that he has rights to these generic features, and he implicitly makes a corresponding rights-claim.*[201]

In *Reason and Morality* Gewirth devotes a significant number of pages to setting out and building stage 2 of the argument.[202] Crucially, he speaks to his direct argument at pages 78 – 79 where he sets out his

> *own more direct argument for the thesis that every agent must hold or accept, at least implicitly, that he has rights to freedom and well-being.*[203]

The argument hinges, according to him, on whether or not the agent's rights-claim is

> *correlative with and logically equivalent to a strict 'ought'-judgment that other persons ought at least to refrain from interfering with the agent's freedom and well-being.*[204]

As Jude must hold that freedom and well-being are necessary goods no matter what *E* is he must, logically, also hold that it is necessary his possession of freedom and well-being is not interfered

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[200] ibid.
[201] Gewirth, *Reason and Morality* (n 3) 63.
[202] ibid 63–103.
[203] ibid 78.
[204] ibid.

with by others.[205] This is because without freedom and well-being Jude does not have what is required to do *X* to achieve *E*. Gewirth suggests this aversion to interference is a consequence of an agent attaching "good" to his actions.[206] In other words, the logical end-point of Jude's "pro-attitude" towards *E* is that he has a "pro-attitude" towards anything which is required to achieve *E*. Consequently, he must have an "anti-attitude" towards anything which makes the achievement of *E* more difficult or less likely.

In essence, from Jude's view the requirement that others do not interfere with his freedom and well-being is a "strict practical 'ought'".[207] Gewirth sets out four conditions he considers to be "necessary and sufficient" for a person to address a practical 'ought' at another person:

> *first, he sets forth a practical requirement for their conduct that he endorses; second, he has a reason on which he grounds this requirement; third, he holds that this requirement and reason justify in some way preventing or dissuading the persons addressed from violating the requirement; fourth he holds that fulfilment of the requirement is due to himself or to the persons in whose behalf he sets it forth.*[208]

As Jude considers freedom and well-being are necessary goods and that others should refrain from interfering with them, so he claims a right to them because he considers others owe him a duty not to interfere.[209]

In the subsequent pages Gewirth formulates and reformulates his argument taking into account hypothetical objectors. Beyleveld considers the (re)formulation in reply to the amoralist to be the most convincing demonstration of stage 2.[210]

Beyleveld himself further reformulates the argument to enable it to be generalized.[211] He begins by restating (4) as Jude

> *(4a) considers his freedom and well-being to be (at least instrumentally) good, good for his purposes, whatever his purposes ≡ he (at least instrumentally) ought to value his freedom and well-being, for his purposes, whatever his purposes ≡ with the positive value that Jude, as a PPA, attaches to his purpose as the criterion, he ought to attach a positive value to his freedom and well-being, at least as instrumental to his purposes, whatever his purposes.*[212]

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[205] ibid.
[206] ibid 79.
[207] ibid.
[208] ibid.
[209] ibid 79–80.
[210] Beyleveld (n 182) 26.
[211] ibid 26–42.
[212] ibid 26.

Because the positive value Jude attaches to his purposes (which is his criterion for this judgement) is proactive, this means that it is dialectically necessary, within his internal viewpoint as a PPA to assent to the proposition that he

> *(4b) (at least instrumentally) ought to pursue his freedom and well-being, for whatever purposes.*[213]

Beyleveld goes on to say that since this 'ought' is strict because it is linked to the agent's purposes it can be restated as Jude having

> *(4c) (at least instrumentally) at least a prima facie duty (on his prudential criterion) to defend his freedom and well-being from interference ≡ he, at least prima facie, strictly ought (on his prudential criterion) to defend his freedom and well-being from interference, as a means to his purposes.*[214]

This does not mean, however, that an agent is required to defend their freedom and well-being from interference as an end in and of itself.[215] It is entirely possible for Jude to end his own agency or to permit others to interfere with his freedom and well-being. However, Beyleveld reminds us that an agent such as Jude would need to defend their freedom and well-being to the extent they need it to give up their freedom and well-being.[216] (4c) is, he says, equivalent to an agent such as Jude saying they

> *have (at least) a prima facie duty (on a prudential criterion) to defend their freedom and well-being from such interference against their will.*[217]

Since 'ought' implies 'can', Jude must hold

> *(4d) every other PPA has at least a prima facie duty (on his criterion) to (at least) refrain from such interference with his freedom and well-being as is against his will (i.e., a duty to refrain from such interference as is not willed by him as a means to relinquishing his agency).*[218]

As a logical consequence of this reasoning, Jude must hold that he

> *(5) (at least) has at least a prima facie claim right (on his prudential criterion) to his freedom and well-being.*[219]

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[213] ibid.
[214] ibid 27.
[215] ibid.
[216] ibid.
[217] ibid.
[218] ibid.
[219] ibid.

Stage 3 of the argument

As Jude has now reasoned his way to (5) from an internal viewpoint, it follows that he must, when assessing what he finds it permissible or impermissible for him or others to pursue, as part of his assessment assert his right claim to freedom and well-being. Beyleveld expresses this as it follows from (1) → (5) that Jude must say he

> *(6) is a PPA → he must have a prima facie claim to freedom and well-being.*[220]

This is equal to Jude holding that he must have a framework of internal assessment of permissibility and impermissibility which asserts his claim to freedom and well-being.

The reason why Jude must, as a PPA, have a framework which asserts his claim to freedom and well-being is because to do otherwise would (as a result of (1) → (5)) contradict his status as a PPA.

In his later statement of the PGC, Gewirth seems to follow more closely to the argument against the amoralist. Stepping back a few steps in the statement, we see that Gewirth concludes freedom and well-being are necessary goods (which he now calls step (3)).[221] From this, he says, it follows that an agent such as Jude must conclude he

> *(4) must have freedom and well-being.*[222]

From that conclusion follows Jude's next conclusion; that he

> *(5) has rights to freedom and well-being.*[223]

Gewirth suggests we can prove (5) follows from (4) by considering what happens when an agent such as Jude denies they have rights to freedom and well-being.[224] By denying he has a right to freedom and well-being, Jude would also have to deny

> *(6) all other persons ought at least to refrain from removing or interfering with his freedom and well-being.*[225]

This would, in turn, force him to accept

> *(7) it is not the case that all other persons ought at least to refrain from removing or interfering with his freedom and well-being.*[226]

This means Jude must then accept

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[220] ibid 42.
[221] Gewirth, 'The Epistemology of Human Rights' (n 3) 15.
[222] ibid.
[223] ibid.
[224] ibid.
[225] ibid.
[226] ibid.

(8) other persons may remove or interfere with his freedom and well-being.[227]

Which leads him to the conclusion that

(9) it is permissible for him to not have freedom and well-being.[228]

However, we have already demonstrated that freedom and well-being are necessary conditions of the ability to achieve *E* whatever *E* may be. In other words, we have already demonstrated an agent must have freedom and well-being as a necessary part of their agency. Accepting (9) would contradict that and, as a result, contradict their agency; (9) must, therefore, be rejected. Since (9) follows from the denial of an agent considering they have rights to freedom and well-being, that denial must also be rejected.[229] Logically, therefore, every agent must accept they have rights to freedom and well-being.

At this point in the statement of the PGC the argument thus far has only considered what underpins an agent's ability to act. It establishes a logical claim to rights but only in a prudential manner; the justifying criteria for claiming a right to freedom and well-being, and this asserting that others ought not to interfere, is merely that it is a necessary condition of the agent's ability to act.

It is, therefore, necessary if the intention is to argue that an agent's rights to freedom and well-being are moral rights to undertake further steps in Jude's journey of reasoning.

Gewirth tells us that it is sufficient justification for someone to claim that he has rights to freedom and well-being because they are a PPA.[230] This comes from the fact rights to freedom and well-being are a necessary consequence of the logical reasoning which begins with the agent doing *X* for purpose *E*. Jude must, therefore, hold that he

(10) has rights to freedom and well-being because he is a prospective purposive agent.[231]

This can be supported by understanding what would happen if Jude rejected (10).[232] Say, for example, Jude elects to reject (10) and instead claims he has rights to freedom and well-being for some other, more restrictive characteristic. This could be that he is male, or that he has certain coloured eyes, or that he is named for the patron saint of forlorn hope and lost causes. He would, therefore, be claiming he

[227] ibid 16.
[228] ibid.
[229] ibid.
[230] ibid.
[231] ibid.
[232] ibid.

(11) has rights to freedom and well-being only because he is [male/blue-eyed/named for the relevant patron saint].[233]

As a logical consequence of claiming a more restricted class of reasons to have rights to freedom and well-being Jude would have to accept that without that characteristic, he would not have those rights. If we take, for example, the idea that Jude only has those rights because he is male, he would be in a position where, if he elected to identify as, or transition to, female he would lose the rights. He would, consequently, be forced to conclude he

(12) does not have rights to freedom and well-being.[234]

This would cause him to contradict himself. We have already seen that logically Jude must accept, prudentially, that he has rights to freedom and well-being because they are necessary features of any action he chooses to take. As he cannot contradict himself, because this would deny his agency, he must reject (11) and accept (10).

Because Jude has accepted that being a PPA is sufficient justification for him to have rights to freedom and well-being he must accept

(13) all prospective purposive agents have rights to freedom and well-being.[235]

Now Jude has reasoned to the conclusion that all PPAs have rights to freedom and well-being he is also committed, on pain of contradiction, to respecting and favourably taking into account the freedom and well-being of others. This is the stage at which Gewirth asserts the rights have now become moral rights.[236]

Jude can be said to accept that he

(14) ought to act in accord with the generic rights of his recipients as well as of himself.[237]

This can be expressed as a general moral principle:

(15) "Act in accord with the generic rights of your recipients as well as of yourself.[238]

PGC: Application

As we have seen, the PGC leads us to the conclusion that there is a logic based moral principle that a person must act in accordance with the generic rights (i.e. the freedom and well-being) of others.[239]

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[233] ibid 16–17.
[234] ibid 17.
[235] ibid.
[236] ibid.
[237] ibid.
[238] ibid.

At first look, this conclusion could cause problems when it is considered against the law-jobs theory. It could be difficult to deal with "trouble-cases" or to maintain a net societal drive if a person's freedom and well-being trumps all else. For example, if all agents are free to pursue whatever they want they could pursue diametrically opposing ends which put the cohesion of the group at risk. However, the PGC does not, when considered more fully, lead to a free for all in terms of rights-claims.

Direct and Indirect Application of the PGC

Gewirth cautions that any direct application of the PGC must be sited in the context of the indirect application.[240] Direct application is where

> *[…] the PGC's requirements are imposed upon the interpersonal actions of individual persons. According to these applications actions are morally right and their agents fulfil their moral obligations if they act in accord with their recipient's rights.*[241]

Indirect is where

> *[…] its requirements are imposed in the first instance not on individual agents and their actions but rather on certain social rules – rules of social activities, associations, or institutions. The requirements of those rules, in turn, are imposed on the actions of individuals.*[242]

Gewirth attempts, at some length, to justify certain rules and structures of enforcement through the lens of the PGC with varying degrees of success. It is possible to bolster the justification by reference back to the law-jobs theory. First, however, we need to consider the indirect application as it is set out by Gewirth.

Many, if not all, exercises of rights-claims by agents are not only by reference to another individual agent; they are, as Gewirth points out, multilateral and complex.[243] This, in turn, leads to complex interactions with a much greater potential for conflict, be it intentional or unintentional. He notes, echoing the conclusion of Llewellyn, that without rules to resolve conflicts in standard, predictable, ways structured groupings will not survive.[244] As a result, there is a link to be found between the moral justification for the rules and that which they seek to regulate.[245]

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[239] See Gewirth, *Reason and Morality* (n 3) 64 for an explanation of 'generic rights'.
[240] ibid 206.
[241] ibid 200.
[242] ibid 272.
[243] ibid 273.
[244] ibid.
[245] ibid.

The presence of rules and structures acts to replace the element of the direct application of the PGC that requires an agent to accord their recipients respect for their freedom and well-being. Instead, the agent and the recipient are both bound by the rules which guide their conduct.[246] This happens regardless of their consent; the moral correctness of the treatment of an agent is to be determined by reference to the relevant rules and the outcome of the rules applies even if they do not agree.[247] As Gewirth says, a batter is out or a convict is sentenced even if they refuse to accept it.[248]

This is not, however, at face value, a sufficient justification for supporting the interference with individual rights and freedoms. If we pause the exploration of the PGC for a moment and consider Kohen's example situation in his criticism of the PGC this becomes clearer.[249]

Kohen tells us he thinks it is possible for an agent to sidestep the PGC without acting inconsistently by

> *believing his victim is somehow less of an agent (and, in the case presented by Rorty, less of a human being) than himself.*[250]

He goes on to say

> *It seems to me that the Nazis knew quite well their Jewish victims could be PPAs in some sense; the Nuremberg Laws of 1935 confirm their awareness that Jews could plan and execute the same sorts of actions they could (voting and working, for example). The rights of the Jews could be restricted, however, because Jews were quite different from Germans; rather than PPAs in the fullest sense, they were, in the eyes of the Nazis, what Rorty calls "pseudohumans".*[251]

It would be possible, instead of reasoning that the Nazis simply see Jews as different or sub-PPAs, to argue that the laws are the laws and they apply because they apply. Such an argument does not require, nor in fact invite, any conclusion to be drawn on whether the Jews were seen as PPAs or not; in much the same way as it does not matter if the fielder considers the batter out, it does not matter if the Nazi considers the Jews to be somehow lesser and therefore justifiably liable to their rights being restricted.

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[246] ibid 274.
[247] ibid.
[248] ibid.
[249] Kohen (n 182) 65–66.
[250] ibid 65 the reference to Rorty is a reference to Richard Rorty, 'Truth and Progress: Philosophical Papers' 178–179.
[251] Kohen (n 182) 65.

When put like that it becomes clear that it is not enough to simply argue "the rules are the rules". There still needs to be a moral consideration of what the rules should be, and how they should become and remain valid. In the next part of this section, we will see how Gewirth deals with this problem.

In setting out the indirect application of the PGC, Gewirth tells us that the list of things regulated by societal rules includes institutions.[252] Institutions are

> *[…] relatively stable, standardized arrangement[s] for pursuing or participating in some purposive function or activity that is socially approved on the ground (whether justified or unjustified) of its value for a society.*[253]

They are constituted by rules setting out what those who participate in the institutions must do and how they must behave. He separates the institutions into:

- Functional – essentially the activity with its rules and requirements, for example education or religion; and
- Organisational – corresponding groups of people who exist to regulate the activity and enforce the rules, for example schools or churches.[254]

Gewirth asserts that certain things are morally wrong even when not prohibited by rules or enforcement; he draws out, in particular the killing of innocents for the gain or desire of the killer, and slavery.[255] These are never permissible because they violate the equality of generic rights; the murderer or enslaver has failed to respect the rights to freedom and well-being of the recipient of their actions.

At face value this seems to suggest the PGC could conflict with any form of control of the actions of agents, relying only on their voluntary compliance with the relevant institutional rules. This would, were it to hold, render any form of enforcement of the rules to be morally indefensible. Gewirth, almost immediately, goes on to claim that there are times where depriving someone of life or liberty is not morally wrong.[256] Over the next few pages we will work through his reasoning for why it is permissible to have enforcement of the rules which involves a restriction of the rights of the individuals.

The first, and perhaps simplest, point is that enforcement of societal rules is something which takes a different character to the actions of an individual. When an agent acts to enforce the rules they are doing so for that purpose, whereas an agent who acts for their own purpose is

[252] Gewirth, *Reason and Morality* (n 3) 274.
[253] ibid.
[254] ibid 275.
[255] ibid.
[256] ibid.

doing so to benefit only themselves. That does not, for Gewirth, go far enough to justify inflicting a harm on an agent, citing tyrannical governments or the enforcers of fugitive slave laws as examples.[257] In order to ensure the correct balance between harming individuals and enforcing institutional rules, he suggests two things must be shown: that the rules conform with the PGC and that enforcing them takes precedence over avoiding harming an individual.[258]

Gewirth draws his reasoning for precedence in part from an anthropological stance. Echoing Llewellyn, albeit in somewhat more direct language, he states that

> *Man's existential situation is in important respects interactive and associative; hence, social rules are needed that are concerned specifically with such associative relations. Because of this specific concern the rules, once certain justificatory requirements are fulfilled, take precedence in the relevant social contexts over the PGC's direct applications, because the latter deal primarily with transactions among individuals that do not fall within the contexts structured according to these rules. The social rules are also concerned with transactions of agents towards their recipients, but the agents now act in their corporate or social roles, not their individual capacities.* [259]

The rules, once justified, take precedence because they facilitate the existential situation – they regulate interactions in a way that ensures associations can endure.[260]

In the direct application of the PGC, an agent's rights are grounded in the concept that both agent and recipient are prospective agents who want to fulfil their respective purposes. In order to pursue their purpose an agent must have, and therefore must make a rights-claim to, freedom and well-being. They must, on pain of contradiction, also accept the rights-claim of their recipient.[261] However, if it is possible to identify a rational argument that the agent is different (or differentiable) from the recipient it does not necessarily hold that they must continue to accept the rights-claim of their recipient.[262]

For example (and assuming here that we are discussing a set of rules which have been properly justified), a judge, who is properly appointed to the position and who has, as a result of the position, the power to commit a properly convicted defendant to prison is clearly differentiable from the person who is standing in the dock and waiting to be taken down. The judge is acting as an agent in their social role rather than in their individual capacity.

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[257] ibid 276.
[258] ibid.
[259] ibid 277.
[260] This links to the law-jobs theory's concepts of removing or preventing the trouble-case and ensuring net societal drive.
[261] Gewirth, *Reason and Morality* (n 3) 277–278.
[262] ibid 278.

The ability to rationally differentiate between the agents, and the roles they play in the interaction, provides the first part of the justification for impeding the rights-claims of agents. However, Gewirth reminds us that that is not alone sufficient; rules may be morally wrong and so the judge could still be acting in a way which is impermissible.[263]

What is needed is a way to consider whether the rules are justified by the PGC and, therefore, remain morally defensible. Where rules are clearly in line with the PGC (for example, a prohibition on harming the well-being of someone) there is clearly no problem with justifying them; they justify themselves by simple deduction. The same cannot be said where the rules appear to conflict with the PGC.[264]

One possible way to justify harm in accordance with the rules is if it is an expression of the agent's voluntariness in the first place. This may seem counter-intuitive, but as we will see it is not necessarily so. There are a number of groups which are an extension of an individual's freedom. These can be because individuals choose to be bound by the rules that already exist and/or there are procedures available which allow for the consensual participation in rulemaking of all those who are subject to them.[265] On the other hand, there are some which, whilst those subject to their rules may not voluntarily agree to them, exist to protect and extend the well-being of group members.[266] We will consider this in more detail below.

Gewirth refers to the former as procedural justification and the latter as instrumental.[267] Crucially, at this point in his discussion of the PGC he suggests a modified formulation of the individual-centric exposition to explain what an agent is logically obliged to accept in respect of societal rules, that is to say

> *'All other persons ought to do X in relation to me because I am Q; therefore I ought to do X in relation to them because they too are Q'. Here, however, 'do X' consists directly not in acting in accord with the generic rights of one's individual recipients but rather in acting in accord with social rules justified by the PGC.*[268]

This formulation is, in the same way as the individual-centric exposition, based on an internal, rational, logical reasoning. A person who acts in accordance with procedurally justified rules does so in accordance with an exercise of their rights-claim to freedom.[269] Similarly, a person who acts

[263] ibid.
[264] ibid 280.
[265] ibid 281.
[266] ibid.
[267] ibid 282.
[268] ibid.
[269] ibid.

in accordance with an institutionally justified rule does so in accordance with their rights-claim to well-being because the rules protect and support the well-being of agents.[270]

Procedurally justified rules are further broken down into two groups:

- Optional-procedural – where all members must consent to the rules; and
- Necessary-procedural – where the rules are binding on all those to whom they are applied but only where those rules have been determined by a method of consent which people are able to participate in.[271]

Instrumental justification, on the other hand, is broken down by Gewirth into phases rather than groups.[272] These represent the different states of being of the agents rather than their level of engagement and consent to the relevant rules. The first phase, *static*, is about preserving and protecting the existing rights-claims of agents where agents have equal and effective access to their rights without interference.[273] Criminal law is an example of law which can be justified by a static-instrumental application of the PGC. The *dynamic* phase is engaged where societal rules seek to remove an inequality in effective access to rights-claims.[274]

Both are, according to Gewirth, corrective and distributive, acting to either distribute penalties to those who violate the equality of basic rights or to (re)distribute component parts of well-being.[275]

The PGC must, in order to be a useful principle, be capable of guiding agents to resolution of conflicting rights-claims where they are both founded in the PGC. Gewirth sets out three criteria which should be capable of resolving the conflict and determining which right-claim takes precedence.[276]

The first principle is the principle of prevention or removal of inconsistency.[277] This principle may justify action in order to prevent or remove an inconsistency of treatment in circumstances where one person or group has violated or is about to violate the generic rights of another. Whether or not action is, in fact, justified depends on a number of circumstances including how important it is to actually remove the inconsistency and whether it is even feasible to do so.

[270] ibid.
[271] ibid 283–284.
[272] ibid 292.
[273] ibid.
[274] ibid.
[275] ibid 294.
[276] ibid 342–350.
[277] ibid 342–343.

The second principle is the principle of necessity for action.[278] This principle for resolving conflict essentially directs that where goods are necessary for action, an agent's duty to respect another's claim to the goods takes precedence over that agent's own claim in circumstances where the goods are more necessary for the other agent's action.

The third principle is the principle of institutional requirements.[279] This principle, according to Gewirth, applies where "many persons interact in a complex society".[280] This principle states that there must be rules which govern interactions; in some cases these will be voluntarily agreed to and in other cases they are imposed in order to prevent serious harm of some persons by others. Crucially, Gewirth considers that the harm can include the "disorder and unpredictability that result from the lack of uniform rules".[281] Institutional requirements take precedence over an individual agent's rights-claims only where they comply with certain conditions, namely:

- they are necessary to prevent undeserved coercion or serious harm;
- they do not go beyond what is needed for such protection;
- the coercions are slight by comparison to the harm they seek to remove;
- they are imposed by the procedures of the method of consent.[282]

These principles demonstrate the completeness of the PGC; not only does the PGC provide an internally coherent argument for the existence of rights-claims merely by reason of being a potential agent, it also provides an internally coherent set of principles for resolving conflicts between the rights of agents.

A Practical Rule of Law Framework

In the preceding sections we have discussed Bingham's rights-based "thick" concept of the rule of law, seen from an anthropological viewpoint why law and legal systems occur, and then worked through the argument of Gewirth that individuals must both claim rights to their own freedom and well-being and accept the right of others to do the same. We have also seen, as a logical extension of that position, that the State can interfere with the individual exercise of rights so long as it does so in a way which itself is compatible with Gewirth's PGC.

In this section, we will see how approaching the idea of the rule of law from an anthropological starting point leads to the adoption of a "thick" concept of the rule of law. I will develop a

[278] ibid 343–344.
[279] ibid 344–345.
[280] ibid 344. It is worth noting that in the theory I develop in the next section I argue this principle is engaged even in simple society.
[281] ibid.
[282] ibid. In respect of the comparison between coercion and harm, Gewirth refers to the 'taxational' coercions.

framework of the rule of law based on the anthropological understanding set out earlier; it will contain two core principles, placing the individual at the centre of their interaction with the State; and three operational principles which protect the rights of, and empower, individuals within the group to have the maximum potential to exercise their rights to freedom and well-being and achieve their goals.

CORE PRINCIPLES OF THE RULE OF LAW

Principle One: Sovereignty of the Law is Confederal

Llewellyn's theory tells us that, anthropologically speaking, individuals will always form into groups of some type. These groups could be on the microlevel, such as families or hamlets, or the macrolevel such as tribes or society at large. This allows individuals to access resources and skills they do not possess, helps to focus on a common direction and, ultimately, helps individuals within the group to survive and thrive in a way they would be unable to if they acted as individuals.

However, it goes on to warn of group disintegration where the group does not adequately ensure the engagement of its members either by allowing them too much individual freedom or by being so authoritarian that they interfere with individual freedoms too much. The possibility of group fracture at the very least suggests, from an anthropological point of view, that sovereignty vests within the individuals, and a particular group exists only to the extent and duration the members suffer it to exist.

The same logic can be seen, perhaps with more force, in the exposition of the PGC and Gewirth's discussion of its indirect application. The PGC recognises the sovereignty of the individual, indeed it goes so far as to say that individuals must recognise and claim their right to freedom and well-being and that others have the same rights on pain of contradicting their status as a PPA; it also, in discussing the indirect application of the principle, recognises there are a number of situations in which an individual will benefit from accepting that their rights are somewhat constrained.[283]

Crucially, Gewirth tells us that an individual accepting a constraint on, or interference with, the exercise of their rights to freedom and well-being is, in and of itself, an exercise of their freedom. Under the indirect application of the PGC it is justifiable for rules to govern the behaviour of group members. This is because either they have chosen to be bound by the rules (including implicitly consenting via mechanisms which allow for their participation in rulemaking, such as the democratic process), or because those rules exist in order to protect their well-being.

[283] It is for that reason I said earlier in the thesis that the PGC provides a compelling companion to the law-jobs theory.

In both the law-jobs theory and the PGC the primary power vests in the individual; they have, and must claim, a right to freedom and well-being which they may assert against all others. This can only be interfered with by the group in a way which is intended to protect the ability of individuals generally to act in accordance with their own wishes or where doing so improves the freedom and well-being of the individuals by ensuring a cohesive group which enhances the ability of members to thrive.

This represents the first, and core, principle of a functional concept of the rule of law; the individuals within a group are sovereign and those structures which are charged with creating, maintaining, and enforcing the law (that is, the State) do so as agents of the group. Any interference with the freedom of the individuals must be the minimum necessary to achieve the aims of the group.

Principle Two: Freedom and Well-being of Individuals is the Prime Function of Law

The second principle of a functional framework is, in essence, the direct application of the first principle. If the continued survival of a group, and the legitimacy of the governance of that group, are contingent on sufficient members of the group being able to thrive and achieve their goals then the freedom and well-being of those members must be the prime function of a legal system.

This does not, however, import a requirement that the freedom and well-being of any particular individual is immune from any form of interference or infringement. As we saw in the earlier discussion of the PGC, there are a number of reasons why some interference may be permissible. This may be, for example, to protect the life of others; it is impermissible for the law to allow anyone to simply elect to kill someone else because to do so would remove that other person's freedom and well-being. In other instances, it is permissible to interfere with the freedom and well-being of individuals because it will enhance the freedom and well-being of group members generally.

For example, it is permissible to interfere with an individual's financial freedom and economic well-being by levying, and enforcing, taxation because it maximises the possibility of the highest possible well-being of the highest number of group members. The provision of education and health services leads to a healthier and more productive society, and therefore a greater chance of fulfilment for its members, whilst the provision of services such as regulation and policing exist to protect the freedom of individuals or to provide certainty for them to take decisions.

Operational Principles of the Rule of Law

The core principles set out above describe the relative position of the individual to the law and what the main, overriding, purpose of law is. However, on their own, they are not sufficient to create a functional framework of the rule of law because they do not tell us how the law needs to

behave in order to respect those principles. Therefore, we need to consider the key elements of a framework which sets out how group survival and thrive is most likely to be achieved.

As we saw above, the logical conclusion to draw from Llewellyn is that a group is a confederacy. It is worth unpacking that a little further here before we can fully consider what that means in practice. Llewellyn tells us there is a benefit to individuals in belonging to a group and also that the group then needs to exercise some control in order to maximise net societal drive, in turn maximising the benefit to each individual of their continued membership. In that sense, the group is acting on the agency of the individual members in the areas those members have given it agency. By considering the relationship between individuals and groups as an agency relationship, with the group exercising only the power the members allow it to, we are also able to comply with the indirect application of the PGC and avoid the risk of self-contradiction. Gewirth's indirect application tells us one of the ways in which a group may act to overrule the individual members is where that action is consistent with rules the member has impliedly consented to. Such an application is only ethically valid where the implied consent has arisen because the rules are established via a system that allows for the involvement of individuals and which the group, on the whole, accepts as an expression of implied consent.

The operational principles we see in the remainder of this section are a set of principles which seek to set out the key pillars of the confederal agency relationship between the individuals and the group. They offer an individual-centric account of the relationship, putting the individual's rights to freedom and well-being at the heart of the relationship.

Principle Three: Equality Under the Law

The law should apply equally, and with the same outcomes, to all unless there is a sound, objective, reasonable, rational reason to apply the law differently to different groups. This principle provides confidence to individuals that the law will not treat them any differently to anyone else, allowing them a level of comfort that the consequences of their decisions are predictable and thus increasing their freedom.

This principle applies horizontally, ensuring that all individuals are able to be certain other individuals are subject to the same law and the same legal consequences unless there is an objective, rational, reason why there is a different consequence. It also applies vertically, between the individual and the group ensuring that the group is subject to the application of the law and legal consequence and that agents of the group act only within the powers the group has given them.

Principle Four: Clarity in the Law

This principle requires that the law is accessible, easily accessed, and clear. Again, this helps to maximise the freedom of the individual, giving them as much certainty as is possible as to what the consequences of their free choice will be. It empowers individuals to assert their rights, ensuring that any interference with them is both lawful and the minimum interference necessary to achieve the legitimate aim pursued.

Principle Five: Effective, Fair, Mechanisms to Deal with Rights-claims and Dispute Resolution

This principle is the one which gives practical effect to the principles set out in the rest of the toolkit. It acts to preserve the sovereignty of each individual, giving them a way through which they can act to enforce or protect their rights and limit any interference with them to the minimum necessary to achieve a legitimate aim of the group.

The most obvious application of this principle is that it mandates a fair, accessible, and effective judicial system which provides a mechanism for individuals to enforce the law and, in doing so, maximise the protection for their freedom and well-being. This might be, for example, an action for damages where someone has injured them, or it might be a dispute between two people about how a contract should be performed. Crucially, it may also be an action to prevent the State from unnecessary interference in their freedom or to obtain recompense where the State has already interfered to an unnecessary degree.

This principle, however, goes further than mandating a judicial system. It is the principle which underpins the ability of the State to interfere in the lives of individuals in the first place. If we return to the law-jobs theory, we will see that it tells us a core role of the group is to deal with the "trouble-case" in order to maximise net societal drive and, in more extreme cases, prevent group fracture. Similarly, in the indirect application of the PGC, Gewirth tells us it is permissible for the group to act in order to balance the competing rights of individuals in a way that, on the whole, increases freedom and well-being.

The State, therefore, has a role to play outside of simply providing a court or tribunal service. For example, a well-resourced, properly constituted, regulator can ensure individuals are protected and can take action to resolve any potential infringement of individual rights by other individuals. A robust regulatory regime can maximise individual freedom of choice because it can give individuals a level of comfort that their interests will be protected, that they will be treated fairly, and that there is recourse available if they are not.

Likewise, effective enforcement of the law can give rise to protection of an individual's rights-claim by protecting that individual's freedom and well-being. It can deter individuals from harming others, punish those it has not deterred and prevent further harm by those individuals. The key to effective law enforcement, however, is that the law it is enforcing is seen to be an

expression of the will of the collective members of the group; if law enforcement, for example, is used as a tool of oppression it loses its legitimacy because it has broken the core principles set out at the start of this toolkit.

The final pillar of this principle is an effective and accepted system for deciding which rights-claims are to be prioritised and what the net societal drive of the group should be. In other words, a system for expressing the will of the group in a way which individuals accept is valid is needed in order to provide the necessary mandate for the State to act as the agent of the individuals in managing competing rights-claims in a complex society. Within our current legal system this is achieved through parliamentary democracy. Although individuals may not agree with the content of each law Parliament passes, and by extension the value judgement of the competing rights-claims Parliament has made, the law can still be legitimately enforced because society has had a collective input into that decision.

This principle can be summed up then, by saying this: in order to maximise the freedom and well-being of individuals, and the well-being of society as a whole, individuals must be given a say in the decisions that set that drive and rank competing interests, there must be a framework for the State to enforce that on their behalf, and they must have the right to nevertheless individually assert their freedom and well-being has been unnecessarily interfered with and to seek a remedy if that is found to be the case.

Conclusion of This Part of the Thesis

In this part of the thesis, I began by setting out, at a high level, a recap of the work which has so far been undertaken in this research project, identifying what still needed to done to answer the research questions. I then set out and considered the Law Commission's work on search warrants because it is clearly of some relevance to this work.

I set out Bingham's rule of law principles and showed how, from an anthropological point of view, we are pushed towards accepting a "thick" concept of the rule of law. From a combination of the law-jobs theory and the PGC we were also able to distil a practical framework for the rule of law. We are now ready to move onto part two of the thesis, where we will consider research paradigms, ethics, methodology and methods.

PART TWO: DRAWING THE PLANS – PARADIGMS, ETHICS, METHODOLOGY AND METHODS

INTRODUCING THIS PART OF THE THESIS

In this part of the thesis, I begin by recapping the research paradigms and then moving onto briefly discuss the ethical implications of the research. Following that I will canter through the methodology and finally set out the method for this part of the research. As with the previous part, much of the in-depth work on the paradigms, ethics and methodology has been dealt with in the previously examined parts of the doctorate; as such, I am not engaging in detail with it here in order to devote the word count to setting out the argument for why the "thick" rule of law is to be preferred and for analysing the results of this research.

PARADIGMS

Guba asserts that it is for a researcher to set out their research paradigm within the context of their research.[284] He suggests the concept of a paradigm defies clarity of meaning.[285] Nevertheless, he goes on to set out three questions which, he says, make up a paradigm:

1. Ontological – what is the nature of reality?
2. Epistemological – what is the relationship of the inquirer to it?
3. Methodological – how should the inquirer go about finding knowledge?[286]

In the previous research, I rejected that formulation.[287] Morgan criticises the three question formulation because it has become an end in and of itself pushing researchers from looking at

[284] Egon Guba, 'The Alternative Paradigm Dialog' in Egon Guba (ed), *The paradigm dialog* (Sage 1990) 17 <http://www.jstor.org/stable/3340973>.
[285] ibid; citing Margaret Masterman, 'The Nature of a Paradigm' in Imre Lakatos and Alan Musgrave (eds), *Criticism and the growth of knowledge* (Cambridge University Press 1970) as claiming Khun uses the term in at least 21 different ways.
[286] Guba (n 284) 18.
[287] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 2: Epistemology and Identity' (n 19) 4–7; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11) 3–4; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18) 3–4.

outcomes and practising some form of "higher level belief system".[288] He suggests Khun's work actually expresses a preference for a paradigm rooted in research communities and practice.[289]

Such a paradigm involved four characteristics:

1. Problem(s) regarded as significant to the advancement of knowledge;
2. A shared understanding within an area of practice as to what techniques are appropriate for investigating the problem;
3. A shared sense of identity; and
4. A research community.[290]

The Communities of Practice paradigm is not without criticism; there is a concern that it causes long-term theoretical knowledge to suffer at the hands of short-term practical research.[291] Denscombe, however, considers those concerns to be unfounded where there is no distinction between practitioners and academics, for example in mixed-method research.[292] Additionally, the paradigm is already accepted, and considered valid, in scientific disciplines.[293]

Denscombe's point is particularly relevant when considering legal research. Much of the research in law, both academic and practitioner, is doctrinal and so there is little distinction to be found between the two branches of research. It is, perhaps, also the case that all legal research contains an element of the long-term; although practitioners are arguably focussing on the particular set of facts and legal issues, they must have in mind the potential for precedential value.

In the previous research I have considered my identity in detail in order to identify my communities of practice and to justify my claim to belong to them.[294] That discussion stands and so is not repeated here. My communities of practice are:

- Law enforcement;[295]

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[288] David L Morgan, 'Paradigms Lost and Pragmatism Regained: Methodological Implications of Combining Qualitative and Quantitative Methods' (2007) 1 Journal of Mixed Methods Research 48, 53.
[289] ibid.
[290] Martyn Denscombe, 'Communities of Practice: A Research Pradigm for the Mixed Methods Approach' (2008) 2 Journal of Mixed Methods Research 270, 275.
[291] Phil Hodkinson, 'Research as a Form of Work: Expertise, Community, and Methodological Objectivity' (2004) 30 British Educational Research Journal; Martyn Hammersley, 'What Can the Literature on Communities of Practice Tell Us about Educational Research? Reflections on Some Recent Proposals.' (2005) 28 International Journal of Research and Method in Education 5.
[292] Denscombe (n 290) 277.
[293] Morgan (n 288) 53.
[294] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 2: Epistemology and Identity' (n 19) 12–18; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11) 5–6; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18) 5–7.
[295] Whilst I recently moved to a role which does not involve advising on law enforcement the majority of my career has been spent working within the wider ambit of law enforcement. I have advised on the use of powers, defended the use of powers, and exercised powers myself.

- Legal practice; and
- Academic.

Public law and human rights act as a thread which pulls the three communities together. The communities are key to this thesis because they form the basis of the claim of validity of the research I set out in the introduction. The Communities of Practice paradigm recognises validity of research because it is undertaken in way which practitioners within the relevant communities would recognise as an acceptable and valid way to undertake the research in question.

ETHICS

It is a requirement of a doctorate that candidates are able to demonstrate they have undertaken their research in an ethical manner. In previous documents I have engaged in a detailed discussion of the ethical constraints placed upon me in my capacities as a civil servant and a lawyer and that discussion remains relevant here.[296]

In this final piece of research, I remain bound by the Civil Service Code and the SRA Code of Conduct for Solicitors, RELs and RFLs.[297] As with previous work, this means I am unable to comment on Government policy or include any commentary which could be seen as political. The main impact of the codes of conduct is one which has brought about a change in the project research plan I set out in document one of the research.

Originally, for this thesis, I had intended to draft a piece of legislation and then consult on it in order to mimic the process new legislation would go through. The consultation would have involved contact with profession related media such as the Law Gazette in order to publicise the consultation and so maximise participation. However, the Civil Service Management Code was updated in 2016 indicating that civil servants should not have contact with the media without prior approval of the relevant Minister. It is not clear how this would apply to the publicising of a survey relating to doctoral research, but out of an abundance of caution I elected not to proceed with the original plan and instead to refocus the research project into a doctrinal analysis based on a theoretical framework.

[296] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 2: Epistemology and Identity' (n 19) 24–28; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11) 40–43; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18) 37–43.

[297] Minister for the Civil Service, 'Civil Service Code' <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>; Minister for the Civil Service, 'Civil Service Management Code' <https://www.gov.uk/government/publications/civil-servants-terms-and-conditions>; Solicitors Regulation Authority, 'SRA Code of Conduct for Solicitors, RELs and RFLs' <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>.

METHODOLOGY

In this section I will set out, and discuss, the methodology which underpins this research and the design of this particular part of the research project.

I begin by focussing on the methodology, explaining why it is necessary to include discussion and setting its parameters before moving on to provide a high-level overview of the debate about legal research methodologies. The debate seems to centre around four main propositions:

1. There is no distinctive methodology in legal research;[298]
2. Almost all legal research is doctrinal;[299]
3. Almost all legal research is empirical;[300] or
4. Almost all legal research occurs on a spectrum and is likely to contain elements of both.

I conclude, as I have in other documents in this project, that my research is largely doctrinal but contains some empirical work.

I then go on to set how I have designed the research and why that will answer the research questions in a way which is ethically sound and which ensures this research is valid.

DISCUSSION OF RESEARCH METHODOLOGY

Recap of Discussions Undertaken Previously in the Research Project

In the previous work I rejected Posner's claim that there is not a distinctive methodology in legal research.[301] Legal research requires engagement with the law, and with legal theory, using the skills, knowledge and training of a lawyer. It requires, according to Duncan and Hutchinson, knowledge of a specific language and depth of thought.[302]

McConville and Chui claim legal research can be categorised as doctrinal, empirical or international and comparative.[303] Doctrinal law is, they say, isolated from the real world whereas empirical seeks to use a range of applied science methods to put law in context.[304] In much the

[298] Richard A Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline' (1988) 38 Toronto Law Journal 333, 345.
[299] Paul Chynoweth, 'Legal Research in the Built Environment'.
[300] Lee Epstein and Gary King, 'Exchange: Empirical Research and the Goals of Legal Scholarships' (2002) 69 University of Chicago Law Review 1, 2–3.
[301] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11) 24–40; Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18) 18–35.
[302] Nigel Duncan and Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' 17 Deakin Law Review 83, 99.
[303] Mike McConville and Wing Hong Chui, 'Research Methods for Law' 3–7.
[304] ibid 4–7.

same way, Cane and Kritzer see doctrinal and empirical legal research as distinct things.[305] There are, according to Chynoweth, vast epistemological differences between legal and scientific research; legal research relies on consensus for its validity whereas scientific research rests upon a recognised process of collection.[306]

The Law is a Toolkit, Not a Neat Methodology

The positions set out above are problematic. Each of them seeks to drive a wedge into the research landscape and to disconnect research of the law from research of how the law functions. It is not, however, possible to consider the law in complete abstract, especially within a common law jurisdiction. The law is, at its heart, a toolkit that guides how problems can be dealt with and resolved. It is formed from, and establishes, a set of principles which must then be applied to the given situation in order to fully understand the impact of the law. Approaching research in the law by attempting to interpret the written word in absence of the world around it is much the same as opening the toolbox but leaving all the tools in place; it is impossible to know if the screwdriver head fits the screw without taking the screwdriver out of the box and trying to fit them together.

According to Epstein and King such an issue is the result of lawyers misclassifying their research. As it is connected to the real world, and creates facts about it, the research is empirical.[307] This is equally problematic. Classifying work as empirical does somewhat risk undermining the skills and language which is unique to the law because it fails to recognise their presence in legal research methodology. Taken to its extreme, this could suggest that legal research is focussed entirely on the problem but takes no account of the principles which guide a solution.

The position that legal research contains both doctrinal and empirical elements is one that makes the most sense to me. Clearly, even the most doctrinal of research will still be considering how the law has been applied and what the outcome of that application is, because that is at the very heart of legal interpretation. On the other hand, even the most empirical of research will need to have a mind to what law is being researched and what principles that law establishes.

Applying the Methodology to This Research

This research involves law and law reform. As we will see in later sections of the thesis, it is largely informed by a combination of legal theory and my experience within the law enforcement and legislative drafting communities. The research relies on an anthropological study to establish a practical toolkit, which is intended to link the anthropological basis of legal systems to the

[305] Peter Cane and Herbert M Kritzer, *The Oxford Handbook of Emperical Legal Research* (Oxford University Press 2010) 4–6.
[306] Paul Chynoweth, 'Legal Research' 30.
[307] Epstein and King (n 300) 2–3.

society in which they seek to function. Clearly, therefore there is an empirical element to this work.

It goes on, however, to consider the drafting of legislation in order to determine if the landscape of powers of entry could be altered in such a way as to make it more compatible with the rule of law. This sits squarely within the doctrinal sphere and, I would argue, represents the main thrust of answering the research questions.

Considering both elements, I would describe this research as doctrinal but with significant empirical influence.

When considering the classification of the research methodology I wondered to what extent it really mattered which classification was applied. There is not, as far as I can tell, a definite view on where doctrinal research becomes empirical or what the tangible implications of the debate are. The key information needed in order to understand how the research has reached the conclusions it has is what has influenced the research and how it has influenced it; classifying each element as doctrinal or empirical does not add anything in particular to the quality of the information.

In setting out the research design below, I must therefore consider how my reliance on my professional skills as a qualified solicitor and my experiences within some of the relevant fields impacts the research.

The first thing to say is that it would be entirely possible for another researcher to follow the design I set out and to come to a different conclusion. That does not, however, invalidate either the method or the conclusion itself. It is a necessary outcome of a legal research project that involves the interpretation of legal theories, the law, and the "real world".

I will need to bear in mind, and identify, where my "real world" experience is influencing my choices and set out how it has done so in order to make it clear why certain research decisions have been made. I will also need to keep it in mind in the discussion of the research and in any conclusions that I form.

Research Method

In order to assess whether it is possible to make the landscape of powers and the oversight of it more compliant with the rule of law, it is necessary to see if it is possible to draft legislation which consolidates the landscape in an accessible manner and which strikes a defensible balance between the rights of individuals and the need to exercise powers.

I will draw on my experience of drafting legislation to produce something tangible on which to base a discussion and conclusion about the possibility of reforming the landscape to make it more

consistent with the rule of law we discussed in part one of the thesis. We will seek to understand if it is possible to draft legislation which is clearer and more accessible, minimises the intrusion into individual liberties and privacy, contains mechanisms to prevent infringement of those liberties, and preserves the ability of the State to exercise its confederated agency to maximise the potential freedom and well-being of the maximum number of members of the group.

As we saw in the introduction, the touchstone of the research questions this project considers is the rule of law. Although I concluded in the section on research methodology that this thesis is doctrinal, the discussion section of the thesis will not include analysis of the case law or, except where it provides a helpful illustration of a point, current statutory provisions. The primary reason for omitting analysis of case law and current statutory provisions is that it does not advance the consideration of the research questions within the context of the draft legislation. Whilst such an analysis might show how the draft legislation differs from the current landscape, and how current case law might apply to it, it would not assist in determining whether the landscape can be rationalised in a way that improves compliance with the rule of law and balances the competing interests of the State and individuals.

Instead, a descriptive narrative approach will be taken. It will draw out particular parts of the draft legislation and explain what it is intended to achieve. This will be assessed against the principles in the practical rule of law framework, and Bingham's principles, to demonstrate how the draft legislation achieves compliance with rule of law principles. In that sense, the research is doctrinal in nature but, because the draft legislation will be informed by my practitioner experience it also contains a significant empirical element.

CONCLUSION

In this part I have set out the paradigm, ethics, methodology and research method which underpin the research undertaken in this thesis.

By rejecting the usual paradigm formulation and, instead, opting for the communities of practice paradigm I am left to establish the validity of this research by reference to my communities of practice; I have already set out my claim to validity in the introduction to the thesis.

Although I have only touched on the ethics discussion briefly in this part of the thesis, the impact of my codes of conduct can be felt throughout the both the research project as a whole and this thesis as a stand-alone document. They have, in some ways, added to the challenge of completing this research. In particular, by placing constraints upon my freedom of speech it has caused me to have to ensure that certain parts of the research project, and this thesis, are carefully worded in order to comply with the Civil Service Code. However, they have also provided an opportunity that might otherwise not have presented itself; by removing the

possibility of issuing a consultation, the Civil Service Code forced me to refocus and engage with the theories which underpin my world view and concept of the rule of law. On reflection, I think the thesis is the richer for it.

Lastly, I have set out how I intend to take us through the process of creating the research output which will allow us to answer the research questions. It is now time for us to turn to the main building work; we will now rebuild the Englishman's castle.

PART THREE: REBUILDING THE CASTLE – DISCUSSION

INTRODUCING THIS PART OF THE THESIS

As I mentioned earlier, I have drafted two pieces of 'legislation'. In this part of the thesis, I will analyse them and assess whether either of them creates a landscape which improves compliance with the rule of law. I have called the first one the "Access to Information, Powers of Entry, and Associated Powers Act 2020" and the second one the "Constables Powers, Powers of Entry and Associated Powers Act 2021".[308] I have used 2020 and 2021 so that, as we work through this part, it will be clear which of the two pieces of draft legislation I am referring to. Although these are clearly not real pieces of legislation, for ease and clarity of expression I will refer to them simply as the "2020 Act" and the "2021 Act". For the avoidance of doubt, I do not intend to give the impression in this part of the thesis that I am referring to actual or prospective Acts of Parliament.

The 2020 Act, which we will consider first, is an attempt to consolidate the landscape of powers identified in document three of the research project without making substantive changes to the powers or the conditions and safeguards attached to their use. As will become clear, the 2020 Act would require a lot of general language with cross references to specific information in Schedules (some of which would then need to cross reference to other pieces of information). The 2021 Act, on the other hand, does not attempt to consolidate the current powers; instead, it tests whether a reimagined landscape can be translated into functioning legislation. The landscape is created by applying a law-jobs lens to a blank canvas, identifying the types of agencies which have law-jobs functions which require powers and then, drawing on the PGC and the practical rule of law framework set out earlier in this thesis, balancing the rights of the individuals against the needs of the agency in performing its function.

THE 2020 ACT

The 2020 Act contains a number of provisions which set out the powers which can be exercised. It starts with powers relating to information, followed by powers of entry and then powers which can be exercised on premises. The powers are based on the classifications I created in document three; however, they have been separated from the powers of entry which are used to "switch on" the powers.[309] The Act would have had provisions relating to the granting of warrants and to oversight of the use of powers. As can be seen in Appendix 1, however, I have not completed the

[308] These can be found at Appendix 1 and Appendix 2 respectively.
[309] The classifications are reproduced at Appendix 3.

draft; this is because it had become clear consolidating the powers in this way would not lead to a more rule of law compliant outcome.

In order to rationalise the number of powers, whilst maintaining the current conditions and safeguards for each one, it is necessary to create a generic power and then to put most of the operative provisions into Schedules to the Act. This does create the advantage of having all the powers in one place and so does make the law more accessible; superficially, it is more compliant with the rule of law.

However, in order to give all the relevant agencies access to the powers they currently have, each power would refer to a Schedule which listed those who could exercise it. As we will see later, the same happens in the 2021 Act but because of the underlying basis on which it is drafted the outcome is significantly different. Preserving the current landscape in the 2020 Act means that a legislation user would need to read every Schedule to ascertain which of the powers were available to any given officer because the "indexing" of the Act is driven by the powers. This makes it inaccessible, particularly to a lay user with limited understanding of the structure of legislation and who would be expecting to find a clear exposition of the powers each organisation had. The complexity would be such that it is unlikely such a structure would lead to better compliance with the rule of law even though the powers were all in one Act.

Attempting to preserve the current conditions for use of powers, and the associated safeguards, leads to added complexity. For example, the powers shown in part 1 of Schedule 2 and part 2 of Schedule 3 cross refer to other Acts under which the conditions are set out. This would lead to a legislation user, once they had determined which of the powers in the Act were available to a person to use, then having to cross-refer to various different pieces of legislation in order to understand whether the power could have been exercised in the particular circumstances.

Some of them also refer to someone being authorised by an appropriate Minister; again, this would require a legislation user to undertake a research exercise in order to ascertain if the person exercising the powers was properly authorised to do so.

Although the consolidation does, superficially, make the legislative landscape more accessible, the complexity which follows from that consolidation actually serves to make the law less accessible. This would, in turn, mean the outcome was likely to reduce adherence to the rule of law, rather than enhance it. It would make the legislation incredibly difficult to use, reducing the accessibility and clarity for the users and reducing compliance with Bingham's first principle, and principle four of the practical rule of law framework.[310]

[310] The law must be accessible, and so far as possible, intelligible, clear and predictable; clarity in the law.

There are also some indirect consequences of the consolidation and its complexity. For example, by increasing the complexity and making the law less accessible to a lay user it is less likely that unlawful exercises of powers will be identified and challenged. Where they are identified, the additional work in forming the opinion that an exercise of the power is liable to challenge may lead to a delay in the challenge being brought. It may also lead to a significant cost in investigating the potential unlawful use of the powers and bringing the necessary proceedings. This has a knock-on effect of making it harder to stop, mitigate, or repair the harm caused to the person against whom the powers have been exercised. This reduces compliance with Bingham's sixth and, potentially, third principles; it also reduces compliance with principles three and five under the practical rule of law framework.[311]

This means a landscape such as the one the 2020 Act would create potentially decreases the likelihood that the law is applied equally to all; where the law is difficult to navigate, those who are least able to engage with it are most likely to suffer unfair and unlawful exercise of power. That creates an unequal application of the law, based purely on ability to engage. It also creates the potential practical reality that those with the means to afford the expert advice they need, and to risk the award of adverse costs if they are not successful in their challenge, achieve a better outcome.

Taken together, the decreased compliance with the principles also means the landscape under the 2020 Act is less likely to provide adequate protection for fundamental human rights. First, the added complexity is likely to make the powers just as difficult to understand for those using them and so increases the risks of inadvertent human rights infringement. Second, the reduced ability to challenge the exercise of the powers means individuals are less able to actively assert and protect their own fundamental rights.

In document three of the research, I tentatively concluded consolidation was possible, and, as I set out in the introduction to this thesis, in document two I suggested it could be achieved by drafting in the way I have done for the 2020 Act. Having gone on to draft some of the 2020 Act, I am able to conclude such a consolidation would, far from resulting in greater compliance, be likely to lead to a reduction in compliance with the rule of law. To borrow from the Law Commission, with whom I agree at least in respect of a consolidation of the landscape as it exists, "the disadvantages of consolidating all search warrant provisions outweighs the benefits".[312]

It would have been possible to leave this research there; after all, the 2020 Act does appear to definitively answer the research questions in the negative: it is not possible to both consolidate

[311] Means for resolving *bone fide* disputes not to be subject to inordinate delay or prohibitive cost, and equal application of the law; equality under the law, and effective mechanisms for rights-claims and dispute resolution.

[312] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 250.

the landscape and increase compliance with the rule of law. However, there is a different approach to consider. Rather than looking to consolidate the existing powers, conditions and safeguards, we could apply a different lens and look to create a new landscape from scratch.

CREATING A DIFFERENT LANDSCAPE

In order to create a new landscape, we need to find a way to create a foundation which provides us with a set of principles we can then use to guide its creation. In part one of this thesis we saw that it is possible to ground the concept of the rule of law in an anthropological, rights-based, framework that tells us the role of the law is to manage the tension between individual wants and needs and group/societal needs. I am using examples from law enforcement because that is the area with which I am most familiar; I am sure, however, there are likely to be similar anomalies in other areas of entry powers.

THE GROUNDING OF A NEW LANDSCAPE

In order to create a new landscape, it is necessary, in order to help ensure compliance with the practical rule of law framework, to have regard to why it is necessary to have agencies with powers. Both the law-jobs theory and the PGC contain the concept of people being empowered in a way which allows them to interfere with the actions, wants and rights of others. The law-jobs theory tells us that each group will need to have structures in place to try to deal with the centrifugal forces. The PGC tells us it is permissible for the rights of individuals to be infringed in order either to protect other individuals from harm or to enforce rules which have been applied to the group. Both theories also warn against infringing too greatly on the freedoms and rights of the individuals; the law-jobs theory tells us that if the infringement is too great it will increase the risk of group fracture, and the PGC tells us that that it is impermissible from a rights-based perspective to interfere with the rights and freedoms of individuals by more than is necessary to protect the rights and freedoms of other members of the group or to enforce the rules of the group.

The underlying consideration, when looking at the law-jobs and the indirect application of the PGC, is the function of the job being performed. The closer the function to the fundamental functioning of the group, the greater the permissibility of the interference with the individual's daily life. In order to begin to reimagine the landscape, therefore, we need to start to think in terms of the specific jobs or functions of the agency to which we are considering giving powers. Focussing on the function the agency performs will help to design out the current anomalies, such as the fraud example set out at the start of the thesis.

Designing out the anomalies, equally as importantly, ensures the jobs which are needed to maintain equilibrium are kept separated and focussed. If we return, briefly, to the arena of law

enforcement which was the original inspiration for this research project we will be able to see an example of how the edges of the jobs have become blurred.

Under the current landscape, the powers available to law enforcement are haphazard; they are partly determined by the sanction which is applied to the person who is not complying with the law and partly determined by the political situation in which they are legislated for.

Law enforcement has evolved in a piecemeal way, with many of the responsibilities being added to the office of constable but some being put into specialist agencies. Each of the specialist agencies will operate different powers to those available to constables, even where the thing under investigation is a criminal offence. The example given in the introduction about the investigative powers available to agencies investigating consumer facing fraud shows how the anomalies can have a real-world impact; the powers available to each of the agencies, along with the conditions and safeguards applied to them, are different and so the experience of people being investigated for the same or similar criminal conduct will not be the same.

There is another example which it is worth including here, as it demonstrates anomalies can exist within the same agency as opposed to just between agencies. The Competition and Markets Authority ("CMA") has the functions of investigating and enforcing against breaches of competition law and of consumer law. Within their investigative toolkit, they have powers to enter premises under warrant.[313] However, the processes for obtaining the warrants and the safeguards which are applied are vastly different.

The Competition Act 1998 ("CA") warrants are obtained by application to the Competition Appeals Tribunal or the High Court.[314] The Enterprise Act 2002 ("EA") warrants are by application to the High Court.[315] The CRA warrants are by application to a justice of the peace.[316]

The CA and EA warrants applications are both made under part 8 of the Civil Procedure Rules as modified by the relevant practice direction.[317] Both are to be made before a judge of the Chancery Division and can be made without notice. They must be made by claim form supported with an affidavit. The applications must name the officer who will execute the warrant and the names of those who will accompany the officer. These names must appear on the face of the warrant, meaning that the warrant only authorises entry by those individuals. The warrant must

[313] Competition Act 1998 s 28 and 28A; Enterprise Act 2002 s 194; Consumer Rights Act 2015.
[314] Competition Act 1998 s 28(1) and 28A(1) s 59 provides the definition of 'court' and 'Trbunal'. In practice, the CMA always applies to the High Court for its warrants.
[315] Enterprise Act 2002.
[316] Consumer Rights Act 2015 Schedule 5, paragraph 32(1).
[317] 'Practice Direction - Application for a Warrant under the Competition Act 1998' <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/appforwarrant>; 'Practice Direction - Application for a Warrant under the Enterprise Act 2002' <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/appforwarrant_comp_act2002>.

also state on the face of it the action it authorises, for example to search or to take possession of documents.

Both the CA and EA warrants are subject to an application to vary or discharge the warrant by the occupier of the premises against which the warrant is issued. The application to vary or discharge is made to a judge of the Chancery Division; the relevant practice directives state the application should be made before the judge who issued the warrant.

As mentioned just above, the CRA warrants are issued by a justice of the peace on application by an officer. In practice, this is likely to be in a magistrates' court and, as with the warrant application I made, before a District Judge (magistrates' court).[318] The warrant may be executed by any authorised officer who may take onto the premises any person they consider necessary. CRA warrants can only authorise entry; once an entry has been affected other powers are authorised by statute alone. There is no route to apply for the warrant to be varied or discharged; instead, the issue and execution of the warrant may be challenged by way of judicial review. The exercise of powers on the premises would also be challenged by way of judicial review, but the respondent and the focus of the challenge would be different.

The fraud example in the introduction shows how the same conduct investigated by different agencies leads to different powers being exercised by the different agencies; the example above shows how different conduct leads to the same agency exercising different powers, governed by different processes and safeguards. Yet the act of entering premises without the consent of the occupier leads to the same infringement of rights and the same harm regardless of the reason for that entry.

One non-law enforcement example exists within the emergency services. The Police and the Fire Service both have statutory powers of entry in relation to the saving of life or limb; the ambulance service appears to have no such power.

THE INHERENT TENSION BETWEEN INDIVIDUAL RIGHTS AND STATE POWERS

The key question, when assessing the balance of rights, is the purpose for which the entry is undertaken. The logic of that is the potential sentence which is available to a court is not relevant to the entry onto premises; it is sufficient for the purposes of assessing what powers are needed and what safeguard should be applied to focus on the point that the conduct under investigation is criminal.

[318] Trading Standards services are likely to apply to lay justices. Interestingly, and perhaps slightly alarmingly within the context of this thesis, there are a large number of judicial office holders who can act as a justice of the peace in a criminal cause or matter (including judges such as those who sit in the First-tier Tribunal) and so would be entitled to hear any application for a warrant which can be heard by a justice of the peace and able to grant that warrant - see Courts Act 2003 s 66.

If we accept that proposition, we then have the foundation on which to build a new landscape; rather than focussing on what follows after an agency has exercised powers, we can view reform through the lens of "law-jobs", considering what an agency exists for and what powers of entry and associated powers it may need in order to perform its law-jobs function.

Over the next few pages, we will see the jobs which arguably need to be provided with powers of entry and associated powers. When considering the potential powers, I am guided by the considerations set out in the practical rule of law framework set out in part one of the thesis.

I am mindful of the requirement to minimise the interference with the freedom and well-being of individuals; although, as we saw earlier in the thesis, the indirect application of the PGC allows for the rights of individuals to be interfered with, the interference itself must still be consistent with the PGC and so it must seek to do no more than is necessary to achieve the legitimate aim of the interference. The impact of the PGC will be most obvious in the difference in powers between law enforcement agencies and regulatory agencies.[319]

The decision by society to criminalise certain conduct sets it apart from other types of conduct. It marks it as something the group considers to be more detrimental to the group equilibrium; consequently, a higher level of interference is justifiable. This means it is possible to justify a deprivation of liberty in respect of criminal conduct where it is not justifiable in respect of non-criminal conduct. Whilst both law enforcement bodies and regulatory agencies will be engaged in the investigation of conduct which breaches rules society has imposed, from the perspective of the PGC the powers available to regulatory agencies must be less intrusive to the rights of individuals than those available to law enforcement bodies.

Once I have set out the jobs and powers, I will draft them into legislation and analyse them against the relevant principles of the rule of law.

LAW ENFORCEMENT

Perhaps the largest conceptual shift within this landscape is to reconfigure all law enforcement agencies (that is, those with duties or functions pertaining to the disruption or investigation of criminal offences) and to equalise their powers. This is consistent with the law-jobs lens; the investigation of criminal offences is a different "job" to the punishment of them and those carrying out investigations into criminal offences are performing the same job regardless of the potential sanction.

The law enforcement jobs are those which are concerned with ensuring compliance with the criminal law. Law enforcement agencies are one of the ways in which society deals with the

[319] These powers are discussed over the next few pages of the thesis.

"trouble-case" Llewellyn cautions us will increase the risk of group fracture. It is consistent with both the law-jobs theory and the PGC to provide a uniform set of powers to all those involved in law enforcement because the law-job they are undertaking is the same regardless of the severity of the offence; prosecuting, convicting and crucially, sentencing are different law-jobs to which different considerations can be applied – all are outside of the scope of this thesis.

Providing a uniform set of powers provides an opportunity to ensure all parts of the law enforcement community are provided with the tools they need to carry out their functions; it would enable gaps in the current armouries of the agencies to be filled, and would also allow the issues relating to electronic evidence which were identified by the Law Commission to be addressed.

One power available to some law enforcement agencies, but not to the Police, is the power to require by notice a person to produce information. Information obtained using information notices cannot usually be used in a prosecution against the person from whom it is obtained.[320] Nevertheless, it is a vital tool in obtaining information from third parties who are worried about the implications, for example contractual or data protection, of voluntarily providing information. In a Police context, the power would enable them to obtain information in situations where they might otherwise not obtain it or obtain it by executing a search warrant. By standardising powers across the agencies, we can provide a better balance between the rights of individuals and the role of the State; providing the Police with a power to compel production from a third party removes the need for the Police to obtain a search warrant and attend on the premises simply because the third party needs some comfort that they will have a defence against claims founded on their voluntarily passing of information to the Police.

One power available to the Police and to HMRC, but not to some other law enforcement agencies is the power to arrest and detain individuals. Such a power is, clearly, an infringement on the person's freedoms and well-being and so would need to be carefully constrained by necessity.[321] However, it is inconsistent with the rule of law to constrain it by reference either to the agency or the offence in question; the principle of the law being applied equally is not complied with if the investigatory powers a person is subjected to is determined by luck as to which agency investigates them.

Law enforcement agencies plainly need powers to enter and search premises in order to undertake their roles. They also need to be able to seize items which are unsafe or (as well as documents) evidence of the offences they are investigating. As identified in the Law Commission

[320] It is possible to use the information to prosecute them in relation to the notice itself, for example if they commit perjury or obstruction.
[321] Similar protections are found within Article 5 in the HRA.

consultation, they need to be able to search electronic information and to seize it where it is needed.[322]

Regulatory Bodies

Regulatory bodies perform a law-job which is in many ways similar to law enforcement agencies. They act to protect society and members of society from harm by upholding the rules and standards society has decided apply in those areas. As with law enforcement, the job performed by these organisations is to deal with the "trouble-case". Much of the work of these types of agencies involves, as with law enforcement, investigating to ascertain whether or not a breach of the law, or standards, has occurred.

In order to properly perform their law-job, regulatory agencies need to be able to obtain information and to be able to enter premises, and to search for and seize things that are relevant to their function.

Civil Defence Agencies

Civil defence agencies perform a vital role in ensuring society is able to function. The most obvious examples of this type of agency are services such as Fire and Rescue, or Ambulance services. It would also include other agencies, for example the Environment Agency. They help to protect life, limb, property, animals and the environment. They may have a limited function requiring access to information such as ensuring compliance with fire safety.

Critical National Infrastructure Operators

These types of organisations would include things such as railways, roads, canals and the electric and gas grids. The law-job they perform is to assist with net societal drive. They help to ensure the economy functions, that food and heat are available, and that people are better able to achieve their goals. In terms of the PGC, critical national infrastructure is something that helps individuals exercise their freedom and well-being and to attain their goals; it is, therefore, something that is of value to people as a whole.

In order to manage and maintain critical national infrastructure, operators need to be able to enter onto premises for a limited number of purposes. They need to be able to respond to, and deal with, emergency situations such as those which would give rise to a risk to life or limb or to the environment. They also need to be able to undertake surveys and works related to the infrastructure so that they can construct, manage and maintain it. In order to facilitate the safe

[322] Law Commission of England and Wales, 'Search Warrants (Law Commission Report Number 396)' (n 7) 477.

operation of the infrastructure equipment it may be necessary to undertake tests, take samples and, if it interferes with the infrastructure, decommission installations on the land in question.

Utilities Companies

Utility companies such as water, electric and gas suppliers have a law-job function of providing a means by which individuals can help to meet their basic needs of food, heating and drinking water. Each of the utilities is potentially dangerous and so there is an argument for providing powers of entry to deal with emergency situations which pose a risk to life or limb or to the environment. There may also be situations where utility companies need to undertake work on pipes or electric cables or the meters which are used to measure supply of their utility to the property.

Civil Society Agencies

This final group essentially acts as a catch-all to ensure agencies which are responsible for law-jobs such as the welfare of people or animals are able to enter onto premises where it is necessary and, once on those premises, to take the action necessary to ensure that welfare is protected.

Safeguards

The safeguards which are applied to powers are, from the practical rule of law framework and both a law-jobs and a PGC perspective, as important as the justifications for agencies to have powers. Safeguards act to ensure that powers cannot be used in a way which would infringe on the rights of individuals, or to ensure where they may have been used in such a way there is the opportunity for individuals within the group to bring their grievance and have it heard and adjudicated on.

There are three main types of safeguards which we need to consider when designing the landscape: those preventing the use of powers where they are not necessary, those applying to the exercise of powers, and the system of oversight which is applied to the exercise of the powers.

Safeguards preventing the use of powers where they are not necessary

These types of safeguards are achieved by drafting clear conditions which must be met in order for a power to be available to be used. This sort of safeguard would include what the Law Commission refer to as access conditions. The conditions which must be satisfied before a power is available to be used need to be tailored to each type of agency, balancing the rights of those against whom the powers might be exercised with the need to preserve the rights of others within the community and to stop the group from splintering. In order to be effective, the

conditions which need to be met in order to use a power need to be stringent enough that the power cannot be abused but not so stringent that the power is almost impossible to use.

At this point we need to take a step back from the academic discussion of the landscape and site these safeguards within the wider law of England and Wales. In particular, we need to consider the impact of the right to respect for private and family life.[323] Article 8 of the European Convention on Human Rights is a qualified right which may be interfered with.[324] Any interference must be in accordance with law, which complying with conditions which enable the exercise of powers would be sufficient to satisfy. However, any interference must also be

> *necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*[325]

When considering whether or not to exercise a power, and which one to exercise if more than one is available, the officer in question will need to be able to demonstrate that its exercise was necessary and proportionate to the achievement a legitimate aim. Where an officer has exercised a power for which the conditions on exercising are met, it may nevertheless be unlawful because the circumstances did not warrant the exercise of the power.

The interaction between the HRA and the exercise of powers gives us reason to pause, and to think about whether there is an opportunity to introduce additional safeguards by making less intrusive powers available, for example by providing all law enforcement agencies with a power to obtain information by notice compelling the production of information. This would introduce a choice of powers for the officers, impacting on the assessment as to whether it is necessary to exercise the more intrusive power in circumstances where a less intrusive one is available.

Safeguards applying to the exercise of powers

Alongside the safeguards which prevent the unnecessary use of powers, it is necessary to provide a series of protections to individuals against whom they are exercised. This helps to ensure the person is placed in the best possible position to protect their rights; for example, requiring a statement of powers which may be used on the premises along with informing the occupier of the premises that they have certain rights in relation to the powers, empowers the person against whom the powers are exercised and so better equips them to defend themselves against unlawful exercises of power.

[323] As contained within the Human Rights Act 1998.
[324] ibid, Schedule 1.
[325] ibid.

The new landscape of powers would need to ensure that certain key current rights remain protected, such as ensuring that legally privileged material is not used in the investigation against someone. It would need to maintain, and ideally reinforce, the requirement for consent of the occupier or independent authorisation to enter premises.

System of oversight

The third safeguard a new landscape would need to ensure is a robust and independent system of oversight of the use of powers. In document four, I concluded that a tribunal system was more appropriate for the oversight of powers, given the specialist nature of them.[326] In designing a new landscape, I will need to design a tribunal that provides for an independent review of the exercise of these powers. I will base the Tribunal on the two-tier system found in the Tribunals, Courts and Enforcement Act 2007 ("TCEA").[327]

THE 2021 ACT

In this section I will analyse the 2021 Act against Bingham's principles, the practical framework of the rule of law and, to the extent necessary, the law-jobs theory and the PGC (where they add something of value over and above the two frameworks). Assessing the Act against the practical framework allows for us to consider how it complies with a rights-based theoretical framework; Bingham, on the other hand, enables us to keep in mind the concept of the rule of law which legal practitioners will recognise.

We will now work through the various parts of the 2021 Act. It rationalises the landscape by legislating into effect the types of agencies needed to undertake the law-jobs we identified earlier in part three. It is worth noting, here, that the 2021 Act is intended to rebalance the power between individuals and State and so not all current powers will be reproduced.

The Act is structured by reference to the types of agencies, followed by a tribunal system to provide oversight, and finally some general provisions relating to codes of practice and offences.

Part 1 – Definitions

Part 1 sets out a short list of definitions; these are included at the start of the Act in order to assist the lay legislation users. Siting the definitions at the start of the Act helps it to comply with principle four of my practical rule of law framework because it assists in making the legislation

[326] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18) 59–61.
[327] Tribunal, Courts and Enforcement Act 2007.

accessible and clear.[328] Two of the definitions are key in ensuring the Act does not inadvertently narrow existing powers; first, "document" is given an expansive definition so that powers are exercisable against anything in which information is stored and second, "premises" is given an expanded definition to ensure powers of entry are exercisable against any place agencies are likely to need to enter.

Part 2 – Constabularies

Part 2 creates a suite of powers for law enforcement agencies.

Chapter 1 creates two types of constabularies; one type of constabulary is based on geographical areas, much as we currently have, and the other is based on specialisms. Both the geographical areas and the specialisms would be listed in Schedules to the Act. The constabularies which are maintained for the areas of the Queen's peace would undertake general policing duties within their respective areas. The specialist constabularies would focus on enforcement of the criminal law in areas of specialism, such as fraud, tax or consumer offences.

Chapter 2 sets out the privileges and duties which apply to constables attested under the Act. The same privileges and duties apply to all the constables, regardless of whether they attest into a constabulary maintained in respect of an area of the Queen's peace or a specialist constabulary. Again, this helps the 2021 Act to comply with the fourth principle of my framework and Bingham's first; by imposing the same duties and privileges on all those charged with enforcing the criminal law the landscape becomes clearer and more intelligible.[329] It also goes part way to ensuring compliance with the third principle because it lays the foundation for the equal application of the law to the enforcement of all criminal offences.[330] Imposing the same duties on all members of agencies which investigate criminal conduct arguably has an indirect impact on improving the compliance of the landscape with the rule of law because it indirectly increases the protection of fundamental human rights. Assuming no other change in terms of resourcing and agencies, the change would increase the number of people with an obligation and the powers to preserve life and limb and to prevent and investigate all crime.

Chapter 3 contains the powers which would be exercisable by constables in the execution of their duties. It is further broken down into a number of sub-divisions to aid navigation of the Act by the legislation users.

[328] Principle four is "clarity in the law"; this corresponds with Bingham's first principle about accessibility and clarity.
[329] Accessibility of the law; clarity in the law.
[330] The laws of the land should equally to all. This coincides with principle three of the practical framework – equality under law.

The first sub-division gives constables the power to serve a notice on a person requiring the person to produce information which is specified in the notice. This is a power that some law enforcement agencies already have, but which the Police do not. Introducing the change would ensure the same tools are available regardless of the criminal conduct being investigated. It would provide a route for the Police to obtain information and evidence from people who would otherwise not want to hand it over without the Police needing to obtain and execute a warrant.[331] The information notice could not be used to compel the production of legally privileged information.[332] Nor would it be possible to rely on the information obtained using an information notice to prosecute the person against whom it was served, unless the prosecution is for an offence relating to the information notice.[333]

Finally, constables are given the power to apply for a warrant of production where a person has failed to comply with an information notice. This will be explained in more detail in the warrants section of this discussion. The ability to access information in this way increases the ability of law enforcement to protect the rights and freedoms of others in society, leading to greater compliance with principles three and five of my framework, and Bingham's third and fifth.[334]

The second sub-division is the part of the Act which sets out the powers of entry to premises which are available to constables. The first power of entry is a power, available without warrant and without providing notice, to enter premises for one of the following three reasons:

- protecting life or limb;
- keeping or preserving the Queen's peace; or
- where it is not reasonably possible to obtain a warrant, in pursuit of a person who is attempting to evade or has escaped from lawful arrest or is otherwise unlawfully at large.[335]

These powers are all necessary for constables to be able to undertake the duties they are charged with undertaking. All of them relate to circumstances of immediacy, with the first two relating to situations where there is a real risk to other agents. The powers help to provide protection for fundamental human rights, meeting Bingham's fifth principle and the second core principle of the practical rule of law.

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[331] Some third parties are reluctant to hand over information without some form of formal compulsion because they are concerned about the implications of doing so. For example, server farms may be concerned they are vulnerable to being sued or subject to an investigation by the Information Commissioners Office if they voluntarily provide the contents of a server.
[332] See section 12(6) of the 2021 Act.
[333] This will be covered later when we discuss safeguards.
[334] Equality under the law and effective, fair mechanisms to deal with rights-claims and dispute resolution; equal application of the law and adequate protection for fundamental human rights.
[335] See section 15 of the 2021 Act.

The second power of entry available to constables is a power of entry without warrant. The power is only available in relation to property which is not used as a dwelling, respecting the English common law tradition around the sanctity of the home. The exercise of the power is limited in one of two ways. It can be used without notice only in an area of the premises to which the public have access in order for the constable to undertake a test purchase or observe the carrying on of a business, or where a notice of intended entry has been served to enter any part of the premises.[336] The notice of intended entry must be served and must contain a number of pieces of information.[337] The information which it must contain would include, amongst other things:

- the offences being investigated,
- a warning that criminal offences may be committed by obstructing constables exercising powers,
- the powers which a constable (and those accompanying them) may exercise whilst on the premises,
- the safeguards which are applied to the use of those powers, and
- the rights occupiers have in respect of the powers.[338]

Requiring the provision of information about their rights and the safeguards which apply to powers helps to redress the imbalance of power slightly by making it clear to the occupier what powers are and are not available and what they can do if they think the powers have not been used properly. This helps the new landscape comply with Bingham's first, second, fourth, and fifth principles and the practical rule of law framework.[339]

The third power of entry available to constables is a power of entry authorised by warrant.[340] The power is drafted in a way that a constable has the power to apply for an entry warrant, and the warrant then (if granted) gives them the power of entry. The warrant of entry covers a number of different scenarios, including providing an ultimate backstop to the information notices powers

[336] See section 16 of the 2021 Act.
[337] See sections 17 and 18 of the 2021 Act.
[338] See section 18 of the 2021 Act. The requirement to identify offences only applies where the duty the constable is performing is either preventing the commission of a crime or investigating a crime – see section 18(b) of the 2021 Act. An entry on notice under section 17 of the 2021 Act does not require a particular length of notice to be given. This is because, under the safeguards provided for in the 2021 Act, an occupier would have a right to refuse entry and an entry without a warrant would be unlawful as a consequence of that right – see section 152 of the 2021 Act.
[339] Accessibility, application of law not discretion, exercise of powers in good faith, adequate protection of fundamental human rights; in respect of the practical framework, it helps to comply with the requirement that freedom and well-being is the prime function of law, together with equality under law and effective dispute mechanisms.
[340] See sections 19 and 20 of the 2021 Act.

discussed earlier and to ensure entry can still be achieved when it has been refused in response to a notice of intended entry. The conditions for granting a warrant are copied below.

> ***Powers of constables: conditions for a warrant of entry***
>
> ***20.****—(1) A Commissioner for Warrants may issue a warrant of entry to a constable, where they are satisfied that there are reasonable grounds to believe that—*
>
> *(a) condition A or B is met; or*
>
> *(b) one or more of conditions C, D, E or F are met, and*
>
> *(c) one of more of conditions G to L are met.*
>
> *(2) Condition A is that—*
>
> *(a) the premises are premises on which documents or information which are the subject of a warrant of production may be found, and*
>
> *(b) the warrant of production has not been complied with.*
>
> *(3) Condition B is that —*
>
> *(a) the constable has served a notice of intended entry under section* ***Error! Reference source not found.****,*
>
> *(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and*
>
> *(c) the entry is necessary.*
>
> *(4) Condition C is that there is likely to be on the premises a thing which a constable would be entitled to inspect under section 24.*
>
> *(5) Condition D is that there is likely to be on, or accessible from, the premises documents or information a constable would be entitled to require to be produced under section 25.*
>
> *(6) Condition E is that there is likely to be on, or accessible from, the premises items a constable would be entitled to require to be produced under section 26.*
>
> *(7) Condition F is that there is likely to be on the premises a person who is attempting to evade or has escaped from lawful arrest or is otherwise unlawfully at large.*
>
> *(8) Condition G is that the premises are unoccupied.*
>
> *(9) Condition H is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.*
>
> *(10) Condition I is that it is not practicable to communicate with any person entitled to grant entry to the premises.*
>
> *(11) Condition J is that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with a person entitled to grant access to the thing, documents, information or items.*
>
> *(12) Condition K is that entry to the premises will not be granted unless a warrant is produced.*
>
> (13) *Condition L is that the purpose of entry may be seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.*

Although the section is superficially complex, it sets out in a logical manner the reasons for which a warrant of entry could be granted. This brings together all the possible reasons for an entry by a constable under warrant into one single list, making the law more accessible than if it were spread

across multiple pieces of legislation. This, in turn, brings the landscape into closer compliance with principle four of my framework and Bingham's first.[341]

The next sub-division of this chapter of the 2021 Act sets out the remaining powers which are available to constables. The way in which the legislation is drafted represents a significant departure from how on-site powers are currently provided to the Police, but at the same time represents a shift towards how they are provided to other enforcement agencies such as Trading Standards and the CMA. The powers are drafted using relatively broad descriptions (such as "item" or "document") in order to future-proof them against further developments.

Section 22 of the 2021 Act sets out the circumstances in which the constables' on-site powers "switch on". It applies the further powers only where a power of entry under the relevant sections of the 2021 Act has been exercised, and then further narrows the application only to the investigation of offences which are specified in a notice of intended entry or a warrant of entry. This means that, as a matter of law, the use of the powers is not authorised by the person issuing the warrant; instead, once the entry has occurred the powers are authorised by operation of law.

The main reason for making warrants under the 2021 Act entry warrants, rather than warrants which authorise the use of powers on the premises as well as the entry, is that it helps to simplify the legislation and so helps to increase compliance with my fourth principle and Bingham's first. This may appear, at first glance, to lower protections for occupiers when compared to the current system under PACE. However, as we will see when the remaining powers are discussed, it is possible to design out the risk by limiting the exercise of the on-site powers by reference to the offences under investigation. When that limit is placed in the context of the oversight regime which is in the 2021 Act, it creates at least as good a protection as now. Arguably, the system may create additional protection because the officers will have to exercise their judgement and that could be open to challenge whereas in the current regime as long as the warrant is properly granted, the exercise of powers on the premises will be lawful.

The remainder of the sub-division sets out the powers which are available. The first is the power to inspect things on the premises; the second is the power to require the production of documents; and the third is the power to require the production of items.[342] Creating powers of inspection and requiring production enables evidence to be collected in the least intrusive manner possible. If we consider again the third parties who might want to assist law enforcement, but would be concerned about voluntarily providing material because they felt it would put them at risk of legal proceedings, framing the powers in this way still makes it so that the material is obtained by compulsion but that it does not need to be searched for. This helps

[341] Clarity in the law; the law must be accessible, and so far as possible, intelligible, clear and predictable.
[342] See sections 24 to 26 of the 2021 Act.

ensure the rights of the occupier and wider society are balanced and interference with the rights of the occupiers is kept to a minimum. Under the current provisions in PACE the only powers to require production relates to information stored in electronic form; this would mean that, strictly speaking, the Police would need to search for any of the other material and seize it in order for it not to be voluntarily provided. It also helps to standardise and modernise the powers across law enforcement; more modern Acts such as the CRA provide powers to compel production.

The sub-division creates a power of search in order to allow the constables to look for anything they would be able to require the production of.[343] This ensures law enforcement agencies are able to carry out their functions effectively in circumstances where the entered premises are empty, or where the occupier of the premises refuses to comply with a requirement to produce. The search power is not dependent on a refusal, allowing law enforcement officers to exercise their operational judgement as to whether or not the purposes of the entry would be better achieved by searching rather than requiring production. By making clear what can be searched for on the face of the legislation, this helps the new landscape comply with Bingham's first principle and my fourth.[344]

It also creates a power for constables to operate and search any electronic device on the premises and to search any information which is accessible from it.[345] This power is included specifically to address the issues identified by the Law Commission.[346] It is intended to make plain there is a power for law enforcement agencies to search electronic devices and to access information held in the cloud by operating those devices. This modernises the powers of law enforcement, making sure the suite of powers they have available to them adequately reflects technological advances. Providing law enforcement agencies with this power helps them to fulfil their law-job and to balance the rights of wider society by reducing the ability of offenders to put their offending beyond reach; this, in turn, helps to ensure equality of treatment – albeit between offenders – and helps to meet my third and fifth principles and Bingham's third and fifth.[347]

Section 29 provides a power for constable to break open containers, doors, and anything in which something may be packed, carried, stored or found. This power is supplementary to the search powers; arguably, it could be implied in a power of search but is included on the face of the legislation in order to make the powers more accessible to the legislation users.

The final two powers in this part of the 2021 Act are seizure powers, reproduced below.

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[343] Section 27 of the 2021 Act.
[344] The law must be accessible, and so far as possible, intelligible, clear and predictable; clarity in the law.
[345] Section 28 of the 2021 Act.
[346] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) ch 10.
[347] Equality under the law, and effective, fair, mechanism to deal with rights-claims and dispute resolution; the laws of the land should apply equally to all, save to extent objective differences justify differentiation, and the law must afford adequate protection of fundamental human rights.

Powers of constables: power to seize after exercising a power of entry

30.*—(1) A constable may seize and retain any thing, document, information or item, where they are satisfied that—*

(a) Condition A is met; or

(b) Condition B, C or D, and

(c) Condition E are met.

(2) Condition A is that—

(a) it is a thing found on the premises; and

(b) it is dangerous such that it causes a risk to life or limb,

(c) it is likely to be used in the commission of a crime, or

(d) it is impracticable to undertake a test on the premises.

(3) Condition B is that—

(a) it is a document or information which a person has been required to produce under section 25, or

(b) it is a document or information which the constable has found, discovered or identified under their power in section 27.

(4) Condition C is that—

(a) it is an item which a person has been required to produce under section 26, or

(b) it is an item which the constable has found, discovered or identified under their power in section 27.

(5) Condition D is that—

(a) it is a document or information a constable has found, discovered or identified under the power in section 28, and

(b) a constable has copied or downloaded the information.

(6) Condition E is that it is likely to be admissible in evidence at a trial for the offence.

(7) The power in subsection (1) includes a power to seize anything in which a document, information or item is contained or comprised.

Powers of constables: additional power to seize where otherwise lawfully on premises

31.*—(1) A constable who is lawfully on any premises may seize anything which comes to the attention of the constable which the constable has reasonable grounds for believing that—*

(a) it has been obtained in consequence of the commission of an offence; or

(b) it is evidence in relation to an offence the constable is investigating or any other offence.

(2) Where the constable has reasonable grounds for believing that any information which is stored in electronic form and is accessible from the premises is evidence of an offence, the constable may require that information to be produced in a form in which it can be taken away in which it is visible and legible or from which it can readily be produced in a visible and legible form.

(3) *Nothing in this section authorises a constable to search the premises in question.*

These powers provide the basis for law enforcement agencies to seize items from premises, setting out clearly the grounds on which a seizure can take place. Again, this helps to increase

compliance with my fourth principle and Bingham's first, because it is clear on the face of the legislation what can be seized and why.[348]

Sections 32 to 41 of the 2021 Act deal with powers of arrest and detention in custody of arrested persons. These are largely based on the powers of Police Constables under the current legislative landscape. The powers are included in the 2021 Act for two main reasons. First, making the powers available to all law enforcement agencies dealing with the criminal law means the anomaly around treatment of suspected offenders by different agencies is removed. It would no longer matter if the offence in question was investigated by the Police or, for example, the SFO, as the potential for interference with the individual's freedom and well-being is the same regardless of the agency which is undertaking the investigation. Second, it would weaken the increased compliance with the rule of law if legislation users needed to look at the 2021 Act to see all the investigatory powers that were available to law enforcement agencies, but then needed to consider various other pieces of legislation in order to ascertain whether or not they could be lawfully arrested and detained in custody.

There are a number of provisions of PACE, dealing, for example, with searches of detained persons and requirements for intimate samples, which I did not copy into the relevant part of the 2021 Act. If the landscape were consolidated, they would likely need to be consolidated as well. They are, however, outside the scope of this research and adding them to the draft legislation would have increased its length significantly with no real benefit to this research.

One aspect of PACE which is deliberately not included in the 2021 Act is the ability to enter and search premises by reason of arresting a person.[349] Re-enacting those powers of entry would preserve what I have described in a conference paper as a lacuna in protection for occupants of premises.[350] Under PACE a warrant application must be made out to a "reasonable belief" standard.[351] Arrest, on the other hand, is available to a constable who has formed a "reasonable suspicion" that someone is about to commit, is committing, or has committed an offence.[352] In addition to forming the reasonable suspicion a constable must also have a reasonable belief that arrest is necessary for one of the reasons set out in section 24 of PACE.[353]

[348] Clarity in the law; the law must be accessible, and so far as possible, intelligible, clear and predictable.
[349] Police and Criminal Evidence Act 1984 s 18 and 32.
[350] James Mullen, 'The Thin Blue Lacuna', *Edinburgh School of Law Postgraduate Conference, Edinburgh, January 2016*.
[351] Police and Criminal Evidence Act 1984 s 8 and 9, the grounds for a 'section 9' warrant are set out in Schedule 1.
[352] ibid 24(1), (2) and (3).
[353] ibid 24(4) and (5).

One of the "necessity grounds" is "to allow the prompt and effective investigation of the offence or the conduct of the person in question".[354] The "necessity grounds" are expanded upon in PACE Code G.[355] Whether or not the grounds are met is "a matter for the operational discretion of individual officers"; some examples are, however, given to help officers to illustrate where the grounds might be met.[356] One such example, in relation to the "prompt and effective investigation ground" is

> *when considering arrest in connection with the investigation of an indictable offence […], there is a need:*
>
> *• to enter and search without a warrant any premises occupied or controlled by the arrested person or where the person was when arrested or immediately before arrest;*
>
> *[…]*[357]

Taken together this means a constable is able to enter and search certain premises merely because they have formed a suspicion that someone has committed an indictable offence and a belief it is necessary to search those premises without a warrant. This, in turn, reduces compliance with the rule of law because it provides a mechanism by which the Police can enter and search premises in circumstances where they would be unable to provide evidence to the standard needed to obtain a warrant.

The final set of powers in relation to constabularies is the power to apply for a civil order to prevent unlawful conduct. Again, this is included in order to remove an anomaly between various law enforcement agencies. Such a power would help to ensure agencies are better equipped to fulfil their law-job and to protect the rights of individuals from infringement by others than they are under the current landscape.[358]

Part 3 – Regulatory Bodies

This part of the 2021 Act introduces the concept of regulatory bodies. Section 44 of the 2021 Act provides that a regulatory body for the purposes of the Act is one that is listed in Schedule 5 to the Act. It allows the body to appoint authorised officers who can then exercise the powers provided by Part 3 of the 2021 Act for a purpose which is specified in the Schedule and which corresponds to the body which has authorised them. This means that a legislation user only

[354] ibid 24(5)(e).
[355] 'Police and Criminal Evidence Act 1984: Code G Revised Code of Practice for the Statutory Power of Arrest by Police Officers.'
[356] ibid 2.7.
[357] ibid 2.9(e)(ii).
[358] Certain agencies are able to apply for Serious Crime Prevention Orders, but these do not apply to all agencies or all crimes.

needs to look in one place to identify what powers are available to which officers and why they can be used. This helps to make the law clearer, complying with my fourth principles.

The remainder of the Part sets out which powers are available and the conditions which must be met in order for them to be used. The powers are drafted by reference to an "authorised officer" in order to ensure they are exercisable by all the regulatory bodies that need them. As we saw in the discussion earlier, regulatory bodies undertake a similar function to law enforcement agencies but they do not enforce the criminal law. This means they require a similar set of powers.

The first power given to regulatory bodies is the power to require information by notice.[359] This provides the same benefits as it does to the constabularies, allowing for the investigation of breaches of the standards and rules the regulatory bodies uphold. As with the constabulary power, it is backstopped with the ability to apply for a warrant of production.[360]

The regulatory bodies are provided with two powers of entry; one on notice and one by warrant. Again, these largely reflect the powers which are given to constabularies but with minor drafting differences to reflect the slightly different jobs. For example, the warrant of entry has different conditions attached:

> ***Powers of authorised officers of regulatory bodies: conditions for a warrant of entry***
>
> ***55.****—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—*
>
> *(a) condition A or B is met; or*
>
> *(b) one or more of conditions C, D or E are met, and*
>
> *(c) one of more of conditions F to K are met.*
>
> *(2) Condition A is that—*
>
> *(a) the premises are premises on which documents or information which are the subject of a warrant of production may be found, and*
>
> *(b) the warrant of production has not been complied with.*
>
> *(3) Condition B is that —*
>
> *(a) the authorised officer has served a notice of intended entry under section 52,*
>
> *(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and*
>
> *(c) the entry is necessary.*
>
> *(4) Condition C is that there is likely to be on the premises a thing which an authorised officer would be entitled to inspect under section 59.*
>
> *(5) Condition D is that there is likely to be on, or accessible from, the premises documents or information an authorised would be entitled to require to be produced under section 60.*
>
> *(6) Condition E is that there is likely to be on, or accessible from, the premises items an authorised officer would be entitled to require to be produced under section 61.*

[359] Section 47 of the 2021 Act.
[360] Section 49 of the 2021 Act.

(7) Condition F is that the premises are unoccupied.

(8) Condition G is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

(9) Condition H is that it is not practicable to communicate with any person entitled to grant entry to the premises.

(10) Condition I is that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with a person entitled to grant access to the thing, documents, information or items.

(11) Condition J is that entry to the premises will not be granted unless a warrant is produced.

(12) *Condition K is that the purpose of entry may be seriously prejudiced unless an authorised officer arriving at the premises can secure immediate entry to them.*

They are then provided with powers which mirror the powers of constabularies except for the power of seizure which, again, is different to reflect the different role:

Powers of authorised officers of regulatory bodies: power to seize after exercising a power of entry

65.*—(1) An authorised officer may seize and retain any document, information or item, where they are satisfied that—*

(a) Condition A, B, C, or D and

(b) Condition E are met.

(2) Condition A is that—

(a) it is a thing which an authorised officer is entitled to test under section ***Error! Reference source not found.****, or*

(b) it is a thing which the officer has found, discovered or identified under their power in section 62; and

(c) it is impracticable to undertake the test on the premises.

(3) Condition B is that—

(a) it is a document or information which a person has been required to produce under section 60, or

(b) it is a document or information which the officer has found, discovered or identified under their power in section 62.

(4) Condition C is that—

(a) it is an item which a person has been required to produce under section 61, or

(b) it is an item which the officer has found, discovered or identified under their power in section 62.

(5) Condition D is that—

(a) it is a document or information an officer has found, discovered or identified under the power in section 63, and

(b) the officer has copied or downloaded the information.

(6) Condition E is that it is likely to be of value or assistance, whether by itself or when combined with something else, to the purpose for which the officer is acting.

(7) *The power in subsection (1) includes a power to seize anything in which a document, information or item is contained or comprised.*

Despite these minor differences, the assessment against the principles stands.

Part 4 – Civil Defence Agencies

This part of the 2021 Act introduces the concept of civil defence agencies. Section 66 provides that a civil defence agency for the purposes of the Act is one which is listed in Schedule 6 to the Act. It allows the agency to appoint authorised officers to exercise the powers set out in Part 4 of the Act. As with the regulatory bodies, an authorised officer of a civil defence agency may only exercise powers for a purpose set out in the Schedule and which corresponds to the agency which has authorised them.

Civil defence agencies are given powers to require information.[361] This is intended to aid investigations within their area of competence, for example where the Fire Brigade investigate the cause of a fire. It is accepted that a number of agencies that would likely fall within the definition would not need to require information from individuals. However, as there would be no reason for them to require information for any of the purposes their officers are authorised the power would not be able to be used. As with the previous discussions, the information notice is backstopped by a warrant of production.

Authorised officers of civil defence agencies are provided with three powers of entry. Firstly, they may enter without warrant and without notice if it is necessary for one of a number of reasons, as set out below.

> ***Powers of authorised officers of civil defence agencies: power to enter premises without warrant in an emergency***
>
> ***74.****—(1) An authorised officer may, using such force as is reasonably necessary, enter premises without a warrant of entry and without notice where there are reasonable grounds for the officer to believe—*
>
> *(a) it is necessary to prevent loss of life or limb;*
>
> *(b) it is necessary in order to effect the rescue of people or protect them from serious harm;*
>
> *(c) it is necessary in order to prevent or deal with an event or situation that causes or is likely to cause—*
>
> *(i) one or more individuals to die, be seriously injured or become seriously ill, or*
>
> *(ii) serious harm to the environment (including the life and health of plants and animals);*
>
> *(d) it is necessary to protect property; or*
>
> *(e) it is necessary to prevent or limit damage to property resulting from action taken after an entry under this section.*
>
> (2) *The power in subsection (1) may only be exercised in connection with a purpose for which the officer is an authorised officer.*

[361] Section 69 of the 2021 Act.

This helps make it plain on the face of the legislation that officers of civil defence agencies are able to enter premises in an emergency, ensuring they have the powers necessary to protect the rights and well-being of people and, in turn, increases compliance with mine and Bingham's fifth principle.[362] Placing this on the face of the legislation, again, helps to create a landscape which complies with my fourth principle and Bingham's first.[363] Bringing together the powers in this way also deals with the anomaly that the Ambulance service does not have a statutory power to enter by force.

The other two powers of entry are on notice and by warrant.[364] The conditions which must be met to obtain a warrant of entry are reproduced below.

> ***Powers of authorised officers of civil defence agencies: conditions for a warrant of entry***
>
> ***78.****—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—*
>
> *(a) Condition A is met; or*
>
> *(b) Condition B is met, and*
>
> *(c) one or more of conditions C to G is met.*
>
> *(2) Condition A is that —*
>
> *(a) the authorised officer has served a notice of intended entry under section 75,*
>
> *(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and*
>
> *(c) the entry is necessary.*
>
> *(3) Condition B is that entry is necessary for one or more of the purposes for which the officer is authorised.*
>
> *(4) Condition C is that the premises are unoccupied.*
>
> *(5) Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.*
>
> *(6) Condition E is that it is not practicable to communicate with any person entitled to grant entry to the premises.*
>
> *(7) Condition F is that entry to the premises will not be granted unless a warrant is produced.*
>
> (8) *Condition G is that the purpose of entry may be seriously prejudiced unless an authorised officer arriving at the premises can secure immediate entry to them.*

The circumstances under which a civil defence agency may be granted a warrant are fewer than would be available to a constabulary or a regulatory body, reflecting the difference in role and the requirement under the law-jobs theory and the PGC to reduce to the minimum the interference with the freedom and well-being of individual group members.

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[362] Protection of human rights.
[363] Clarity in the law; the law must be accessible, and so far as possible, intelligible, clear and predictable.
[364] Sections 73 and 77 of the 2021 Act.

Officers of civil defence agencies are then provided with a further suite of powers, all of which only switch on when they have exercised a power of entry.

The first power they are provided with only 'switches-on' when they have entered the premises using the power to enter in an emergency. It provides an authorised officer powers to do anything they reasonably believe necessary to achieve a prescribed outcome, as shown below.

> ***Powers of authorised officers of civil defence agencies: powers after an entry in relation to an emergency***
>
> ***80.*** *An authorised officer may do anything the officer reasonably believes is necessary—*
>
> *(a) to prevent loss of life or limb;*
>
> *(b) to effect the rescue of people or protect them from serious harm;*
>
> *(c) to prevent or deal with an event or situation that causes or is likely to cause—*
>
> *(i) one or more individuals to die, be seriously injured or become seriously ill, or*
>
> *(ii) serious harm to the environment (including the life and health of plants and animals);*
>
> *(d) to protect property; or*
>
> *(e) to prevent or limit damage to property resulting from action taken after an entry under section 74.*

The inclusion of the power on the face of the legislation helps to bring the landscape closer in line with my fourth and Bingham's first principles.[365]

The remaining on-site powers are switched on by an entry on notice or under a warrant of entry.[366] Authorised officers are provided with the power to survey and undertake works, giving them the ability to deal with any issues arising in connection with the purposes for which they are authorised.[367] For example, it could be used to give the Environment Agency the power to determine what flood defences are needed on rivers and build them.

Officers are also given the power to inspect or test things, equipment or installations and to switch off or decommission installations.[368] Again, this provides a range of powers to ensure civil defence agencies are able to undertake their functions properly. For example, a Fire Service could use these powers to during a fire safety inspection and, if they found unsafe equipment which is a fire risk, make it safe.

The next power in the civil defence agency part is a power to extinguish lights.[369] This power exists in the current landscape. It would be used, for example, to prevent shipping being confused or during times of war. Including the power in this Part of the Act would not lead to an

[365] Clarity of the law.
[366] See section 79 of the 2021 Act.
[367] Sections 81 and 82 of the 2021 Act.
[368] Sections 83 and 84 of the Act.
[369] Section 85 of the 2021 Act.

expansion in powers, because of the restriction that powers can only be exercised for a purpose for which the officer is acting, and they can only be authorised to act for a purpose listed in the Schedule in respect of that agency. Including the power is necessary to achieve consolidation and so it helps to meet Bingham's first principle and my fourth.[370]

The next two powers in this Part of the Act are the powers to test and cull animals.[371] The power to test animals would likely be used as part of routine animal health surveillance and as part of a response to an outbreak of disease such as Foot and Mouth. The power to cull would only be used in respect of disease control or containment. As with the other powers in this Part of the Act, it would only be available to the civil defence agencies which have a function in this area. Again, the inclusion of the power helps the landscape to meet Bingham's first principle and my fourth. Indirectly, it also helps the landscape meet mine and Bingham's fifth principle in two ways.[372] First, it helps to protect human health in circumstances where the disease is hazardous to them. Second, it helps to protect, for example, the wider economy particularly in the countryside; this, in turn, helps to ensure access to basic goods for those who rely on the economy to provide access to them.

The next two sections provide officers of civil defence agencies with the powers they need to undertake compliance checks and investigations within their area of competence.[373] These sections provide a power to require the production of documents and items. They are constrained by reference to the need to have reasonable grounds to suspect the documents or items relate to the purpose of their entry. By constraining the power in this way, the rights of the occupiers are balanced with the ability of the officers to carry out their law-job function. As with the powers above, putting these powers into the 2021 Act strengthens the compliance with Bingham's first and fifth principles and my fourth and fifth, making the law clear and accessible whilst providing the legal grounds to enable the officers to undertake their functions.[374]

Section 90 provides officers of civil defence agencies with the power to search for anything over which they would be able to exercise a power. As with the powers in the preceding Parts of the 2021 Act, a search power is necessary to ensure the functions of the officers in question can be properly discharged. The main purpose of including the power to search is to ensure Bingham's fifth principle is best served; like the officers of the other agencies given search powers under the 2021 Act, the ability of officer of civil defence agencies to perform the function given by the group

[370] The law must be accessible, and so far as possible, intelligible, clear and predicably; clarity of the law.
[371] Sections 86 and 87 of the 2021 Act.
[372] Protection of human rights.
[373] Sections 88 and 89 of the 2021 Act.
[374] Clarity and protection of human rights.

would be hampered if they were unable to search premises in circumstances where occupiers were non-compliant.

The next two sections provide additional powers to insure further against gaps in powers which would undermine the purpose of the entry.[375] The first, covering the same gaps in relation to electronically held material as the corresponding sections in the constabulary and regulatory body Parts, provides for the power to access and search electronic devices. The second, again covering the same gap as corresponding powers elsewhere in the 2021 Act, providing a power to break open in order to undertake a search.

The final power given to officers of civil defence agencies is the power to seize, as set out below.

> ***Powers of authorised officers of civil defence agencies: power to seize after exercising a power of entry***
>
> ***93.****—(1) An authorised officer may seize and retain any thing, document, information or item, where they are satisfied that—*
>
> *(a) one or more of Conditions A to F are met, and*
>
> *(b) Condition G is met.*
>
> *(2) Condition A is that—*
>
> *(a) it is a thing, item, equipment or installation which an authorised officer is entitled to test under section 83, or*
>
> *(b) it is a thing which the officer has found, discovered or identified under their power in section 90; and*
>
> *(c) it is dangerous such that it causes a risk to life or limb, or*
>
> *(d) it is impracticable to undertake the test on the premises.*
>
> *(3) Condition B is that—*
>
> *(a) it is an animal which an authorised officer is entitled to test under section 83, or*
>
> *(b) it is an animal which the officer has found, discovered or identified under their power in section 90; and*
>
> *(c) it is impracticable to undertake the test on the premises.*
>
> *(4) Condition C is that—*
>
> *(a) it is an animal which an authorised officer is entitled to cull under section 87,*
>
> *(b) or it is an animal which the officer has found, discovered or identified under their power in section 90; and*
>
> *(c) it is impracticable to cull the animal on the premises.*
>
> *(5) Condition D is that—*
>
> *(a) it is a document or information which a person has been required to produce under section 88, or*
>
> *(b) it is a document or information which the officer has found, discovered or identified under their power in section 90.*
>
> *(6) Condition E is that—*
>
> *(a) it is an item which a person has been required to produce under section 89, or*

[375] Sections 91 and 92 of the 2021 Act.

(b) it is an item which the officer has found, discovered or identified under their power in section 90.

(7) Condition F is that—

(a) it is a document or information the officer has found, discovered or identified under the power in section 90, and

(b) the officer has copied or downloaded the information.

(8) Condition G is that it is likely to be of value or assistance, whether by itself or when combined with something else, to the purpose for which the officer is acting.

(9) *The power in subsection (1) includes a power to seize anything in which a document, information or item is contained or comprised.*

As with the powers of seizure in the earlier Parts of the 2021 Act, the conditions under which a seizure can be made are tailored to the class of agency.

Part 5 – Critical National Infrastructure Operators

This part of the 2021 Act introduces the concept of critical national infrastructure operators. Section 94 provides that a critical national infrastructure operator for the purposes of the Act is one which is listed in Schedule 7 to the Act. It allows the operator to appoint authorised officers to exercise the powers set out in Part 5 of the Act. As with the previous two types of agencies, an authorised officer of a critical national infrastructure operator may only exercise powers for a purpose set out in the Schedule and which corresponds to the operator which has authorised them.

Critical national infrastructure operators are organisations with responsibility for the maintenance of infrastructure which is critical to the function of society or the economy; it includes, for example, organisations which are responsible for the construction and maintenance of utility services such as water, gas, electric and sewerage, roads and railways, ports and so on.

Part 5 of the 2021 Act contains three powers of entry. First, authorised officers of the operators are provided a power to enter on notice.[376] Second, authorised officers of the operators are provided with a power to enter premises without notice and without a warrant of entry in cases of emergency; the types of emergency are the same as those set out in relation to the civil defence agencies and help to meet the same principles.[377] The third power of entry is a warranted entry, with a warrant available in the circumstances set out below.

Powers of authorised officers of critical national infrastructure operator: conditions for a warrant of entry

102.*—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—*

[376] Section 97 of the 2021 Act.
[377] Section 98 of the 2021 Act.

(a) Condition A is met; or

(b) Condition B is met, and

(c) Condition C or D is met.

(2) Condition A is that —

(a) the authorised officer has served a notice of intended entry under section 99,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(3) Condition B is that the entry is necessary for one or more of the purposes for which the officer is authorised.

(4) Condition C is that the premises are unoccupied.

(5) *Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.*

The conditions which give rise to grounds for entry are much fewer than those provided to organisations under Parts 2, 3 and 4 of the 2021 Act, reflecting the different jobs performed by operators of critical national infrastructure. The effect of the conditions is such that entries will almost always be on notice, reducing the level of infringement of the rights of the occupier.

The remainder of this Part of the 2021 Act sets out the powers which may be exercised once on the premises. Again, the powers are switched on by exercising a power of entry.[378] The first on site power is the power to do anything necessary in an emergency; the power can only be exercised after exercising the power to enter in an emergency, follows the same format as the power given to civil defence agencies, and has the same impact in terms of Bingham's principles and my rule of law framework.

The next four powers given to critical national infrastructure operators are the powers which are necessary for them to be able to undertake their role within society. Again, all of the powers are constrained by reference to the purpose for which the operator is acting.

The first power is a power to undertake surveys, allowing them, for example, to obtain information about land to inform any work they intend to undertake there.[379] The next power is a power to undertake works, which could include building or maintenance of the structure.[380] The third power given to operators is to inspect or test things, equipment or installations.[381] This would enable them to ensure, for example, that ground conditions were favourable or that the occupier had not installed something on the land which would interfere with the safe operation of the infrastructure. The final power given to infrastructure operators is a power to switch off or

[378] Section 103 of the 2021 Act.
[379] Section 105 of the 2021 Act.
[380] Section 106 of the 2021 Act.
[381] Section 107 of the 2021 Act.

decommission equipment or installations, enabling them to minimize the disruption to the infrastructure which might be caused by the occupier.[382]

The inclusion of these powers in the 2021 Act would, by maximising the consolidation opportunity within the landscape, lead to better compliance with Bingham's first principle, and my fourth, because it would make the law more accessible.[383] Indirectly, it would also increase the protection for fundamental human rights because it would ensure the infrastructure needed to allow a complex society, and the individuals within it, to obtain basic necessities such as heat, food, and clean water and also provided the basis from which they could thrive.

This Part of the 2021 Act does not have any search powers attached to it, nor does it allow for officers to break open anything or to make seizures in consequence of their entry.[384] There are two main reasons for this.

First, most infrastructure would be sited in open land and so there would be little need to provide for the officers to search and break open in order to find it to exercise their other powers. That includes finding installations which would interfere with the infrastructure, albeit it might be possible, for example, to interfere with a mobile telephone mast by using some form of signal interference device in a nearby building.

Second, although it might be possible to theorise situations where something which hinders the provision of the infrastructure could be hidden, the practical likelihood of those powers making any difference weigh in favour of the occupier's rights being protected. For example, if it would be possible to interfere with the signal from a mobile telephone mast by placing some sort of interference device in a nearby building it would be possible to do it by placing it in different premises than the one on which the mast was located. That would mean the operator would need to exercise their search powers at a potentially large number of premises, most of which would be entirely unconnected to the issue at hand.

Part 6 – Utility Companies

This part of the 2021 Act introduces the concept of utility companies. Section 109 provides that a utility company for the purposes of the Act is one which is listed in Schedule 8 to the Act. It allows the company to appoint authorised officers to exercise the powers set out in Part 6 of the Act. Again, the exercise of powers by authorised officers would be constrained by reference to

[382] Section 108 of the 2021 Act.
[383] Clarity and accessibility of the law.
[384] The construction of the emergency powers is such that it would be permissible for an officer to search and break open in order to deal with the emergency. The power is broad, but it is also clearly drafted and so an expressed power to search is not necessary – the officers plainly have the power to do anything necessary to deal with the emergency situation.

the purpose for which they are authorised to act. Utility companies would include the end-user supplier of electricity, gas and water.

Authorised officers of the utility companies are given powers of entry which mirror those of critical national infrastructure operators.[385] However once on the premises they are only provided with the emergency powers and the power to undertake works and to inspect equipment or installations.[386] The power to undertake works includes the powers needed to connect and disconnect supply and to install pre-payment meters.

Including the powers in the 2021 Act meets my fourth and Bingham's first principle.[387] There is, however, a crucial debate to be had in relation to providing utility companies powers of entry other than in relation to an emergency situation. I have included the powers to disconnect and to alter supply to a pre-payment meter here because they exist in the current landscape and are authorised by Parliament; there is, therefore, an argument that the indirect application of the PGC justifies the powers existing because they have been granted in accordance with the accepted procedure of setting societal rules.

On the other hand, including the powers could be said to breach Bingham's requirement that the law applies equally to all unless differentiation is objectively justified. The power to install pre-payment meters, or to cut off customers, is currently used to insure against customers running up bad debt. It is correct to acknowledge that utility companies are not necessarily in the same situation as other private companies in that they cannot as easily stop delivery of the utility until the debt is paid, or sue for the debt and use the normal monetary enforcement mechanism. Nevertheless, by giving utility companies the power to enter premises coupled with a power to disconnect supply or force pre-payment they are put in a privileged position compared to all other companies who a person may run up bad debts with.

Part 7 – Civil Society Agencies

This part of the 2021 Act introduces the concept of civil society agencies. Section 122 provides that a civil society agency for the purposes of the Act is one which is listed in Schedule 9 to the Act. It allows the agency to appoint authorised officers to exercise the powers set out in Part 7 of the Act. Again, the exercise of powers by authorised officers would be constrained by reference to the purpose for which they are authorised to act.

This Part of the Act is essentially a "catch-all" provision, ensuring those who need some form of powers of entry are in a position to be able to undertake their role. It recognises there is some

[385] Sections 112, 113 and 116 of the 2021 Act.
[386] Sections 119, 120 and 121 of the 2021 Act.
[387] Accessibility and intelligibility of the law; clarity in the law.

societal benefit provided by these agencies and, as such, they help to ensure the better functioning of society. They would include, for example, local councils in respect of their functions relating to vulnerable children and may include organisations such as the RSPCA.

Officers of civil society agencies are provided with two powers of entry. The first power of entry is a power to enter on notice.[388] The second power is a power of entry under warrant, which can be granted by reference to the conditions set out below.

> ***Powers of authorised officers of civil society agencies: conditions for a warrant of entry***
>
> ***129.****—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—*
>
> *(a) Condition A is met; or*
>
> *(b) Condition B is met, and*
>
> *(c) one or more of conditions C to E is met.*
>
> *(2) Condition A is that —*
>
> *(a) the authorised officer has served a notice of intended entry under section 126,*
>
> *(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and*
>
> *(c) the entry is necessary.*
>
> *(3) Condition B is that the entry is necessary for one or more of the purposes for which the officer is authorised.*
>
> *(4) Condition C is that the premises are unoccupied.*
>
> *(5) Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.*
>
> (6) *Condition E is that it is not practicable to communicate with any person entitled to grant entry to the premises.*

Again, these conditions make it most likely that any entry will have already been notified to the occupier of the premises.

Officers are then granted three powers which can be exercised on the premises. As with the powers of other agencies and organisations, these are constrained by the link to the purpose for which they are authorised.

The first power is to do anything necessary to safeguard a person, animal or the environment.[389] This power is widely drafted, because of the catch-all nature of this Part of the 2021 Act; this does not undermine the respect for the rights of the occupiers required by both Bingham's fifth principle and the second principle of the practical rule of law framework because of the constraints mentioned above. The power could be used, for example, by the RSPCA to seize animals where there is evidence they are being mistreated in order to safeguard their welfare; it

[388] Section 125 of the 2021 Act.
[389] Section 131 of the 2021 Act.

could not, however, be used by a local council to seize animals where they have entered a home to undertake checks relating to looking after children.

There may be some instances in which this would increase the number of times premises are entered by different civil society agencies acting for their respective purposes. This would lead to a marginal increase in interference with the rights of that individual but when balanced against cases where the constraints provide for an increase in rights, this approach leads to a better overall protection of the rights of occupiers.

Officers are provided with search powers and the power to break open in order to enable them to achieve the purpose of the entry.[390] These powers are necessary because the purpose of entry for some agencies which are likely to be covered by this class of organisation would be frustrated easily by hiding things, for example the mistreated animals, from them.

Including these powers helps to ensure the right of society to ensure its rules are complied with and so provides some additional compliance with Bingham's principles.

Part 8 – Safeguards on the Use of Powers and Rights of Persons Against Whom the Powers are Used

As we have worked through the powers included in the earlier Parts of the 2021 Act, we have seen that each of the powers has some limited safeguards built into them: the powers are only given to specific agencies or organisations; the person exercising them must be authorised; the powers can only be exercised by the authorised person for specific purposes; and the powers contain conditions which need to be met in order for them to be used or constraints about their use.

Those safeguards are not enough on their own to either maintain the sort of balance between the group and individuals envisaged by Llewellyn or to limit the interference with individual rights to the least possible needed to enforce the rules of the group as envisaged by Gewirth. They do not provide for an adequate dispute resolution mechanism which is a key component of the law-jobs theory, Bingham's "thick" concept of the rule of law and my practical rule of law framework.

This Part of the 2021 Act introduces additional safeguards and rights which are applied to the powers under the Act. Placing all the additional safeguards and rights in one Part assists legislation users, in particular lay users, to identify them and better equips them to assert their own rights. This is assisted by the requirement in the other Parts of the Act that occupiers are given a written statement of safeguards and rights which apply to the use of the powers.

[390] Sections 132 and 133 of the 2021 Act.

The first safeguard prevents information which has been produced under a notice requiring the production of information from being used in criminal proceedings against the person who has provided the information.[391] This ensures the privilege against self-incrimination is not eroded by a power to compel a person to produce information. This safeguard is subject to a small qualification, allowing the information which is provided to be referred to in a prosecution for an offence of obstruction or perjury relating to the exercise of the power.

The second safeguard imposes a requirement to secure premises against trespass where they have been entered by an officer.[392] This mitigates against the potential for an exercise of powers under the 2021 Act leaving an occupier's premises in a worse position of security against others than they would have been but for the exercise of the powers.

The next section imposes a positive duty on an officer who has seized anything under the Act to ensure legal professional privilege is not infringed.

Safeguards on the use of certain powers: duty to examine for legal professional privilege

136.*—(1) It is the duty of the relevant officer to secure—*

(a) that anything which is produced or seized under a power in this Act ("the property") is as soon as reasonably practicable—

(i) examined by an officer ("the examining officer") who is not involved in the investigation,

(ii) that the examination is sufficient to reasonably identify documents, information or items which are LPP material, and

(iii) that anything which is LPP material is kept separate from the remainder of the property ("the sifted material").

(2) The examining officer must serve a notice on any person with an interest in the property informing the person—

(a) of their right to be present or represented at the examination;

(b) of their right to provide a list of search terms for the purposes of an examination of electronic material; and

(c) the date by and manner in which they must indicate—

(i) whether they intend to be present or represented at the examination; and

(ii) the list of search terms for the purposes of an examination of electronic material.

(3) The date in subsection (2)(c) must be no sooner than 21 days from the date on which the notice is served.

(4) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business or at any premises on which the business trades;

[391] Section 134 of the 2021 Act.
[392] Section 135 of the 2021 Act.

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(5) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(6) The examining officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

(7) Where a person on whom a notice is served does not respond by date in subsection (2)(c)—

(a) the person forfeits the right to be present or represented at the examination;

(b) the person forfeits the right to provide a list of search terms for the purposes of the examination of electronic material; and

(c) the examining officer may, in conjunction with the relevant officer, use their best judgement to produce a list of search terms for the purposes of the examination of electric material.

(8) Upon completion of the examination the examining officer must take steps to ensure the LPP material is kept separate from the sifted material and stored in a manner in which the relevant officer, or anyone else working on the investigation, is unable to access it.

(9) It is the duty of the relevant officer to ensure that if it becomes apparent that the sifted material contains items which are subject to legal professional privilege those items are removed and transferred to the examining officer to be stored with the other LPP material.

(10) *In this section LPP and section 139, "LPP material" means material which is subject to legal professional privilege.*

The safeguard works in the following way. The officer must ensure that anything seized using powers in the 2021 Act is examined by an officer who is not involved in the investigation for which it is seized. The examination has to be sufficient to identify things which would be subject to legal professional privilege and anything which would then need to be kept separate from the remainder of the seized property.

The officer performing the examination would have to serve a notice on any person with an interest in the seized property informing them:

- of their right to be present or represented at the sift;
- of their right to provide a list of search terms to assist in the sift of electronic material; and
- the date and manner in which they must indicate if they intend to be present or represented and by which the list of search terms must be provided.

This process provides transparency and ensures that anyone with an interest in the seized property is put in a position where they can protect their interests. Indirectly this would increase compliance with Bingham's first principle, and my fourth, because it means the law in action is

clearer. It increases protection of fundamental human rights, complying with one of the core principles of the practical framework of the rule of law, by requiring a legal professional privilege sift to be undertaken whenever a seizure occurs and by making sure a person has the opportunity to be fully involved.

Introducing a statutory requirement to provide the opportunity for those with an interest in the property to be involved could, however, introduce a mechanism which could be used to frustrate an investigation. Introducing such a mechanism would reduce compliance with Bingham's principles and the practical rule of law framework because it would reduce the protection of the rights of others which is afforded by the proper exercise of functions by those empowered by the state.

This risk is dealt with by subsection (7) which removes the right to be present or represented and the right to provide a list of search terms for the electronic sift if the date for responding to the notice has passed without the information being provided. The rights of the person are still protected in two ways. First, the sift must still take place; the difference between a sift where the notice is complied with and where it is not is that the sift would be undertaken using search terms compiled using the best judgement of the examining officer and the officer working on the investigation. Second, the section also imposes a positive duty to remove legal professional privilege material from the sifted material if it becomes apparent it is legally privileged; this would ensure that any material which was missed during the sift is subsequently protected.

There is one further issue which needed to be considered when drafting this section of the legislation. Whilst preventing access to legally privileged material is fundamentally right in most situations, there are some where it would be necessary in order for an organisation to fulfil its purpose. Bodies which are responsible for the professional regulation of lawyers may need to access legally privileged information in order to properly fulfil their regulatory functions. In order to preserve the right of those who are regulated the disapplication needs to be limited to items which are subject to the privilege held by their clients. This is dealt with in the following section:

> ***Safeguards on the use of certain powers: application for access to LPP material***
>
> ***139.****—(1) A relevant officer who is an authorised officer of a regulatory body may apply to a Commissioner for Warrants for access to LPP material.*
>
> *(2) An application under this section must be made in writing and set out why the access is necessary in the public interest.*
>
> *(3) An application under this section may only be made where the relevant officer is acting for a purpose connected with the regulation of legal professionals.*
>
> (4) *LPP material which is LPP material because it exists as a result of a relationship between the person under investigation and their legal adviser is exempt from this section.*

Section 137 acts to safeguard individuals from the risk of a large-scale invasion of privacy by imposing a positive duty to sift anything which has been seized and remove irrelevant material.

Safeguards on the use of certain powers: duty to examine for irrelevant material

137.—*(1) It is the duty of the relevant officer to secure—*

(a) that anything which is produced or seized under a power in this Act ("the property") is as soon as reasonably practicable—

(i) examined by an officer ("the examining officer") who is not involved in the investigation,

(ii) that the examination is sufficient to reasonably identify documents, information or items which are not relevant to the investigation, and

(iii) that anything which is identified as not relevant to the investigation ("the irrelevant material") is kept separate from the remainder of the property ("the sifted material").

(2) The examining officer must serve a notice on any person with an interest in the property informing the person—

(a) of their right to be present or represented at the examination;

(b) of their right to provide a list of search terms for the purposes of an examination of electronic material; and

(c) the date by and manner in which they must indicate—

(i) whether they intend to be present or represented at the examination; and

(ii) the list of search terms for the purposes of an examination of electronic material.

(3) The date in subsection (2)(c) must be no sooner than 21 days from the date on which the notice is served.

(4) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business or at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(5) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(6) The examining officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

(7) Where a person on whom a notice is served does not respond by date in subsection (2)(c)—

(a) the person forfeits the right to be present or represented at the examination;

(b) the person forfeits the right to provide a list of search terms for the purposes of the examination of electronic material; and

(c) the examining officer may, in conjunction with the relevant officer, use their best judgement to produce a list of search terms for the purposes of the examination of electric material.

(8) *Upon completion of the examination the examining officer must take steps to ensure the irrelevant material is kept separate from the sifted material and stored in a manner in which the relevant officer, or anyone else working on the investigation, is unable to access it.*

The section follows the same procedure as the LPP safeguard, but there is no power to apply for access to the irrelevant material because it is not needed.

The next section creates the concept of special material and applies safeguards to it. Special material is

(a) records relating to an individual's—

(i) physical or mental health,

(ii) spiritual counselling or assistance given, or to be given, to that individual, or

(iii) counselling or assistance given to that individual for the purpose of that individual's welfare by an individual or organisation who has responsibilities by reason of their office, occupation or court order,

which a person has acquired or created in the course of any trade, business, profession or other occupation which that person holds in confidence;

(b) human tissue or tissue fluid which had been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;

(c) material which is acquired or created for the purpose of journalism and which is seized from the possession of the person who acquired or created it for that purpose; or

(d) *material which a person has acquired in the course of their business (other than anything subject to legal professional privilege) and which is held by that person under an express or implied undertaking to hold it in confidence or under an obligation of secrecy contained in any Act including any Act passed after this Act.*

This section effectively combines material which is considered excluded or special procedure material in PACE. As can be seen below, the procedure mirrors those for isolating legal professional privilege and irrelevant material.

Safeguards on the use of certain powers: duty to examine for special material

138.*—(1) It is the duty of the relevant officer to secure—*

(a) that anything which is produced or seized under a power in this Act ("the property") is as soon as reasonably practicable—

(i) examined by an officer ("the examining officer") who is not involved in the investigation,

(ii) that the examination is sufficient to reasonably identify documents, information or items which are special material, and

(iii) that anything which is identified as special material is kept separate from the remainder of the property ("the sifted material").

(2) The examining officer must serve a notice on any person with an interest in the property informing the person—

(a) of their right to be present or represented at the examination;

(b) of their right to provide a list of search terms for the purposes of an examination of electronic material; and

(c) the date by and manner in which they must indicate—

(i) whether they intend to be present or represented at the examination; and

(ii) the list of search terms for the purposes of an examination of electronic material.

(3) The date in subsection (2)(c) must be no sooner than 21 days from the date on which the notice is served.

(4) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business are at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or(c);

(e) by facsimile; or

(f) by email.

(5) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(6) The examining officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

(7) Where a person on whom a notice is served does not respond by date in subsection (2)(c)—

(a) the person forfeits the right to be present or represented at the examination;

(b) the person forfeits the right to provide a list of search terms for the purposes of the examination of electronic material; and

(c) the examining officer may, in conjunction with the relevant officer, use their best judgement to produce a list of search terms for the purposes of the examination of electric material.

(8) Upon completion of the examination the examining officer must take steps to ensure the special material is kept separate from the sifted material and stored in a manner in which the relevant officer, or anyone else working on the investigation, is unable to access it.

(9) In this section and section 140, "special material" means—

(a) records relating to an individual's—

(i) physical or mental health,

(ii) spiritual counselling or assistance given, or to be given, to that individual, or

(iii) counselling or assistance given to that individual for the purpose of that individual's welfare by an individual or organisation who has responsibilities by reason of their office, occupation or court order,

which a person has acquired or created in the course of any trade, business, profession or other occupation which that person holds in confidence;

(b) human tissue or tissue fluid which had been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;

(c) *material which is acquired or created for the purpose of journalism and which is seized from the possession of the person who acquired or created it for that purpose*

(d) *material which a person has acquired in the course of their business (other than anything subject to legal professional privilege) and which is held by that person under an express or implied undertaking to hold it in confidence or under an obligation of secrecy contained in any Act including any Act passed after this Act.*

Section 140 provides a mechanism to apply to access special material where it is in the public interest to do so.

Safeguards on the use of certain powers: application for access to special material

140.*—(1) A relevant officer may apply to a Commissioner for Warrants for access to special material.*

(2) *An application under this section must be made in writing and set out why the access is necessary in the public interest.*

This would help to deal with situations like those described by the Law Commission such as where medical records are relevant to a regulatory investigation into medical malpractice or where information in medical records might be relevant to a criminal investigation.[393]

The safeguards which would, under the 2021 Act, apply to LPP and special material work in a different way to how the safeguards in the current landscape generally apply. At the moment, the material is protected by virtue of being excluded from seizure, subject to the additional powers of seizure contained in the Criminal Justice and Police Act 2001 ("CJPA").[394] The 2021 Act, however, permits the seizure of material and provides safeguards by forcing agencies to undertake a sifting procedure which ensures the risk of those carrying out an investigation seeing the sensitive material is reduced. There are three main reasons behind taking this approach.

The first is that the increasing presence of, and reliance on, electronic storage devices mean that a significant number of seizures will contain irrelevant material and some will be likely to contain privileged or sensitive information. The devices will have been seized under "seize and sift" provisions and so a similar process to that set out in the 2021 Act will already be being undertaken. Given the powers of additional seizure in CJPA effectively narrow the prohibition on seizure to material which is likely to be hard copy and small in volume, it is somewhat artificial to maintain the prohibition.

The second is that the "mischief" is not in the seizure of the material but in the reading of, and reliance on, it by officers who are exercising powers in order to pursue an investigation. Refocusing the safeguards on that mischief is consistent with the application of a "jobs" lens to

[393] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 192–193.
[394] See Criminal Justice and Police Act 2001 pt 2.

the landscape redesign; it creates a targeted intervention which applies to the same point in the process regardless of the volume and complexity of material in question. This underpins the third reason, which is set out below.

By applying the safeguard after seizure, and requiring the examination of all material by an independent officer, the safeguard better protects the rights of the individual against whom the powers have been exercised than the current landscape does. The requirement to examine seized material reduces the risk of sensitive information being read by officers who are investigating the person from whom the information is seized. The process outlined in the 2021 Act also provides the person with a right to provide key terms for sifting, enabling them to make sure the sift is more likely to identify sensitive information and prevent the case team from seeing it.

The process would, unlike the current landscape, mean everything which is seized would need to be examined. This would likely place an additional burden on the agencies concerned; it should be noted, however, that the type of information this process seeks to protect, is either information which is deeply personal or which is key to a person being appraised of their legal rights and so it is right that it is given proper protection even if it leads to an increased administrative burden for those exercising the powers.

The next section places a limit on the length of time for which something which has been seized can be retained. It limits retention to six months unless it reasonably required for longer, in which case the retention is limited to the period for which it is required.[395] The Act also introduces a restriction on collateral use, meaning that authorities cannot obtain information for one purpose and use it for another; the exception to this is where an investigation into an offence reveals evidence of a different offence, meeting the wider public interest in enforcing the criminal law.[396]

The final two safeguards are a requirement to have regard to any codes issued under the 2021 Act and a requirement to make a record of the use of powers.[397]

The remainder of this Part of the 2021 Act sets out the rights of those against whom the powers are exercised. The first two rights relate to arrest and detention; the first provides a right to apply for an order that arrest or detention was unlawful and the second sets out a right to apply for a writ of habeas corpus in respect of a person who is currently arrested or detained.[398]

The inclusion of these rights is key in ensuring the new landscape proposed in this legislation complies with Bingham's principles and the practical rule of law framework, in particular the

[395] Section 141 of the 2021 Act.
[396] Section142 of the 2021 Act.
[397] Sections 143 and 144 of the 2021 Act.
[398] Sections 145 and 146 of the 2021 Act.

respect for fundamental rights. Although arrest and constabulary detention are relatively short-lived interferences with a person's liberty, it is still an interference which strikes at the heart of their freedom and well-being as an agent under the PGC because it places an absolute restriction on their ability to freely choose and act. By providing a mechanism to secure the release of someone during the currency of their unlawful detention, or a means of obtaining redress after an unlawful detention has ceased, the legislation helps to ensure the right balance is struck between interfering with liberty where it is necessary and protecting liberty from unnecessary or unlawful interference.

The next section provides the statutory underpinning for the rights which correspond to the sifting process set out in the sections dealing with legal professional privilege, irrelevant and special material safeguards.[399]

The following three sections give rights relating to the lawfulness of the exercise of powers in the 2021 Act. They provide a right to apply for an order that warrants issued under the 2021 Act were unlawfully issued and a right to apply for an order that the exercise of any power in the 2021 Act was unlawful.[400]

These rights provide the basis for individuals to act to protect themselves against the infringement of their rights by state authorised agencies. They help to maintain the balance required by the application of the law-jobs theory and PGC to the landscape of powers, as well as the practical rule of law framework, ensuring there is an effective mechanism by which those exercising a law-job function can be challenged and held to account.

The next section provides a right to apply for the return of anything which has been seized under a power in the 2021 Act. This gives those from whom things are seized a way to protect themselves against unlawful interference with or conversion of property by state authorised agencies.[401]

Occupiers of premises are provided, by the next section, with a right to refuse entry to an officer who is attempting to enter by notice.[402] This makes it clear that the power of entry on notice is not an unfettered power; the occupier will either have to consent to the entry or the officer will need to obtain a warrant.

Two further rights are given. First, a right to apply for compensation in respect of the exercise of powers; this helps to ensure the balance between individuals and those exercising powers is maintained by creating a mechanism by which redress can be achieved where a person's rights

[399] Section 147 of the 2021 Act.
[400] Sections 148 to 150 of the 2021 Act.
[401] Section 151 of the 2021 Act.
[402] Section 152 of the 2021 Act.

have been infringed by the unlawful exercise of powers.[403] Second, the right to apply for an interim injunction in order to protect their interests until a decision has been made about the lawfulness of an exercise of a power.[404] This increases protection for individual rights by providing a mechanism to prevent officers, for example, examining the private information they have obtained until such time as an independent body has confirmed the seizure was lawful.

Part 9 – Commissioners for Warrants

Part 9 of the 2021 Act introduces the concept of Her Majesty's Commissioners for Warrants and Her Majesty's Deputy Commissioners for Warrants. Commissioners are appointed in line with the provisions of Schedule 10 to the 2021 Act.[405] Commissioners are given four specific powers:

- to issue a warrant of entry;
- to issue a warrant of production;
- to grant access to legal professional privilege material; and
- to grant access to special material.[406]

The powers to issue a warrant of entry or warrant of production are drafted in a way which allows them to work for any of the types of organisations which are given powers to apply for them under the 2021 Act, as shown below.

> ***Warrant of entry: power of commissioner for warrants to issue warrants***
>
> ***158.****—(1) A Commissioner for Warrants may, where the conditions in subsections (2) to (4) are met, issue a warrant authorising a relevant officer to enter premises.*
>
> *(2) The first condition is that this Act confers a power on that relevant officer to make an application for a warrant of entry.*
>
> *(3) The second condition is that the conditions for issuing a warrant of entry to that relevant officer are met.*
>
> *(4) The third condition is that there are reasonable grounds to believe the entry is necessary and proportionate in all the circumstances.*
>
> *(5) A warrant under this section authorises entry by force if necessary.*
>
> *(6) Subject to subsection (10) a relevant officer may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.*
>
> *(7) Subject to subsection (10) a person who is accompanying a relevant officer may exercise the same powers as a relevant officer.*
>
> *(8) Subject to subsection (10) a warrant under this section ceases to have effect at the end of the period of 84 days beginning with the day it is issued.*

[403] Section 153 of the 2021 Act.
[404] Section 154 of the 2021 Act.
[405] Section 155 of the 2021 Act.
[406] Section 156 of the 2021 Act.

(9) Subject to sub-section (10) a warrant authorises multiple entries.

(10) A warrant under this section may have conditions placed on its execution by the Commissioner for Warrants including (but not limited to)—

(a) the times and days at which the warrant may be executed;

(b) a shorter period than the period mentioned in sub-section (8);

(c) the number or categories of persons a relevant officer may be accompanied by;

(d) the powers available to persons accompanying a relevant officer;

(e) the maximum number of entries the warrant authorises.

(11) *Where the relevant officer is a constable, this section does not confer a power of arrest on any person who is accompanying them under a warrant.*

Warrant of production: power for commissioner for warrants to issue warrants

161.*—(1) A Commissioner for Warrants may, where the conditions in subsections (2) to (4) are met, issue a warrant requiring a person to produce documents or information to a relevant officer.*

(2) The first condition is that this Act confers on that relevant officer a power to make an application for a warrant of production.

(3) The second condition is that the conditions for issuing a warrant to that relevant officer are met.

(4) *The third condition is that it is necessary and proportionate to require the information to be produced.*

Both powers are drafted by reference to certain conditions being met. The first condition for both of them is that the relevant officer has the power to apply for the warrant. The second condition for both is that the conditions for issuing a warrant to that officer are met. The conditions in question sit within the Part of the 2021 Act which empowers the officer to apply for a warrant, enabling the conditions to be tailored to the different types of organisation which sit in the landscape. The third condition is that there are reasonable grounds to believe the entry or production of information (as the case may be) are necessary and proportionate.

The third condition provides a crucial safeguard, making it plain on the face of the legislation that it is for the Commissioner to be satisfied the granting of the warrant is necessary and proportionate and giving them the ability to refuse the application if they are not satisfied. This helps the proposed landscape meet the requirements within the practical rule of law framework to provide clarity, protect freedom and well-being, and provide an effective mechanism to prosecute their rights-claims.

Both warrants are applied for by an officer by written information on oath. The requirement to put the application in writing, coupled with the requirement that the Commissioner records their reasons for issuing the warrant, ensures the best possible scrutiny of the warrants in any challenge brought by the person against whom they are executed. This, in turn, helps to increase

compliance with the rule of law and the protection of individuals against unlawful access to their private information.

The 2021 Act also sets out what must be included in the warrant applications.

Warrant of entry: application by a relevant officer

160.*—(1) An application for a warrant of entry under this Act must be made by written information on oath given by a relevant officer.*

(2) An application for a warrant of entry under this Act may be made without notice.

(3) An application for a warrant of entry under this Act must state—

(a) the name of the relevant officer;

(b) the basis on which they are a relevant officer and the evidence of their appointment and authority;

(c) the purpose for which the relevant officer is acting;

(d) the section of this Act that confers a power on the relevant officer to make an application for a warrant of entry;

(e) the section of this Act that sets out the conditions for issuing a warrant of entry to the relevant officer;

(f) the premises to which the warrant of entry will authorise entry;

(g) the grounds (supported by relevant exhibits) on which the relevant officer says the conditions for issuing a warrant of entry are met;

(h) any information which may undermine the application for a warrant of entry or otherwise militate against a Commissioner for Warrants issuing it; and

(i) any information which may reasonably assist a Commissioner for Warrants to consider whether or not any conditions should be placed on the execution of a warrant of entry, including (but not limited to)—

(i) the type of premises;

(ii) the identity of known or suspected occupiers of the premises;

(iii) whether any of the known or suspected occupiers of the premises are—

(aa) under the age of 18;

(bb) infirm; or

(cc) otherwise to be considered vulnerable; and

(iv) *where the premises are business premises, the ordinary opening hours of the business*.

Warrant of production: application by a relevant officer

163.*—(1) An application for a warrant of production under this Act must be made by written information on oath by a relevant officer.*

(2) An application for a warrant of production under this Act must state—

(a) the name of the relevant officer;

(b) the basis on which they are a relevant officer and the evidence of their appointment and authority;

(c) the purpose for which the relevant officer is acting;

(d) *the section of this Act that confers a power on the relevant officer to make an application for a warrant of production;*

(e) *the section of this Act that sets out the conditions for issuing a warrant of production to the relevant officer;*

(f) *the documents and information sought;*

(g) *the grounds (supported by relevant exhibits) on which the relevant officer says the conditions for issuing a warrant of production are met.*

As we can see, the requirements are stricter for the warrant of entry than the warrant of production; this is for two reasons. First, an entry into premises is of itself more intrusive than requiring a person to produce documents without entry occurring. An entry into premises means, even if no further powers are exercised, officers are able to see anything which is open to view in the premises, leading to an immediate loss of privacy. Second, under the 2021 Act an entry under a power of entry switches on other powers and, as a result, causes a larger potential interference with the freedom of the individuals on the premises.

When applying for a warrant of entry, officers are required to inform the Commissioner of anything which would reasonably assist the Commissioner in deciding if they want to place conditions on the execution of the warrant. An indicative, non-exhaustive, list is used to ensure the most pertinent information is always given so that the disruption of the warrant and the impact on vulnerable groups of its execution can be properly weighed against the need for the officer to enter. Again, this helps to achieve compliance with Bingham's principles, and the practical rule of law toolkit, by reducing the interference with the rights of individuals.

As a warrant of entry can be applied for without notice, and in most cases will be; the 2021 Act places an express requirement that the information sets out anything which undermines the application. This is a requirement in the current law, although not set out in any of the legislation. It is maintained, and expressly enacted, in the 2021 Act because it is fundamental to ensuring the procedure is fair and that the rights of the occupiers of any premises to be entered are protected.

Part 10 – Powers Tribunal and Powers Appeal Tribunal

This Part of the 2021 Act establishes a new tribunal for the purposes of hearing challenges to warrants and powers under the Act. In document four I concluded that, on balance, the oversight of the use of powers fit more within the type of work that belongs to a tribunal structure than a court; the tribunal structure is more appropriate because powers are more specialist than generalist, the factors a decision maker needs to take into account are closely aligned to administrative law, and the issues are such that an individual might reasonably be expected to be able to bring a case themselves without legal counsel. I have carried that conclusion through to the drafting here. One clear advantage of doing so, is that a bespoke system can be designed rather than shoehorning it into the current court landscape.

The model used in this Act is based on the two-tier system introduced by the TCEA. This allows for appeals to be heard within the parallel system, with the courts only becoming involved at Court of Appeal stage on a "second appeal" basis. Sections 165 to 167 of the 2021 Act create the various offices which are needed (for example, member, judge and so on) for the structure to function.

The Powers Tribunal is the venue for an application by a person against whom powers have been exercised to challenge the lawfulness, seek return of unlawfully obtained materials and compensation.[407]

The key function of the Powers Tribunal in the proposed landscape is to provide an effective mechanism by which the exercise of powers can be challenged and independently adjudicated on. It is designed in a way which prevents lack of funds being a barrier to a person challenging the exercise of powers; section 169(1)(h) of the 2021 Act gives the tribunal the power to award costs only where a party has been unreasonable. The speedier, more informal processes using a tribunal system allows creates the opportunity for resolving disputes more quickly; this helps to mitigate against the impact of a misuse of the system of oversight and so assists the organisations in protecting the rights of others.

The Powers Appeal Tribunal provides a further level of oversight, exercising a supervisory jurisdiction over the decision of the Powers Tribunal.[408] Appeals to the Powers Appeal Tribunal are appeals on a point of law, recognising the Powers Tribunal as the primary finder of fact. It would still be open for a person to challenge perverse findings of fact as these are considered to be errors of law.

It has the additional function of hearing applications for a writ of habeas corpus; it would be possible for that function to have been given to the Powers Tribunal, however, it is much more likely that an application for a writ would cause more disruption to the business of the Powers Tribunal than the Powers Appeal Tribunal because it would be the busier of the two tribunals.[409]

Section 173 of the 2021 Act gives a further right of appeal to the Court of Appeal. The legislation follows the "second appeal" test, requiring either an important principle of law or practice or some other compelling reason. This helps to manage the volume of appeals which would go to the Court of Appeal and to maintain the balance between rights.

Section 174 of the 2021 Act provides a power to make and amend rules of procedure for the Powers Tribunal and the Powers Appeals Tribunal, enabling a bespoke procedure to be

[407] Sections 168 and 169 of the 2021 Act.
[408] Section 171(1) of the 2021 Act.
[409] Section 171(2) of the 2021 Act.

implemented to ensure individuals are put in the best possible position to defend their rights. The rules of procedure are not included in this thesis, because they would further extend the scope and discussion.

The tribunal system set out in the 2021 Act ensures the landscape of powers has the necessary checks and balances to protect the rights of those against whom powers are exercised and those on whose behalf the organisations exercising them are ultimately acting. It provides for an open, transparent, and fair system of adjudication to resolve disputes about the application of the law and legal rights. This helps to improve compliance with Bingham's principles and the practical rule of law framework.

Part 11 – Offences

Part 11 of the 2021 Act creates offences which help to provide a backstop to the powers contained in the Act. It provides a mechanism of ensuring compliance, which is needed if the powers are to have the maximum possible use.[410]

Part 12 – General Provisions

Part 12 of the 2021 Act deals with the general provisions such as extent and commencement. It contains three key provisions which are worthy of mention in this discussion. First, it places a duty to uphold the independence of the Commissioners for Warrants and the judges and members of the Powers Tribunal and Powers Appeal Tribunal on all those involved in the administration of justice.[411]

Second, it establishes the Powers Codes Committee which is made up of a selection of Commissioners for Warrants, judges of the two tribunals and lay members. The Committee is required to produce codes of practice relating to the arrest and detention of persons and to the use of powers under the Act. The codes must be kept under review and take into account issues which arise in the tribunals, ensuring that there is guidance available to both those using the powers and those against whom they are used.[412]

Third, it contains a power to amend the legislation by statutory instrument so that it can keep pace with the needs of society.[413] There is a power to add bodies to each of the schedules which contain a list of bodies with powers under the Act, enabling new agencies to be given the powers they need without those powers being placed in a different Act.[414] This will help to prevent a return to the current landscape of hundreds of different pieces of legislation. The power is

[410] Section 175 of the 2021 Act.
[411] Section 176 of the 2021 Act.
[412] Section 177 of the 2021 Act.
[413] Section 178 of the 2021 Act.
[414] Section 178(1) of the 2021 Act.

subject to the negative procedure in the Houses of Parliament, meaning the addition of the agency will have effect without express Parliamentary approval.[415]

There is also a power to add or remove powers and to add safeguards or rights under the Act; safeguards and rights cannot be removed by secondary legislation.[416] This enables the law to remain nimble enough to keep pace with advances in technology, preventing a repeat of the electronic evidence problems identified by the Law Commission. The power is subject to the draft affirmative procedure in the Houses of Parliament, requiring the consent of both houses to the creation of new powers.[417]

Conclusions

As we have seen in this section, it is possible to consolidate the powers into one Act and to improve compliance with Bingham's "thick" concept of the rule of law, as well as the practical framework, when doing so. However, in order to consolidate into one Act it was necessary to reimagine the landscape, moving away from piecemeal conditions to a system of categorising organisations by the law-jobs function they perform.

Part Four: Filling the Moat – Concluding the Research Project

Introducing this part of the Thesis

At the beginning of this thesis, I set out the questions this research is intended to answer and explained that this particular piece draws together a research arc which has been undertaken via a number of previously examined documents and this final piece of work. In this conclusion, we will draw together the threads of the research so that the answers to the questions are placed in one, coherent, setting.

Once the answers have been set out, we will consider the strengths and the limitations of the thesis. This will be followed with suggestions for future research.

[415] Section 181(1) of the 2021 Act.
[416] Section 178(2) of the 2021 Act.
[417] Section 181(2) of the 2021 Act.

ANSWERING THE RESEARCH QUESTIONS

1. To what extent, if at all, can powers of entry and access to information be rationalised?

As we saw in the introduction to this thesis, the research undertaken in document three of the overall project suggested it should be possible to rationalise powers of entry and access to information.[418] This thesis has tested two different forms of rationalisation by attempting to draft the legislation which would be required to achieve them.

The first was an attempt to rationalise the existing landscape into a single Act without changing any of the detail of the conditions or safeguards which currently apply to them. This became what is referred to in the discussion section as the 2020 Act; the drafting of the Act was not finished as it became clear it would not be possible to achieve a result which provided clear and intelligible law. In other words, although it may well have proved it was technically possible to consolidate the legislation in that way it the end result would have led to a negative result in terms of the third research question. Maintaining the current conditions and safeguards would cause such complexity that it is hard to see how the rights of individuals could be effectively protected. If anything, the complexity of the cross-referencing could be such that consolidation in such a way risks further erosion of their rights.

The second attempt effectively ripped up the current landscape and started from a blank canvas, creating what is referred to in the discussion section as the 2021 Act. This created much more freedom in drafting, creating an opportunity to consider the functions agencies might undertake and provide powers based on the category of law-job they perform. This approach was more successful, creating a suite of significantly fewer powers than the current landscape and a single set of safeguards and rights which applied to them all.

The answer this project provides to the first question, then, is that it is possible to significantly rationalise powers of entry, associated powers, and powers to access information but only if a wholly new landscape based on parity of functions is created.

[418] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 3: A Catalogue of Powers' (n 11).

2. To what extent, if at all, would a modified tribunal system be better placed to oversee a system of powers of entry and access to information than the combination of courts currently charged with that oversight?

This question was largely answered by the research undertaken in document four of the project; that research suggested the exercise of powers is a specialist area of law more appropriate to a specialist tribunal rather than a court.[419]

Again, this thesis then tests that conclusion by drafting the legislation which would be needed to introduce a tribunal system; if it is not possible to achieve the outcome with clear drafting then the current system cannot be improved on. The 2021 Act shows it is possible to do so when linked to a reimagining of the landscape. Although it was not tested in this thesis, I have my doubts if the same could be said if the landscape remains the same as it is now. Empowering a tribunal to oversee the current landscape would involve removing the jurisdiction of a number of different courts whilst at the same time creating one body which would need to be able to engage with the complexities involved in different conditions and safeguards applying to each of the powers they oversaw.

The answer this project provides to the second question, then, is split into two parts. First, it is technically possible to say a tribunal system would be better placed than the courts to oversee the system of powers. Second, the legislative complexity created by consolidating the existing powers without changing the landscape (the 2020 Act approach) is such that moving to a tribunal system of oversight might lead to worse oversight; where the landscape is reimagined along the lines of the 2021 Act, however, the benefits provided by a tribunal system are more readily realised and so oversight would likely be better.

[419] Mullen, 'Warrants and Information Notices - A New Approach. Chapter 4: Oversight, Scrutiny and the Venue of Challenge' (n 18).

3. Whether or not a rationalised system of entry powers, powers to access information, and oversight can be developed in such a manner as to ensure:

- ***the rights of individuals are effectively protected;***
- ***the ability of the State to protect other individuals is not reduced by the rationalisation; and***
- ***a new system reduces the administrative burden for the State in the exercise of its powers?***

This question really breaks down into two main themes. First, how to balance the rights of those against whom powers are exercised and the rights of other members of society on whose behalf they are exercised. Second, how to ensure that balance is properly struck in the legislation which governs the powers.

As we saw earlier in this thesis, I have used Bingham's "thick" concept of the rule of law throughout this thesis as a proxy for assessing the balance and protection of the competing rights within the landscape. In previous documents I had also made reference to Gewirth's PGC as a framework which contemplates such a balance taking place. In part one of this thesis I set out my justification for preferring the "thick" concept, arguing that it is possible to work from the anthropological grounding of the law-jobs theory, via the indirect application of the PGC which expressly provides an ethical basis for curtailing the rights of individuals where that is done in line with ethical principles, to a concept of the rule of law which places human rights at its centre. I set out five principles which can be distilled from the interaction between the law-jobs theory and the PGC.

That argument provided the foundation for the reimagining of the landscape when it became clear the 2020 Act rationalisation would lead to significant complexity. It allowed a new piece of legislation to be drafted which was based around the law-jobs theory, creating categories of agencies which perform a function which is vital to maintaining either societal cohesion or net societal drive. By applying the practical rule of law framework, and the principle in the PGC that interference with the rights of individuals should be kept to the minimum necessary for group rules to be enforced, it was possible to tailor the powers and conditions on the use of those powers to the law-jobs being performed.

In part three of this thesis, the resulting Act is discussed and, where relevant, the principles of my practical rule of law framework and Bingham's formulation of the rule of law it complies with are identified. That discussion suggests it is possible to create a coherent landscape with powers and safeguards that strike the balance between the competing rights.

It is harder to assess what impact on the burden of administration the 2021 Act would have, because it would need to be seen in the real world in order to understand how the processes function and what level and complexity of legal proceedings arose once the system was bedded in. However, it is still possible to give an assessment based on some of the features of the draft legislation.

The 2021 Act significantly reduces the number of powers officers and the judiciary would need to be conversant with. It also introduces uniformity in process, meaning that judicial office holders would not need to read and understand the nuances of whichever piece of legislation provided the power in question; instead, they would need to be familiar only with the one set of processes and one piece of legislation. Additionally, it creates a specialist oversight body, giving the possibility of time and administration savings brought by specialist judges not needing to be taken through an unfamiliar area in the same level of detail as would be needed under the current system. It provides the opportunity for a single body of caselaw, creating a much nimbler system which reduces the burden.

On the other hand, it does increase some of the administrative burden placed on officers; for example, it requires certain documents to be given to occupiers which are not currently required in all circumstances.

On balance then, the answer to this question is that such a system can be developed, but that it would need to be developed from scratch in order to achieve the benefit of doing so.

Conclusion of the Research

This research shows it is possible to create a landscape of powers which has an increased compliance with the rule of law than the current landscape. However, this could not be achieved by a simple consolidating Act. Some of the changes in the 2021 Act would need significant political backing; for example, reconfiguring the law enforcement landscape so that all agencies are constables and able to exercise the same powers would be a significant departure from the current way in which law enforcement is currently viewed.

Strengths of the Research

As I set out in the introduction to the thesis, I have significant practitioner experience which is relevant to this research; I have advised on and defended the use of powers, I have led investigations, and as part of those investigations exercised powers myself, and I have drafted legislation. I have been able to draw on this expertise throughout this thesis, and the research project more generally, to add a real-world practitioner voice to the discussion.

I have followed a policy formulation and legislative drafting process which mirrors, as closely as possible within the confines of the degree and my professional ethics, one which would be followed in any major shift in policy. I have identified the competing rights of individuals and society and developed a framework to try and address those rights.

I have drawn on my experience of the limitations of current drafting to inform the drafting of the 2021 Act to try and avoid some of the pitfalls that exist in current legislation. Of course, no piece of legislative drafting is perfect and it is likely that if this legislation was actually added to the statute book other pitfalls would become apparent but I have at least been able to avoid the ones that already exist.

The legislative drafting element of this research is, without doubt, its key strength. This is demonstrated by the impact it has had on the answers to the questions; as mentioned in the introduction to the thesis my tentative conclusion in document three was that the current landscape could be consolidated into an Act whilst keeping intact the current legislative provisions. By using my practitioner legislative drafting experience, however, I was able to test if that was correct and to identify it was not; if I had not undertaken a drafting exercise, I could have formed what turned out to be an incorrect conclusion to this research.

Another strength of this research is that it provides an authentic practitioner voice to the debate. When it comes to the discussion of powers, it is easy to focus on only one half of the debate. For example, the Law Commission recognised, in respect of electronic information, "particular concerns about the right to privacy" and provisionally proposed "additional steps are required for investigators and issuing authorities to consider the necessity and proportionality of the seizure of electronic devices".[420]

I touched on this earlier in the thesis, when I talked about the process used to sift electronic information and the fact that despite seizing a large volume of information very little of it is seen by actual people. There is, however, another element to debates relating to the interaction of rights and powers. Wherever an investigation is taking place, those undertaking that investigation are charged by society to do so in order to protect the rights of society in general.

Many of those undertaking investigations will be like me; aware that they are given powers to intrude on the lives of others and keen to exercise them in a way which respects the rights of those people whilst performing their duty to protect the rights of others. Most will be doing their best, within a difficult legislative landscape, to balance those competing rights and to protect those who they are employed to protect. I have, on a number of occasions in my career, had to undertake such a balancing act and I would like to pause briefly to discuss two examples.

[420] Law Commission of England and Wales, 'Search Warrants (Consultation Paper 235)' (n 7) 18.

First, when undertaking an investigation into the potential manipulation of vulnerable people into paying for a service they were not receiving I had to balance the right to privacy of them, and the people being investigated, against their right not to be manipulated and offended against. The only way to be sure if offences were committed was to obtain what was potentially a significant amount of personal private information. I remained aware throughout that investigation that I would be doing so, but that without doing so any opportunity I had to protect vulnerable people would be lost.

Second, when dealing with an application for disclosure of information I had to balance the right of an individual to receive a fair trial with the risk that disclosing the information would lead to the death of at least two individuals, one of whom was a young child. Although protecting life is clearly the right thing to do in those circumstances, I have not forgotten that the only way I could do so was to interfere with the fair administration of a trial by obtaining a court order preventing disclosure.

These examples show the sorts of decisions those involved in law enforcement must make on a daily basis and it is easy to view the outcomes of those decisions through a particular lens. I hope, though, this thesis demonstrates a level of engagement with rights which shows they are actually at the heart of all discussions on powers and that sometimes the contribution of those with law enforcement experience is informed by seeing the impact on the rights of those not under investigation if there is a deficiency in the powers.

Before moving on to the limitations of the research, there is one further finding I would like to mention here. The discipline of considering the drafted legislation through the lens of the law-jobs each type of agency would perform identified some areas in the draft legislation which would not work. For example, I had originally drafted the 2021 Act with an absolute bar on obtaining material which is subject to legal professional privilege; when I came to analyse the legislation for the purposes of writing up this thesis, however, I realised this would prevent regulators such as the SRA from effectively discharging their functions because they would not be able to investigate any solicitor misconduct which required access to the files to prove. Although it strictly falls outside this research project, this does show the benefit of focussing on the law-job the legislation is intended to give effect to when reviewing any drafts of it.

LIMITATIONS OF THE RESEARCH

Although my practitioner experience is a strength of this research because it has given me a basis on which to design the powers, a research method which involves me drafting legislation based on my interpretation of a rights-based framework and my particular experience in the use of powers is obviously limited because it has not subjected the legislation to consultation to account

for the experience of others. Such a limitation was unavoidable because, as set out in the ethics section, the impact of the Civil Service Code made engaging in such a consultation unviable.

As I set out in my research method, I have mitigated against this by asking three trusted individuals with relevant professional experience to review the legislation and provide comments on whether the drafting was coherent and any lacunas were obvious.

A further limiting factor is inherent in the nature of the course. As a professional doctorate thesis is shorter than a traditional PhD, I have had to exercise judgement about the depth to which I have gone and the breadth of the work to which I have referred. For example, I have argued for the use of Bingham's concept of the rule of law and have used two theories to underpin that choice; however, I have not engaged with the significant body of literature around either the rule of law or those theories because doing so, and providing an adequate defence, would have represented a complete PhD in itself and it was not necessary for the purposes for which I have put the theories to use.

Further Avenues for Research Impact or Additional Research

This thesis represents an original contribution to knowledge by testing through the drafting of legislation whether consolidation of the landscape of powers of entry and associated powers would be possible in a way which improved the protections of the rights of individuals. It has shown that it would be possible, but it has not demonstrated whether such a move would be welcome to practitioners or the general public. In order to better understand whether it would be, it would be necessary to conduct a survey. This could be done by following the usual consultation process followed by Government to ensure the widest possible number of stakeholders.

The research has the potential to provide an additional piece of knowledge to the debate, should a further review of the landscape take place.

Depending on the eventual remit of the Royal Commission on the Criminal Justice System, further arguments could be developed around the changes to the office of constable envisaged by the 2021 Act and submitted as part of that review.

It would also be interesting, if the opportunity presented itself, to develop the framework of Llewellyn, Gewirth and Bingham and consider the fuller implications of how it could inform debate around the law.

A Castle Rebuilt; A Ruined Tenement Defiant Once More

This thesis starts, before even the contents page is reached, with Pitt the Elder's evocative image of even the most ruined of houses standing defiantly against the incursions of the State, protecting the liberties and freedoms of those within. Those liberties and freedoms are what led Sir Edward Coke to declare an Englishman's home, even a ruined tenement, to be his castle.

The current landscape of powers of entry, vast, complex, and at times illogical, is such that it is no longer clear that an occupier of a premises whether a broken-down cottage, a country estate, or an actual castle is able to "bid defiance to all the forces of the Crown". This research shows, however, it is possible to reimagine the landscape in such a way that occupiers are once again empowered to protect their liberties and freedoms.

The castle can, with sufficient political will, be rebuilt.

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Competition Act 1998

Consumer Rights Act 2015

Courts Act 2003

Criminal Justice and Police Act 2001

Enterprise Act 2002

Human Rights Act 1998

Police and Criminal Evidence Act 1984

Tribunal, Courts and Enforcement Act 2007

APPENDICES

- Appendix 1: the 2020 Act
- Appendix 2: the 2021 Act
- Appendix 3: classification of existing powers

Appendix 1

Access to Information, Powers of Entry, and Associated Powers Act 2020

An Act to make provision for the consolidation of powers to access information, powers to enter premises with or without warrant, and their associated powers, and to establish a single, coherent system of judicial oversight over the exercise of those powers.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows —

PART 1

Powers to require the production of information

Power to require, by notice, the production of information

1.—(1) A relevant officer may give notice to a person requiring that person to provide the information specified in the notice.

(2) A notice given under this section must be for a relevant purpose.

(3) A notice given under this section must meet the relevant conditions.

(4) A notice given under this section must comply with the relevant controls.

(5) Part 1 of Schedule 1 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 1 of Schedule 1

"relevant controls" means the controls in the corresponding column of the table in Part 1 of Schedule 1

"relevant officer" means a person of the description in the corresponding column of the table in Part 1 of Schedule 1

"relevant purpose" means a purpose in the corresponding column of the table in Part 1 of Schedule 1.

Power to require, by order, the production of information

2.—(1) A Commissioner or Deputy commissioner may, on application by a relevant officer, require a person to provide information to the relevant officer.

(2) An order given under this section must be for a relevant purpose.

(3) An order given under this section must meet the relevant conditions.

(4) An order given under this section must comply with the relevant controls.

(5) Part 2 of Schedule 1 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 2 of Schedule 1

"relevant controls" means the controls in the corresponding column of the table in Part 2 of Schedule 1

"relevant officer" means a person of the description in the corresponding column of the table in Part 2 of Schedule 1

"relevant purpose" means a purpose in the corresponding column of the table in Part 2 of Schedule 1.

PART 2

Powers of entry and associated powers

CHAPTER 1

Powers of entry

Power of entry without warrant

3.—(1) A relevant officer may enter premises without warrant.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 1 of Schedule 2 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"premises" includes or excludes, as the case may be, anything listed as such in the corresponding column of the table in Part 1 of Schedule 2

"relevant conditions" means the conditions in the corresponding column of the table in Part 1 of Schedule 2

"relevant controls" means the controls in the corresponding column of the table in Part 1 of Schedule 2

"relevant officer" means a person of the description in the corresponding column of the table in Part 1 of Schedule 2

"relevant purpose" means a purpose in the corresponding column of the table in Part 1 of Schedule 2.

Power of entry with warrant

4.—(1) A commissioner or Deputy Commissioner may, upon application by a relevant officer, issue a warrant authorising entry to premises.

(2) A warrant issued under this section must be for a relevant purpose.

(3) A warrant issued under this section must meet the relevant conditions.

(4) An entry pursuant to a warrant issued under this section must comply with the relevant controls.

(5) Unless indicated to the contrary in the relevant controls, an entry pursuant to a warrant issued under this section may be made by such reasonable force as is necessary in the circumstances.

(6) Part 2 of Schedule 2 makes further provision about the exercise of the power in subsection (1).

(7) In this section—

"premises" includes or excludes, as the case may be, anything listed as such in the corresponding column of the table in Part 1 of Schedule 2

"relevant conditions" means the conditions in the corresponding column of the table in Part 1 of Schedule 2

"relevant controls" means the controls in the corresponding column of the table in Part 1 of Schedule 2

"relevant officer" means a person of the description in the corresponding column of the table in Part 1 of Schedule 2

"relevant purpose" means a purpose in the corresponding column of the table in Part 1 of Schedule 2.

CHAPTER 2

Associated powers

Associated powers exercisable only upon exercise of power of entry

5.Sections [ ] to [ ] apply if a relevant officer has entered premises under the power in section 3(1) or under a warrant under section 4(1).

Power to search without warrant

6.—(1) A relevant officer may, without warrant, search premises.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 1 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 1 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 1 of Schedule 3.

"relevant officer" means a person of the description in the corresponding column of the table in Part 1 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 1 of Schedule 3

Power to search with warrant

7.—(1) A Commissioner or Deputy Commissioner may, at the same time as issuing a warrant to enter premises under section 4(1), authorise a relevant officer to search premises.

(2) A warrant issued under this section must be for a relevant purpose.

(3) A warrant issued under this section must meet the relevant conditions.

(4) A search pursuant to a warrant issued under this section must comply with the relevant controls.

(5) Part 2 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 2 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 2 of Schedule 3.

"relevant officer" means a person of the description in the corresponding column of the table in Part 2 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 2 of Schedule 3.

Power to break open containers

8.—(1) A relevant officer may break open a container found on the premises.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 3 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"container" includes an item of a description listed in the corresponding column of the table in Part 3 of Schedule 3

"relevant conditions" means the conditions in the corresponding column of the table in Part 3 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 3 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 3 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 3 of Schedule 3.

Power to seize from premises

9.—(1) A relevant officer may seize relevant material found on the premises.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 4 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 4 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 4 of Schedule 3

"relevant material" includes an item of a description listed in the corresponding column of the table in Part 4 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 4 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 4 of Schedule 3.

Power to require the production of information

10.—(1) A relevant officer may require the production of information.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 5 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"information" includes an item of a description listed in the corresponding column of the table in Part 5 of Schedule 3

"relevant conditions" means the conditions in the corresponding column of the table in Part 5 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 5 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 5 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 5 of Schedule 3.

Power to conceal object

11.—(1) A relevant officer may conceal a relevant object found on the premises.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 7 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 7 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 7 of Schedule 3

"relevant object" means an object of the description in the corresponding column of the table in Part 7 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 7 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 7 of Schedule 3.

Power to cull

12.—(1) A relevant officer may cull relevant animals.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 8 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant animal" means an animal listed in the corresponding column of the table in Part 8 of Schedule 3

"relevant conditions" means the conditions in the corresponding column of the table in Part 8 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 8 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 8 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 8 of Schedule 3.

Power to deal with personal property

13.A relevant officer may deal with personal property.

(1) The exercise of a power under this section must be for a relevant purpose.

(2) The exercise of a power under this section must meet the relevant conditions.

(3) The exercise of a power under this section must comply with the relevant controls.

(4) Part 9 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(5) In this section—

"personal property" means an item of a description in the corresponding column of the table in Part 9 of Schedule 3

"relevant conditions" means the conditions in the corresponding column of the table in Part 9 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 9 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 9 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 9 of Schedule 3.

Power to destroy object

14.—(1) A relevant officer may destroy a relevant object.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 10 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 10 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 10 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 10 of Schedule 3

"relevant object" means an object of the description in the corresponding column of the table in Part 10 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 8 of Schedule 3.

Power to distrain

15.—(1) A relevant officer may distrain a relevant object.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 11 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 11 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 11 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 11 of Schedule 3

"relevant object" means an object of the description in the corresponding column of the table in Part 11 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 8 of Schedule 3.

Power to excavate

16.—(1) A relevant officer may excavate.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 12 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 12 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 12 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 12 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 12 of Schedule 3.

Power to extinguish light

17.—(1) A relevant officer may extinguish light.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 13 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 13 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 13 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 13 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 13 of Schedule 3.

Power to give effect to an order of the court

18.—(1) A relevant officer may give effect to a relevant court order.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 14 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 14 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 14 of Schedule 3

"relevant court order" means an order of the description in the corresponding column of the table in Part 14 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 14 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 14 of Schedule 3.

Power to provide treatment

19.—(1) A relevant officer may provide relevant treatment.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 15 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 15 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 15 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 15 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 15 of Schedule 3

"relevant treatment" means treatment of a description in the corresponding column in Part 15 of Schedule 3.

Power to remove object

20.(1) A relevant officer may remove a relevant object.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 16 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 16 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 16 of Schedule 3

"relevant object" means an object of the description in the relevant column of the table in Part 16 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 16 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 16 of Schedule 3.

Power to remove person to safe place

21.(1) A relevant officer may remove a relevant person to a safe place.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 17 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 17 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 17 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 17 of Schedule 3

"relevant person" means a person of the description in the corresponding column in Part 17 of Schedule 3.

"relevant purpose" means a purpose in the corresponding column of the table in Part 17 of Schedule 3.

Power to survey

22.(1) A relevant officer may survey.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 18 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 18 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 18 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 18 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 18 of Schedule 3.

Power to take possession

23.(1) A relevant officer may take possession of land.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 19 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 19 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 19 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 19 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 19 of Schedule 3.

Power to take samples

24.(1) A relevant officer may take samples.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 20 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 20 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 20 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 20 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 20 of Schedule 3.

Power to undertake works

25.(1) A relevant officer may undertake works.

(2) The exercise of a power under this section must be for a relevant purpose.

(3) The exercise of a power under this section must meet the relevant conditions.

(4) The exercise of a power under this section must comply with the relevant controls.

(5) Part 21 of Schedule 3 makes further provision about the exercise of the power in subsection (1).

(6) In this section—

"relevant conditions" means the conditions in the corresponding column of the table in Part 21 of Schedule 3

"relevant controls" means the controls in the corresponding column of the table in Part 21 of Schedule 3

"relevant officer" means a person of the description in the corresponding column of the table in Part 21 of Schedule 3

"relevant purpose" means a purpose in the corresponding column of the table in Part 21 of Schedule 3.

SCHEDULES

SCHEDULE 1

Powers to require the production of information

PART 1

Power to require the production, by notice, of information

1.The following table sets out who may require the production, by notice, of information, the purposes for which they can require the information, the conditions which must be met in order to use the power, the controls on the use of the power, and where the power which is being re-enacted was originally found.

Relevant officers	*Relevant purposes*	*Relevant conditions*	*Relevant controls*	*Power to require assistance*	*Offence of obstruction applies*	*Proceedings for obstruction*	*Source*
An officer of the Competition and Markets Authority		The following conditions apply to the exercise of this power— **1.**The notice must specify the purpose for which the information is required. **2.**If the purpose is to allow the officer to consider whether to exercise a function the notice must specify the					

SCHEDULE 2

Powers of entry

PART 1

Power of entry without warrant

1.The following table sets out who may enter premises without warrant, the purposes for entry may be made, the conditions which must be met in order to use the power, the controls on the use of the power, and where the power which is being re-enacted was originally found.

Relevant officers	*Relevant purposes*	*Relevant conditions*	*Relevant controls*	*Power to require assistance*	*Offence of obstruction*	*Source*
A person authorised by the appropriate Minister.	To inspect premises in which— a child is living with a person with whom the child has been placed by an adoption agency, or a child in respect of whom a notice of intention to adopt has been given under section 44 of the Adoption and Children Act 2002 is, or will be, living.	Premises must be one premises in which— a child is living with a person with whom the child has been placed by an adoption agency, or a child in respect of whom a notice of intention to adopt has been given under section 44 of the Adoption and Children Act 2002 is, or will be, living.	Power must only be exercised at a reasonable time. If required to do so a relevant officer must produce a duly authenticated document showing their authority.	A relevant officer may require a person to provide any assistance the relevant officer may reasonably require.	Any person who intentionally obstructs another in the exercise of this power is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.	Section 15 Adoption and Children Act 2002
A person authorised by the Minister	To determine— whether, and if so in what					

	manner, any of the powers contained within the Agriculture Act 1947 are to be exercised, or whether, and if so in what manner, any direction given under a power in the Agriculture Act 1947 has been complied with.					

PART 2

Power of entry with warrant

2.The following table sets out who may enter premises with warrant, the purposes for entry may be made, the conditions which must be met in order to use the power, the controls on the use of the power, and where the power which is being re-enacted was originally found.

Relevant officers	*Relevant purposes*	*Relevant conditions*	*Relevant controls*	*Power to require assistance*	*Offence of obstruction*	*Source*
Constable	To exercise a power of search— for a child who has been, or is likely to be, removed in contravention of any of the provisions in Chapter 3 of Part 1 of the Adoption and	Where it appears to a Commissioner or Deputy Commissioner that a child has been removed in contravention of any of the provisions in Chapter 3 of Part 1 of the Adoption and Children Act	The warrant may only be issued if it appears to the Commissioner or Deputy Commissioner that there are reasonable grounds to believe the child to be on them.	Does not apply.	Any person intentionally obstructing a Constable exercising this power is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the	Section 41(2)(d) Adoption and Children Act 2002.

Children Act 2002, or where a person has failed to comply with sections 31(4), 32(3), 33(2), 34(3) or 35(2) of the Adoption and Children Act 2002.	2002, or where there are reasonable grounds for believing that a person intends to remove a child in contravention of those provisions.		standard scale.

SCHEDULE 3

Associated powers

PART 1

Powers of search without warrant

1. The following table sets out who may enter premises with warrant, the purposes for entry may be made, the conditions which must be met in order to use the power, the controls on the use of the power, and where the power which is being re-enacted was originally found.

Relevant officers	*Relevant purposes*	*Relevant conditions*	*Relevant controls*	*Power to require assistance*	*Offence of obstruction*	*Source*

PART 2

Powers of search with warrant

2. The following table sets out who may search premises with warrant, the purposes for which a search may be carried out, the conditions which must be met in order to exercise the power of search, the controls on the use of the power, and where the power which is being re-enacted was originally found.

Relevant officers	*Relevant purposes*	*Relevant conditions*	*Relevant controls*	*Power to require assistance*	*Offence of obstruction*	*Source*
Constable	To exercise a power of search— for a child who has been, or is likely to be, removed in contravention of any of the provisions in Chapter 3 of Part 1 of the Adoption and Children Act 2002, or where a person has failed to comply with sections 31(4), 32(3), 33(2), 34(3) or 35(2) of the Adoption and Children Act 2002.	Where it appears to a Commissioner or Deputy Commissioner that a child has been removed in contravention of any of the provisions in Chapter 3 of Part 1 of the Adoption and Children Act 2002, or where there are reasonable grounds for believing that a person intends to remove a child in contravention of those provisions.	The warrant may only be issued if it appears to the Commissioner or Deputy Commissioner that there are reasonable grounds to believe the child to be on them.	Does not apply	Any person intentionally obstructing a Constable exercising this power is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.	Section 41(2)(d) Adoption and Children Act 2002

PART 3

Power to require the production of information

3. The following table…

Relevant officer	*Information*	*Relevant conditions*	*Relevant controls*

Appendix 2

Constables Powers, Powers of Entry and Associated Powers Act 2021

An Act to make provision for the consolidation of powers to access information, powers to enter premises with or without warrant, and their associated powers, and to establish a single, coherent system of judicial oversight over the exercise of those powers.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows —

PART 1

Definitions

Definitions

1.—(1) These definitions apply in this Act.

(2) "Commissioner for Warrants" means a person appointed under section 155.

(3) "constable" means a person who is attested as a constable and a member of a constabulary maintained under section 4.

(4) "document" includes information recorded in any form and anything in or on which information of any description is or can be recorded.

(5) "notice of intended entry" means a notice which an officer is required to serve before the exercise of a power of entry without warrant.

(6) "premises" includes any place, vehicle, vessel, aircraft, hovercraft, offshore installation, tent or moveable structure.

(7) "relevant officer" means a person who may exercise powers under this Act.

(8) "unlawful conduct" means conduct occurring in any part of England and Wales which is unlawful under the criminal law of that part.

(9) "warrant of entry" means a warrant issued under section 158.

(10) "warrant of production" means a warrant issued under section 161.

PART 2

Constabularies

CHAPTER 1

Organisation of constabularies

Organisation of constabularies: areas of the Queen's peace

2.—(1) England and Wales shall be divided into areas of the Queen's peace.

(2) The areas referred to in sub-section (1) shall be—

(a) those listed in Schedule 1,

(b) the metropolitan area, and

(c) the City of London area.

Organisation of constabularies: areas of specialism

3.—(1) There shall be areas of specialism.

(2) The areas of specialism shall be those listed in Schedule 2.

Organisation of constabularies: maintenance of constabularies

4.—(1) A constabulary shall be maintained for every area of the Queen's peace.

(2) A constabulary shall be maintained for every area of specialism.

Organisation of constabularies: aid of one constabulary by another

5. A constabulary may, on the application of any other constabulary, provide constables or other assistance for the purpose of enabling the other constabulary to meet any special demand on its resources.

Organisation of constabularies: administration of constabularies

6. Schedule 3 contains provision about the administration of constabularies.

CHAPTER 2

Office and duties of constables

Office and duties of constables: appointment of constables

7.—(1) Every constable shall, on appointment, be attested by making a declaration in the form set out in subsection (2) before a justice of the peace.

(2) The form of the declaration is as follows—

'I ……. of ……. do solemnly and sincerely declare that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people, and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property, and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.'.

Office and duties of constables: duties of constables

8. It is the duty of a constable to—

(a) keep and preserve the Queen's peace;

(b) protect life and limb;

(c) protect property;

(d) prevent the commission of a crime;

(e) investigate crime.

Office and duties of constables: jurisdiction of constables

9. A person attested as a constable under this Act shall have all the powers and privileges of a constable throughout England and Wales and the adjacent United Kingdom waters.

Office and duties of constables: ranks, conduct and investigations

10. Schedule 4 makes provision about—

(a) the ranks to which a constable may be appointed;

(b) the conduct of constables; and

(c) the investigation and disciplinary processes which may be applied to constables.

CHAPTER 3

Powers of constables

SECTION 1

Investigatory powers exercisable by constables

Powers of constables: power to serve a notice requiring the production of information

11.—(1) A constable may serve on any person a notice requiring the person to produce the information specified in the notice to the constable.

(2) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business or at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) A constable may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of constables: contents of notice requiring the production of information

12.—(1) A notice under section 11 must be in writing.

(2) The notice must specify—

(a) the duties which the constable is acting in the execution of by serving the notice;

(b) the information which the constable requires the person to produce;

(c) the time within which the person on whom it is served must produce the information;

(d) the manner in which the person on whom it is served must comply with it;

(e) the form in which the information must be provided; and

(f) that offences under section 175 apply in relation to the exercise of this power.

(3) The notice may require production of information to which the person has access.

(4) The notice may require—

(a) the creation of documents, or documents of a description, specified in the notice, and

(b) the provision of those documents to the constable.

(5) A requirement to produce information or create a document is a requirement to do so in a legible form.

(6) The notice does not require a person to provide any information or create any documents which are subject to legal professional privilege.

Powers of constables: power to apply for a warrant of production

13. If a person fails to comply with a notice under section 11 a constable may apply for a warrant of production.

Powers of constables: conditions to be met for the issue of a warrant of production to the constable

14. A warrant of production may only be issued to a constable if there are reasonable grounds for a Commissioner for Warrants to believe—

(a) that a notice under section 11 has been served on a person;

(b) that the constable who served the notice did so in the execution of one or more of their duties;

(c) that the information required by the notice is reasonably required by the constable in the execution of their duties; and

(d) that the person on whom the notice was served has failed to comply without reasonable excuse.

SECTION 2

Powers to enter premises

Powers of constables: power to enter premises for the purposes of protecting life or limb, keeping the peace, and pursuing an offender

15. A constable may, using such force as is reasonably necessary, enter premises without a warrant of entry and without notice for the purpose of—

(a) protecting life or limb;

(b) keeping, or preserving, the Queen's peace; or

(c) where it is not reasonably practicable to obtain a warrant of entry, in pursuit of a person who is attempting to evade or has escaped from lawful arrest or is otherwise unlawfully at large.

Powers of constables: power to enter premises without warrant

16.—(1) A constable may enter without warrant premises other than premises used wholly or mainly as a dwelling.

(2) The power in subsection (1) may only be used—

(a) insofar as the entry is to premises to which the public has access (whether or not the public has access at that time) and it is for the purposes of exercising a power under—

(i) section 21, or

(ii) section 23; or

(b) where a notice has been served under section 17.

(3) A constable entering premises under this section may be accompanied by such persons, and may take onto the premises such equipment, as the constable thinks necessary.

(4) A person who is accompanying a constable under this section may exercise the same powers as a constable other than the power of arrest.

Powers of constables: power to serve a notice of intended entry

17.—(1) A constable may serve a notice of intended entry on the occupier of the premises.

(2) The notice may be served—

(a) by personal service;

(b) by post at the premises the constable intends to enter;

(c) in the case of a business, by post at the registered office of the business;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) A constable may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of constables: contents of a notice of intended entry

18.—(1) A notice under section 17 must be in writing.

(2) The notice must specify—

(a) the duties which the constable is acting in the execution of by serving the notice;

(b) where the duties are to prevent the commission of a crime or to investigate crime, the offences in question;

(c) the premises which the constable intends to enter;

(d) the date and time at which the constable intends to enter the premises;

(e) the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers on the premises;

(f) the powers those entering the premises are entitled to use whilst on the premises;

(g) the safeguards which apply to powers mentioned in paragraph (f);

(h) the rights which apply to the powers mentioned in paragraph (f); and

(i) that the occupiers have a right to refuse entry and that exercising that right may lead to an application for a warrant of entry.

Powers of constables: power to apply for a warrant of entry

19. A constable may apply for a warrant of entry.

Powers of constables: conditions for a warrant of entry

20.—(1) A Commissioner for Warrants may issue a warrant of entry to a constable, where they are satisfied that there are reasonable grounds to believe that—

(a) condition A or B is met; or

(b) one or more of conditions C, D, E or F are met, and

(c) one of more of conditions G to L are met.

(2) Condition A is that—

(a) the premises are premises on which documents or information which are the subject of a warrant of production may be found, and

(b) the warrant of production has not been complied with.

(3) Condition B is that —

(a) the constable has served a notice of intended entry under section 17,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(4) Condition C is that there is likely to be on the premises a thing which a constable would be entitled to inspect under section 24.

(5) Condition D is that there is likely to be on, or accessible from, the premises documents or information a constable would be entitled to require to be produced under section 25.

(6) Condition E is that there is likely to be on, or accessible from, the premises items a constable would be entitled to require to be produced under section 26.

(7) Condition F is that there is likely to be on the premises a person who is attempting to evade or has escaped from lawful arrest or is otherwise unlawfully at large.

(8) Condition G is that the premises are unoccupied.

(9) Condition H is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

(10) Condition I is that it is not practicable to communicate with any person entitled to grant entry to the premises.

(11) Condition J is that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with a person entitled to grant access to the thing, documents, information or items.

(12) Condition K is that entry to the premises will not be granted unless a warrant is produced.

(13) Condition L is that the purpose of entry may be seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

SECTION 3

Further investigatory powers exercisable by constables

Powers of constables: power to purchase products

21.—(1) A constable may—

(a) make a purchase of a product, or

(b) enter into an agreement to secure the provision of a service.

(2) The power in subsection (1) includes a power to undertake any steps that an ordinary consumer would take up-to and including purchase.

(3) The power in subsection (1) may be exercised covertly.

Powers of constables: application of powers whilst on premises

22.—(1) Sections 23 to 30 apply if a constable has entered premises under the power in section 16 or under a warrant of entry.

(2) Sections 25 to 28 apply only where the entry is—

(a) to prevent the commission of a crime; or

(b) to investigate crime.

(3) Sections 25 to 28 apply only in relation to offences which are—

(a) specified in the notice of intended entry under section 17; or

(b) specified on the warrant of entry.

Powers of constables: power to observe the carrying on of business

23.—(1) A constable may, whilst on premises, observe the carrying on of a business.

(2) The power in subsection (1) may be exercised covertly.

Powers of constables: power to inspect things on the premises

24.—(1) A constable may inspect and test any thing found on the premises.

(2) A constable may inspect anything purporting to be records pertaining to the thing they have inspected.

Powers of constables: power to require the production of documents

25.—(1) A constable may require any person present on the premises to produce any documents or information to which the person has access and which the constable has reasonable grounds to suspect relates to the offences specified in the notice of intended entry under section 17 or the warrant of entry.

(2) Where a document required to be produced under this section contains information recorded electronically, the power includes a power to require the production of a copy of the document in a form in which it can be easily taken away and in which it is visible and legible.

(3) This section does not confer a power to require a person to create a document other than as set out in subsection (2).

(4) The power in this section includes a power to require a person to give an explanation of a document which the person has produced.

(5) Where a person who has been required to produce a document or information cannot reasonably produce the document or information whilst the constable is present on the premises, the requirement to produce remains in force after the constable has left the premises.

Powers of constables: power to require the production of items

26.—(1) A constable may require any person present on the premises to produce any items to which the person has access and which the constable has reasonable grounds to suspect relates to the offences specified in the notice of intended entry under section 17 or the warrant of entry.

(2) The power in this section includes a power to require a person to give an explanation of a items which the person has produced.

(3) Where a person who has been required to produce an item cannot reasonably produce the item whilst the constable is present on the premises, the requirement to produce remains in force after the constable has left the premises.

Powers of constables: power to search premises

27. A constable may search the premises for the purpose of—

(a) finding, discovering or identifying a thing they would be entitled to inspect under section 24;

(b) finding, discovering or identifying documents or information they would be entitled to require to be produced under section 25;

(c) finding, discovering or identifying an item they would be entitled to require to be produced under section 26; or

(d) finding a person who is attempting to evade or has escaped from lawful arrest or is otherwise unlawfully at large.

Powers of constables: power to operate and search electronic devices

28.—(1) A constable may operate and search any electronic device on the premises, and search any information which is accessible from the device for the purpose of—

(a) finding, discovering or identifying documents or information they would be entitled to require to be produced under section 25;

(b) finding, discovering or identifying an item they would be entitled to require to be produced under section 26.

(2) A constable may require a person on the premises to provide access to an electronic device.

(3) A constable may require any person on the premises to provide such information or assistance as is necessary to operate an electronic device, including such security credentials as may be required to fully access and operate the electronic device or access any information which is accessible from the device.

(4) A constable may copy or download the information stored on or accessible from an electronic device.

Powers of constables: power to break open

29. A constable may for the purposes of exercising a power under section 27—

(a) break open any door;

(b) break open any container; or

(c) break open anything in which something may be packed, carried, stored or found.

Powers of constables: power to seize after exercising a power of entry

30.—(1) A constable may seize and retain any thing, document, information or item, where they are satisfied that—

(a) Condition A is met; or

(b) Condition B, C or D, and

(c) Condition E are met.

(2) Condition A is that—

(a) it is a thing found on the premises; and

(b) it is dangerous such that it causes a risk to life or limb,

(c) it is likely to be used in the commission of a crime, or

(d) it is impracticable to undertake a test on the premises.

(3) Condition B is that—

(a) it is a document or information which a person has been required to produce under section 25, or

(b) it is a document or information which the constable has found, discovered or identified under their power in section 27.

(4) Condition C is that—

(a) it is an item which a person has been required to produce under section 26, or

(b) it is an item which the constable has found, discovered or identified under their power in section 27.

(5) Condition D is that—

(a) it is a document or information a constable has found, discovered or identified under the power in section 28, and

(b) a constable has copied or downloaded the information.

(6) Condition E is that it is likely to be admissible in evidence at a trial for the offence.

(7) The power in subsection (1) includes a power to seize anything in which a document, information or item is contained or comprised.

Powers of constables: additional power to seize where otherwise lawfully on premises

31.—(1) A constable who is lawfully on any premises may seize anything which comes to the attention of the constable which the constable has reasonable grounds for believing that—

(a) it has been obtained in consequence of the commission of an offence; or

(b) it is evidence in relation to an offence the constable is investigating or any other offence.

(2) Where the constable has reasonable grounds for believing that any information which is stored in electronic form and is accessible from the premises is evidence of an offence, the constable may require that information to be produced in a form in which it can be taken away in which it is visible and legible or from which it can readily be produced in a visible and legible form.

(3) Nothing in this section authorises a constable to search the premises in question.

SECTION 4

Arrest by constables

Powers of constables: power of arrest without warrant

32.—(1) A constable may, using such force as is reasonably necessary, arrest without warrant—

(a) anyone who is, or whom the constable has reasonable grounds to suspect is, breaching or about to breach the Queen's peace;

(b) anyone who is on bail and has failed to surrender to bail or the constable has reasonable grounds to suspect has broken conditions of bail;

(c) anyone who is, or whom the constable has reasonable grounds to suspect is, about to commit an offence;

(d) anyone who is, or whom the constable has reasonable grounds to suspect is, in the act of committing an offence;

(e) where the constable has reasonable grounds to suspect that an offence has been committed, anyone whom the constable has reasonable grounds to suspect of being guilty of the offence;

(f) if an offence has been committed, anyone—

(i) who is guilty of the offence;

(ii) whom the constable has reasonable grounds to suspect of being guilty of it.

(2) A constable may not exercise the power of arrest conferred by subsection (1) unless the constable has reasonable grounds for believing it is necessary for any of the following reasons—

(a) to keep, or preserve, the Queen's peace;

(b) to ensure a person surrenders to custody or otherwise to prevent the breach of bail conditions;

(c) where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person is their real name, to enable the constable to ascertain the name of that person;

(d) where the constable does not know, and cannot readily ascertain, the address of the premises where the person resides, or has reasonable grounds for doubting whether an address given by that person is the real address at which they reside, to enable the constable to ascertain the address at which that person resides;

(e) to prevent the person in question—

(i) causing physical injury to himself or any other person;

(ii) suffering physical injury;

(iii) causing loss of or damage to property;

(iv) committing an offence against the public decency in circumstances where members of the public going about their normal business cannot reasonably be expected to avoid the person in question;

(f) to protect a child or other vulnerable person from the person in question;

(g) to allow the prompt and effective investigation of the offence or the conduct of the person in question;

(h) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

Powers of constables: information to be given on arrest

33.—(1) Where a person is arrested, the arrest is not lawful unless that person is informed at the time of the arrest or as soon as is practicable—

(a) that they are under arrest;

(b) the grounds on which they are arrested; and

(c) why the arrest is necessary.

(2) Subsection (1) applies regardless of whether the arrest and the grounds on which the arrest is made is obvious or ought to be obvious.

(3) Subsection (1) is not to be taken to require that a person is informed if it was not reasonably practicable to do so by reason of that person having escaped from arrest before the information could be given.

Powers of constables: steps to be taken by a constable after the arrest of a person

34.—(1) Where a person is arrested, the person must be taken by a constable to a place of lawful constabulary detention as soon as practicable after the arrest.

(2) Where the presence of the arrested person is reasonably necessary at a place other than a place of lawful constabulary detention in order to carry out such investigations as it is reasonable to carry out immediately after arrest, the requirement in subsection (1) is satisfied if the arrested person is thereafter immediately taken to a place of lawful constabulary detention.

(3) Where, prior to the arrival of the arrested person at a place of lawful constabulary detention, a constable is satisfied there are no longer reasonable grounds for keeping the person under arrest the person must be released without bail.

(4) Subject to subsection (5), a place is a lawful place of constabulary detention if it is a building used by a constabulary and at which there is present a constable who is able to undertake the duties of a custody officer under section 37.

(5) A place ceases to be a lawful place of constabulary detention six hours after the arrival of the arrested person unless it is designated by a constabulary as a place of extended detention.

(6) If an arrested person is taken to a place of lawful constabulary detention that is not designated as a place of extended detention, the arrested person shall be taken to a place of extended detention not more than six hours after arrival at the first place of lawful constabulary detention.

Powers of constables: release of an arrested person elsewhere than at a place of lawful constabulary detention

35.—(1) A constable may, prior to the arrival of the arrested person at a place of lawful constabulary detention, release the arrested person without bail.

(2) A constable may, prior to the arrival of the arrested person at a place of lawful constabulary detention, release the arrested person on bail if—

(a) the constable is satisfied that releasing the arrested person on bail is necessary and proportionate in all the circumstances (having regard, in particular, to any conditions of bail which would be imposed), and

(b) a constable of the rank of inspector or above authorises the release on bail (having considered any representations made by the arrested person).

(3) Where a constable releases an arrested person on bail under this section the arrested person must be required to attend a place of lawful constabulary detention.

(4) Where a constable releases an arrested person on bail under this section the constable may impose, as conditions of the bail, such requirements as appear to the constable to be reasonably necessary—

(a) to secure that the arrested person surrenders to custody;

(b) to secure that the arrested person does not commit an offence whilst on bail;

(c) to secure that the arrested person does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to themselves or any other person; or

(d) for the arrested person's own protection or, if the arrested person is under the age of 18, for the arrested person's own welfare or in their own interests.

(5) Where a constable releases an arrested person on bail under this section—

(a) no recognizance for the arrested person's surrender to custody shall be taken from the person;

(b) no security for the arrested person's surrender to custody shall be taken from the person or from anyone else on the person's behalf;

(c) the arrested person shall not be required to provide a surety or sureties for their surrender to custody; and

(d) no requirement to reside in a bail hostel may be imposed as a condition of the bail.

SECTION 5

Detention of arrested persons

Powers of constables: designation as a place of extended detention

36.—(1) The chief officer of a constabulary may designate a place of lawful constabulary detention as a place in which an arrested person may be subject to extended detention.

(2) A place may only be designated as a place of extended detention where it appears to the chief officer to provide enough accommodation for the purpose.

Powers of constables: custody officers at places of lawful constabulary detention

37.—(1) One or more custody officers must be appointed for each place of lawful constabulary detention.

(2) A custody officer must be a holder of the office of constable and have obtained at least the rank of sergeant.

(3) A constable may not act in the capacity of custody officer in relation to an investigation or arrest in which they are involved.

Powers of constables: duty of custody officer to determine if a ground for detention is met

38.—(1) Where a person is arrested for an offence without warrant, the custody officer must determine whether a ground in subsection (2) or (3) is met.

(2) The first ground is that the detention is necessary to secure or preserve evidence relating to an offence for which the person is under arrest.

(3) The second ground is that the detention is necessary to enable evidence to be obtained by questioning that person.

(4) The custody officer must make the determination referred to in subsection (1) when the arrested person is brought to a place of lawful constabulary detention and subsequently at intervals no further apart than three hours.

(5) Each of the subsequent determinations made by the custody officer must be agreed by a constable of a rank senior to the custody officer who is not involved in the investigation or arrest of the person.

Powers of constables: power of custody officer to order a person detained

39. Where a custody officer is satisfied a ground for detention in section 38 is met the custody officer may order the detention or (as the case may be) continued detention of a person in a place of lawful constabulary custody.

Powers of constables: limits on power of custody officer to order a person detained

40.—(1) Where a custody officer is not satisfied a ground in section 38 is met they must not order the detention or (as the case may be) continued detention of a person.

(2) Where a custody officer is of the opinion the grounds in section 38 have ceased to be met they must immediately release the arrested person from the place of lawful constabulary custody.

(3) Where a constable of senior rank to the custody officer does not agree with a subsequent determination under section 38(4) the custody officer must immediately release the arrested person from the place of lawful constabulary custody.

(4) A person may not be detained for a period in excess of 24 hours from the time at which they were first arrested by a constable.

Powers of constables: duties of custody officers to the detained person

41. A custody officer must ensure—

(a) the welfare of the person in detention;

(b) that the person in detention is made aware of their rights;

(c) that the rights of the person in detention are observed; and

(d) that the provisions of any codes issued under this Act are complied with.

CHAPTER 4

Civil disposal of offences

Powers of constables: power to apply for an order to cease unlawful conduct

42. A constable may apply to a justice of the peace for an order to cease unlawful conduct under section 43.

Powers of constables: power of the court to issue an order to cease unlawful conduct

43.—(1) Where, on an application made by a constable, a justice of the peace is satisfied on the balance of probabilities that a person has engaged in unlawful conduct the court may issue an order to cease unlawful conduct.

(2) An order made under this section must—

(a) indicate the nature of the unlawful conduct; and

(b) order the person not to continue or repeat the conduct.

(3) An order under this section may—

(a) require a person to pay compensation or other redress to a person who has been affected by the unlawful conduct; or

(b) impose requirements on a person which are intended to prevent or reduce the occurrence of further unlawful conduct.

(4) An order made under this section must not remain in force after 10 years from the date the order is made.

(5) A person who breaches an order under this section commits an offence.

(6) A person who is guilty of an offence under this section is liable—

(a) on summary conviction to—

(i) imprisonment for a term not exceeding one year,

(ii) a fine not exceeding level 4 on the standard scale, or

(iii) both

(b) on indictment to—

(i) imprisonment for a term not exceeding five years,

(ii) an unlimited fine, or

(iii) both.

PART 3

Regulatory bodies

CHAPTER 1

Designation as a regulatory body

Designation as a regulatory body

44. A body is a regulatory body for the purposes of this Act if it is listed in column 1 of Schedule 5.

CHAPTER 2

Authorised officers of regulatory bodies

Authorised officers of regulatory bodies: appointment of officers

45. A regulatory body may appoint authorised officers.

Authorised officers of regulatory bodies: purposes for which an officer may be authorised

46. An authorised officer may only use powers under this Act for a purpose listed in the corresponding entry in column 2 of Schedule 5.

CHAPTER 3

Powers of authorised officers of regulatory bodies

SECTION 1

Investigatory powers exercisable by authorised officers of regulatory bodies

Powers of authorised officers of regulatory bodies: power to serve a notice requiring the production of information

47.—(1) An authorised officer may serve on any person a notice requiring the person to produce the information specified in the notice to the authorised officer.

(2) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business or at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officers of regulatory bodies: contents of notice requiring the production of information

48.—(1) A notice under section 47 must be in writing.

(2) The notice must specify—

(a) the purpose for which the authorised officer is acting when serving the notice;

(b) the information which the authorised officer requires the person to produce;

(c) the time within which the person on whom it is served must produce the information;

(d) the manner in which the person on whom it is served must comply with it;

(e) the form in which the information must be provided; and

(f) that offences under section 175 apply in relation to the exercise of this power.

(3) The notice may require production of information to which the person has access.

(4) The notice may require—

(a) the creation of documents, or documents of a description, specified in the notice, and

(b) the provision of those documents to the constable.

(5) A requirement to produce information or create a document is a requirement to do so in a legible form.

(6) The notice does not require a person to provide any information or create any documents which are subject to legal professional privilege.

Powers of authorised officers of regulatory bodies: power to apply for a warrant of production

49. If a person fails to comply with a notice under section 47 an authorised officer may apply for a warrant of production.

Powers of authorised officers of regulatory bodies: conditions to be met for the issue of a warrant of production to the authorised officer

50. A warrant of production may only be issued to an authorised officer if there are reasonable grounds for a Commissioner for Warrants to believe—

(a) that a notice under section 47 has been served on a person;

(b) that the authorised officer who served the notice did so for one or more of the purposes for which they can exercise powers under this Act;

(c) that the information required by the notice is reasonably required by the authorised officer for one or more of the purposes for which they can exercise powers under this Act; and

(d) that the person on whom the notice was served has failed to comply without reasonable excuse.

Powers of authorised officers of regulatory bodies: power to enter premises without warrant

51.—(1) An authorised officer may enter without warrant premises other than premises used wholly or mainly as a dwelling.

(2) The power in subsection (1) may only be used—

(a) insofar as the entry is to premises to which the public has access (whether or not the public has access at that time) and it is for the purposes of exercising a power under—

(i) section 56, or

(ii) section 58; or

(b) where a notice has been served under section 52.

(3) An authorised officer entering premises under this section may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(4) A person who is accompanying an authorised officer under this section may exercise the same powers as an authorised officer.

Powers of authorised officer of regulatory bodies: power to serve a notice of intended entry

52.—(1) An authorised officer may serve a notice of intended entry on the occupier of the premises.

(2) The notice may be served—

(a) by personal service;

(b) by post at the premises the authorised officer intends to enter;

(c) in the case of a business, by post at the registered office of the business;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officer of regulatory bodies: contents of a notice of intended entry

53.—(1) A notice under section 52 must be in writing.

(2) The notice must specify—

(a) the purposes for which the authorised officer is acting when serving the notice;

(b) the premises which the officer intends to enter;

(c) the date and time at which the officer intends to enter the premises;

(d) the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers on the premises;

(e) the powers those entering the premises are entitled to use whilst on the premises;

(f) the safeguards which apply to powers mentioned in paragraph (e);

(g) the rights which apply to the powers mentioned in paragraph (e); and

(h) that the occupiers have a right to refuse entry and that exercising that right may lead to an application for a warrant of entry.

Powers of authorised officers of regulatory bodies: power to apply for a warrant of entry

54. An authorised officer may apply for a warrant of entry.

Powers of authorised officers of regulatory bodies: conditions for a warrant of entry

55.—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—

(a) condition A or B is met; or

(b) one or more of conditions C, D or E are met, and

(c) one of more of conditions F to K are met.

(2) Condition A is that—

(a) the premises are premises on which documents or information which are the subject of a warrant of production may be found, and

(b) the warrant of production has not been complied with.

(3) Condition B is that —

(a) the authorised officer has served a notice of intended entry under section 52,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(4) Condition C is that there is likely to be on the premises a thing which an authorised officer would be entitled to inspect under section 59.

(5) Condition D is that there is likely to be on, or accessible from, the premises documents or information an authorised would be entitled to require to be produced under section 60.

(6) Condition E is that there is likely to be on, or accessible from, the premises items an authorised officer would be entitled to require to be produced under section 61.

(7) Condition F is that the premises are unoccupied.

(8) Condition G is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

(9) Condition H is that it is not practicable to communicate with any person entitled to grant entry to the premises.

(10) Condition I is that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with a person entitled to grant access to the thing, documents, information or items.

(11) Condition J is that entry to the premises will not be granted unless a warrant is produced.

(12) Condition K is that the purpose of entry may be seriously prejudiced unless an authorised officer arriving at the premises can secure immediate entry to them.

SECTION 3

Further investigatory powers exercisable by authorised officers of regulatory bodies

Powers of authorised officers of regulatory bodies: power to purchase products

56.—(1) An authorised officer may—

(a) make a purchase of a product, or

(b) enter into an agreement to secure the provision of a service.

(2) The power in subsection (1) includes a power to undertake any steps that an ordinary consumer would take up-to and including purchase.

(3) The power in subsection (1) may be exercised covertly.

Powers of authorised officers of regulatory bodies: application of powers whilst on premises

57. Sections 58 to 65 apply if an authorised officer has entered premises under the power in section 51 or under a warrant of entry.

Powers of authorised officers of regulatory bodies: power to observe the carrying on of business

58.—(1) An authorised officer may, whilst on premises, observe the carrying on of a business.

(2) The power in subsection (1) may be exercised covertly.

Powers of authorised officers of regulatory bodies: power to inspect things on the premises

59.—(1) An authorised officer may inspect and test any thing found on the premises.

(2) An authorised officer may inspect anything purporting to be records pertaining to the thing they have inspected.

Authorised officers of regulatory bodies: power to require the production of documents

60.—(1) An authorised officer may require any person present on the premises to produce any documents or information to which the person has access and which the officer has reasonable grounds to suspect relates to the purposes for entry specified in the notice of intended entry under section 51 or the warrant of entry.

(2) Where a document required to be produced under this section contains information recorded electronically, the power includes a power to require the production of a copy of the document in a form in which it can be easily taken away and in which it is visible and legible.

(3) This section does not confer a power to require a person to create a document other than as set out in subsection (2).

(4) The power in this section includes a power to require a person to give an explanation of a document which the person has produced.

(5) Where a person who has been required to produce a document or information cannot reasonably produce the document or information whilst the officer is present on the premises, the requirement to produce remains in force after the officer has left the premises.

Powers of authorised officers of regulatory bodies: power to require the production of items

61.—(1) An authorised officer may require any person present on the premises to produce any items to which the person has access and which the officer has reasonable grounds to suspect relates to the purposes for entry specified in the notice of intended entry under section 51 or the warrant of entry.

(2) The power in this section includes a power to require a person to give an explanation of a items which the person has produced.

(3) Where a person who has been required to produce an item cannot reasonably produce the item whilst the officer is present on the premises, the requirement to produce remains in force after the officer has left the premises.

Powers of authorised officers of regulatory bodies: power to search premises

62. An authorised officer may search the premises for the purpose of—

(a) finding, discovering or identifying a thing they would be entitled to inspect or test under section 59;

(b) finding, discovering or identifying documents or information they would be entitled to require to be produced under section 60;

(c) finding, discovering or identifying an item they would be entitled to require to be produced under section 61.

Powers of authorised officers of regulatory bodies: power to operate and search electronic devices

63.—(1) An authorised officer may operate and search any electronic device on the premises, and search any information which is accessible from the device for the purpose of—

(a) finding, discovering or identifying a thing they would be entitled to inspect or test under section 59;

(b) finding, discovering or identifying documents or information they would be entitled to require to be produced under section 60;

(c) finding, discovering or identifying an item they would be entitled to require to be produced under section 61.

(2) An authorised officer may require a person on the premises to provide access to an electronic device.

(3) An authorised officer may require any person on the premises to provide such information or assistance as is necessary to operate an electronic device, including such security credentials as may be required to fully access and operate the electronic device or access any information which is accessible from the device.

(4) An authorised officer may copy or download the information stored on or accessible from an electronic device.

Powers of authorised officers of regulatory bodies: power to break open

64. An authorised officer may for the purposes of exercising a power under section 62—

(a) break open any door;

(b) break open any container; or

(c) break open anything in which something may be packed, carried, stored or found.

Powers of authorised officers of regulatory bodies: power to seize after exercising a power of entry

65.—(1) An authorised officer may seize and retain any document, information or item, where they are satisfied that—

(a) Condition A, B, C, or D and

(b) Condition E are met.

(2) Condition A is that—

(a) it is a thing which an authorised officer is entitled to test under section 59, or

(b) it is a thing which the officer has found, discovered or identified under their power in section 62; and

(c) it is impracticable to undertake the test on the premises.

(3) Condition B is that—

(a) it is a document or information which a person has been required to produce under section 60, or

(b) it is a document or information which the officer has found, discovered or identified under their power in section 62.

(4) Condition C is that—

(a) it is an item which a person has been required to produce under section 61, or

(b) it is an item which the officer has found, discovered or identified under their power in section 62.

(5) Condition D is that—

(a) it is a document or information an officer has found, discovered or identified under the power in section 63, and

(b) the officer has copied or downloaded the information.

(6) Condition E is that it is likely to be of value or assistance, whether by itself or when combined with something else, to the purpose for which the officer is acting.

(7) The power in subsection (1) includes a power to seize anything in which a document, information or item is contained or comprised.

PART 4

Civil defence agencies

CHAPTER 1

Designation as a civil defence agency

Designation as a civil defence agency

66. A body is a civil defence agency for the purposes of this Act if it is listed in column 1 of Schedule 6.

CHAPTER 2

Authorised officers of civil defence agencies

Authorised officers of civil defence agencies: appointment of officers

67. A civil defence agency may appoint authorised officers.

Authorised officers of civil defence agencies: purposes for which an officer may be authorised

68. An authorised officer may only use powers under this Act for a purpose listed in the corresponding entry in column 2 of Schedule 6.

CHAPTER 3

Powers of authorised officers of civil defence agencies

SECTION 1

Investigatory powers exercisable by authorised officers of civil defence agencies

Powers of authorised officers of civil defence agencies: power to serve a notice requiring the production of information

69.—(1) An authorised officer may serve on any person a notice requiring the person to produce the information specified in the notice to the authorised officer.

(2) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business are at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officers of civil defence agencies: contents of notice requiring the production of information

70.—(1) A notice under section 69 must be in writing.

(2) The notice must specify—

(a) the purpose for which the authorised officer is acting when serving the notice;

(b) the information which the authorised officer requires the person to produce;

(c) the time within which the person on whom it is served must produce the information;

(d) the manner in which the person on whom it is served must comply with it;

(e) the form in which the information must be provided; and

(f) that offences under section 175 apply in relation to the exercise of this power.

(3) The notice may require production of information to which the person has access.

(4) The notice may require—

(a) the creation of documents, or documents of a description, specified in the notice, and

(b) the provision of those documents to the authorised officer.

(5) A requirement to produce information or create a document is a requirement to do so in a legible form.

(6) The notice does not require a person to provide any information or create any documents which are subject to legal professional privilege.

Powers of authorised officers of civil defence agencies: power to apply for a warrant of production

71. If a person fails to comply with a notice under section 69 an authorised officer may apply for a warrant of production.

Powers of authorised officers of civil defence agencies: conditions to be met for the issue of a warrant of production to the authorised officer

72. A warrant of production may only be issued to an authorised officer if there are reasonable grounds for a Commissioner for Warrants to believe—

(a) that a notice under section 69 has been served on a person;

(b) that the authorised officer who served the notice did so for one or more of the purposes for which they can exercise powers under this Act;

(c) that the information required by the notice is reasonably required by the authorised officer for one or more of the purposes for which they can exercise powers under this Act; and

(d) that the person on whom the notice was served has failed to comply without reasonable excuse.

Powers of authorised officers of civil defence agencies: power to enter premises without warrant

73.—(1) An authorised officer may enter without warrant premises other than premises used wholly or mainly as a dwelling.

(2) The power in subsection (1) may only be used where a notice has been served under section 75.

(3) An authorised officer entering premises under this section may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(4) A person who is accompanying an authorised officer under this section may exercise the same powers as an authorised officer.

Powers of authorised officers of civil defence agencies: power to enter premises without warrant in an emergency

74.—(1) An authorised officer may, using such force as is reasonably necessary, enter premises without a warrant of entry and without notice where there are reasonable grounds for the officer to believe—

(a) it is necessary to prevent loss of life or limb;

(b) it is necessary in order to effect the rescue of people or protect them from serious harm;

(c) it is necessary in order to prevent or deal with an event or situation that causes or is likely to cause—

(i) one or more individuals to die, be seriously injured or become seriously ill, or

(ii) serious harm to the environment (including the life and health of plants and animals);

(d) it is necessary to protect property; or

(e) it is necessary to prevent or limit damage to property resulting from action taken after an entry under this section.

(2) The power in subsection (1) may only be exercised in connection with a purpose for which the officer is an authorised officer.

Powers of authorised officer of civil defence agencies: power to serve a notice of intended entry

75.—(1) An authorised officer may serve a notice of intended entry on the occupier of the premises.

(2) The notice may be served—

(a) by personal service;

(b) by post at the premises the authorised officer intends to enter;

(c) in the case of a business, by post at the registered office of the business;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officer of civil defence agencies: contents of a notice of intended entry

76.—(1) A notice under section 75 must be in writing.

(2) The notice must specify—

(a) the purposes for which the authorised officer is acting when serving the notice;

(b) the premises which the officer intends to enter;

(c) the date and time at which the officer intends to enter the premises;

(d) the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers on the premises;

(e) the powers those entering the premises are entitled to use whilst on the premises;

(f) the safeguards which apply to powers mentioned in paragraph (e);

(g) the rights which apply to the powers mentioned in paragraph (e); and

(h) that the occupiers have a right refuse entry and that exercising that right may lead to an application for a warrant of entry.

Powers of authorised officers of civil defence agencies: power to apply for a warrant of entry

77. An authorised officer may apply for a warrant of entry.

Powers of authorised officers of civil defence agencies: conditions for a warrant of entry

78.—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—

(a) Condition A is met; or

(b) Condition B is met, and

(c) one or more of conditions C to G is met.

(2) Condition A is that —

(a) the authorised officer has served a notice of intended entry under section 75,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(3) Condition B is that entry is necessary for one or more of the purposes for which the officer is authorised.

(4) Condition C is that the premises are unoccupied.

(5) Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

(6) Condition E is that it is not practicable to communicate with any person entitled to grant entry to the premises.

(7) Condition F is that entry to the premises will not be granted unless a warrant is produced.

(8) Condition G is that the purpose of entry may be seriously prejudiced unless an authorised officer arriving at the premises can secure immediate entry to them.

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SECTION 3

Powers exercisable on premises

Powers of authorised officers of civil defence agencies: application of powers whilst on premises

79.—(1) Section 80 applies where an authorised officer has entered the premises under the power in section 74.

(2) Sections 81 to 93 apply where an authorised officer has entered the premises under the power in section 73 or a warrant of entry.

Powers of authorised officers of civil defence agencies: powers after an entry in relation to an emergency

80. An authorised officer may do anything the officer reasonably believes is necessary—

(a) to prevent loss of life or limb;

(b) to effect the rescue of people or protect them from serious harm;

(c) to prevent or deal with an event or situation that causes or is likely to cause—

(i) one or more individuals to die, be seriously injured or become seriously ill, or

(ii) serious harm to the environment (including the life and health of plants and animals);

(d) to protect property; or

(e) to prevent or limit damage to property resulting from action taken after an entry under section 74.

Powers of authorised officers of civil defence agencies: power to undertake survey

81. An authorised officer may undertake such surveys as are necessary to achieve the purpose for which they are acting.

Powers of authorised officers of civil defence agencies: power to undertake works

82. An authorised officer may undertake such works as are necessary to achieve the purpose for which they are acting.

Powers of authorised officers of civil defence agencies: power to inspect or test things, equipment or installations

83.—(1) An authorised officer may inspect or test any thing, item, equipment or installation on the premises.

(2) The power in subsection (1) includes a power to take samples.

(3) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Powers of authorised officers of civil defence agencies: power to switch off or decommission equipment or installations

84.—(1) An authorised officer may switch off or decommission equipment or installations on the premises.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Powers of authorised officers of civil defence agencies: power to extinguish light

85.—(1) An authorised officer may extinguish any light on the premises.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Powers of authorised officers of civil defence agencies: power to test animals

86.—(1) An authorised officer may test any animal on the premises.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Powers of authorised officers of civil defence agencies: power to cull animals

87.—(1) An authorised officer may cull any animal on the premises.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Authorised officers of civil defence agencies: power to require the production of documents

88.—(1) An authorised officer may require any person present on the premises to produce any documents or information to which the person has access and which the officer has reasonable grounds to suspect relates to the purposes for entry specified in the notice of intended entry under section 75 or the warrant of entry.

(2) Where a document required to be produced under this section contains information recorded electronically, the power includes a power to require the production of a copy of the document in a form in which it can be easily taken away and in which it is visible and legible.

(3) This section does not confer a power to require a person to create a document other than as set out in subsection (2).

(4) The power in this section includes a power to require a person to give an explanation of a document which the person has produced.

(5) Where a person who has been required to produce a document or information cannot reasonably produce the document or information whilst the officer is present on the premises, the requirement to produce remains in force after the officer has left the premises.

Powers of authorised officers of civil defence agencies: power to require the production of items

89.—(1) An authorised officer may require any person present on the premises to produce any items to which the person has access and which the officer has reasonable grounds to suspect relates to the purposes for entry specified in the notice of intended entry under section 75 or the warrant of entry.

(2) The power in this section includes a power to require a person to give an explanation of a items which the person has produced.

(3) Where a person who has been required to produce an item cannot reasonably produce the item whilst the officer is present on the premises, the requirement to produce remains in force after the officer has left the premises.

Powers of authorised officers of civil defence agencies: power to search premises

90. An authorised officer may search the premises for the purpose of—

(a) finding, discovering or identifying a thing they would be entitled to inspect or test under section 83;

(b) finding, discovering or identifying any equipment or installation they would be entitled to switch off or decommission under section 84;

(c) finding, discovering, or identifying an animal they would be entitled to test under section 86;

(d) finding, discovering, or identifying an animal they would be entitled to cull under section 87;

(e) finding, discovering or identifying documents or information they would be entitled to require to be produced under section 88;

(f) finding, discovering or identifying an item they would be entitled to require to be produced under section 89.

Powers of authorised officers of civil defence agencies: power to operate and search electronic devices

91.—(1) An authorised officer may operate and search any electronic device on the premises, and search any information which is accessible from the device for the purpose of—

(a) finding, discovering or identifying documents or information they would be entitled to require to be produced under section 88;

(b) finding, discovering or identifying an item they would be entitled to require to be produced under section 89.

(2) An authorised officer may require a person on the premises to provide access to an electronic device.

(3) An authorised officer may require any person on the premises to provide such information or assistance as is necessary to operate an electronic device, including such security credentials as may be required to fully access and operate the electronic device or access any information which is accessible from the device.

(4) An authorised officer may copy or download the information stored on or accessible from an electronic device.

Powers of authorised officers of civil defence agencies: power to break open

92. An authorised officer may for the purposes of exercising a power under section 90—

(a) break open any door;

(b) break open any container; or

(c) break open anything in which something may be packed, carried, stored or found.

Powers of authorised officers of civil defence agencies: power to seize after exercising a power of entry

93.—(1) An authorised officer may seize and retain any thing, document, information or item, where they are satisfied that—

(a) one or more of Conditions A to F are met, and

(b) Condition G is met.

(2) Condition A is that—

(a) it is a thing, item, equipment or installation which an authorised officer is entitled to test under section 83, or

(b) it is a thing which the officer has found, discovered or identified under their power in section 90; and

(c) it is dangerous such that it causes a risk to life or limb, or

(d) it is impracticable to undertake the test on the premises.

(3) Condition B is that—

(a) it is an animal which an authorised officer is entitled to test under section 83, or

(b) it is an animal which the officer has found, discovered or identified under their power in section 90; and

(c) it is impracticable to undertake the test on the premises.

(4) Condition C is that—

(a) it is an animal which an authorised officer is entitled to cull under section 87,

(b) or it is an animal which the officer has found, discovered or identified under their power in section 90; and

(c) it is impracticable to cull the animal on the premises.

(5) Condition D is that—

(a) it is a document or information which a person has been required to produce under section 88, or

(b) it is a document or information which the officer has found, discovered or identified under their power in section 90.

(6) Condition E is that—

(a) it is an item which a person has been required to produce under section 89, or

(b) it is an item which the officer has found, discovered or identified under their power in section 90.

(7) Condition F is that—

(a) it is a document or information the officer has found, discovered or identified under the power in section 90, and

(b) the officer has copied or downloaded the information.

(8) Condition G is that it is likely to be of value or assistance, whether by itself or when combined with something else, to the purpose for which the officer is acting.

(9) The power in subsection (1) includes a power to seize anything in which a document, information or item is contained or comprised.

PART 5

Critical national infrastructure

CHAPTER 1

Designation as a critical national infrastructure operator

Designation as a critical national infrastructure operator

94. A body is a critical national infrastructure operator for the purposes of this Act if it is listed in column 1 of Schedule 7.

CHAPTER 2

Authorised officers of critical national infrastructure operators

Authorised officers of critical national infrastructure operators: appointment of officers

95. A critical national infrastructure operator may appoint authorised officers.

Authorised officers of critical national infrastructure operators: purposed for which an officer may be authorised

96. An authorised officer may only use powers under this Act for a purpose listed in the corresponding entry in column 2 of Schedule 7.

Powers of authorised officers of critical national infrastructure operators: power to enter premises without warrant

97.—(1) An authorised officer may enter premises without warrant.

(2) The power in subsection (1) may only be used where a notice has been served under section 99.

(3) An authorised officer entering premises under this section may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(4) A person who is accompanying an authorised officer under this section may exercise the same powers as an authorised officer.

Powers of authorised officers of critical national infrastructure operators: power to enter premises without warrant in an emergency

98.—(1) An authorised officer may, using such force as is reasonably necessary, enter premises without a warrant of entry and without notice where there are reasonable grounds for the officer to believe—

(a) it is necessary to prevent loss of life or limb;

(b) it is necessary in order to effect the rescue of people or protect them from serious harm;

(c) it is necessary in order to prevent or deal with an event or situation that causes or is likely to cause—

(i) one or more individuals to die, be seriously injured or become seriously ill, or

(ii) serious harm to the environment (including the life and health of plants and animals);

(d) it is necessary to protect property; or

(e) it is necessary to prevent or limit damage to property resulting from action taken after an entry under this section.

(2) The power in subsection (1) may only be exercised in connection with a purpose for which the officer is an authorised officer.

Powers of authorised officers of critical infrastructure operator: power to serve a notice of intended entry

99.—(1) An authorised officer may serve a notice of intended entry on the occupier of the premises.

(2) The notice may be served—

(a) by personal service;

(b) by post at the premises the authorised officer intends to enter;

(c) in the case of a business, by post at the registered office of the business or at any the premises the authorised officer intends to enter;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officers of critical infrastructure operator: contents of a notice of intended entry

100.—(1) A notice under section 99 must be in writing.

(2) The notice must specify—

(a) the purposes for which the authorised officer is acting serving the notice;

(b) the premises which the officer intends to enter;

(c) the date and time at which the officer intends to enter the premises;

(d) the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers on the premises;

(e) the powers those entering the premises are entitled to use whilst on the premises;

(f) the safeguards which apply to powers mentioned in paragraph (e);

(g) the rights which apply to the powers mentioned in paragraph (e); and

(h) that the occupiers have a right to refuse entry and that exercising that right may lead to an application for a warrant of entry.

Powers of authorised officers of critical national infrastructure operator: power to apply for a warrant of entry

101. An authorised officer may apply for a warrant of entry.

Powers of authorised officers of critical national infrastructure operator: conditions for a warrant of entry

102.—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—

(a) Condition A is met; or

(b) Condition B is met, and

(c) Condition C or D is met.

(2) Condition A is that —

(a) the authorised officer has served a notice of intended entry under section 99,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(3) Condition B is that the entry is necessary for one or more of the purposes for which the officer is authorised.

(4) Condition C is that the premises are unoccupied.

(5) Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

CHAPTER 3

Powers of authorised officers of critical national infrastructure operators

SECTION 1

Powers of authorised officers of critical national infrastructure operator: application of powers whilst on premises

103.—(1) Section 104 applies where an authorised officer has entered the premises under the power in section 98.

(2) Sections 105 to 108 apply where an authorised officer has entered the premises under the power in section 97 or a warrant of entry

Powers of authorised officers of critical national infrastructure operators: powers after an entry in relation to an emergency

104. An authorised officer may do anything the officer reasonably believes is necessary—

(a) to prevent loss of life or limb;

(b) to effect the rescue of people or protect them from serious harm;

(c) to prevent or deal with an event or situation that causes or is likely to cause—

(i) one or more individuals to die, be seriously injured or become seriously ill, or

(ii) serious harm to the environment (including the life and health of plants and animals);

(d) to protect property; or

(e) to prevent or limit damage to property resulting from action taken after an entry under section 98.

Powers of authorised officers of critical national infrastructure operators: power to undertake survey

105. An authorised officer may undertake such surveys as are necessary to achieve the purpose for which they are acting.

Powers of authorised officers of critical national infrastructure operators: power to undertake works

106. An authorised officer may undertake such works as are necessary to achieve the purpose for which they are acting.

Powers of authorised officers of critical national infrastructure operators: power to inspect or test things, equipment or installations

107.—(1) An authorised officer may inspect any thing, item, equipment or installation on the premises.

(2) An authorised officer may test any equipment or installation on the premises.

(3) The power in subsection (1) includes a power to take samples.

(4) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Powers of authorised officers of critical national infrastructure operators: power to switch off or decommission equipment or installations

108.—(1) An authorised officer may switch off or decommission equipment or installations on the premises.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

PART 6

Utility companies

CHAPTER 1

Designation as a utility company

Designation as a utility company

109. A body is a utility company for the purposes of this Act if it is listed in column 1 of Schedule 8.

CHAPTER 2

Authorised officers of utility companies

Authorised officers of utility companies: appointment of officers

110. A utility company may appoint authorised officers.

Authorised officers of utility companies: purposes for which an officer may be authorised

111. An authorised officer may only use powers under this Act for a purpose listed in the corresponding entry in column 2 of Schedule 8.

Powers of authorised officers of utility companies: power to enter premises without warrant

112.—(1) An authorised officer may enter premises without warrant.

(2) The power in subsection (1) may only be used where a notice has been served under section 114.

(3) An authorised officer entering premises under this section may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(4) A person who is accompanying an authorised officer under this section may exercise the same powers as an authorised officer.

Powers of authorised officers of utility companies: power to enter premises without warrant in an emergency

113.—(1) An authorised officer may, using such force as is reasonably necessary, enter premises without a warrant of entry and without notice where there are reasonable grounds for the officer to believe—

(a) it is necessary to prevent loss of life or limb;

(b) it is necessary in order to effect the rescue of people or protect them from serious harm;

(c) it is necessary in order to prevent or deal with an event or situation that causes or is likely to cause—

(i) one or more individuals to die, be seriously injured or become seriously ill, or

(ii) serious harm to the environment (including the life and health of plants and animals);

(d) it is necessary to protect property; or

(e) it is necessary to prevent or limit damage to property resulting from action taken after an entry under this section.

(2) The power in subsection (1) may only be exercised in connection with a purpose for which the officer is an authorised officer.

Powers of authorised officers of utility companies: power to serve a notice of intended entry

114.—(1) An authorised officer may serve a notice of intended entry on the occupier of the premises.

(2) The notice may be served—

(a) by personal service;

(b) by post at the premises the authorised officer intends to enter;

(c) in the case of a business, by post at the registered office of the busines;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officers of utility companies: contents of a notice of intended entry

115.—(1) A notice under section 114 must be in writing.

(2) The notice must specify—

(a) the purposes for which the authorised officer is acting serving the notice;

(b) the premises which the officer intends to enter;

(c) the date and time at which the officer intends to enter the premises;

(d) the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers on the premises;

(e) the powers those entering the premises are entitled to use whilst on the premises;

(f) the safeguards which apply to powers mentioned in paragraph (e);

(g) the rights which apply to the powers mentioned in paragraph (e); and

(h) that the occupiers have a right to refuse entry and that exercising that right may lead to an application for a warrant of entry.

Powers of authorised officers of utility companies: power to apply for a warrant of entry

116. An authorised officer may apply for a warrant of entry.

Powers of authorised officers of utility companies: conditions for a warrant of entry

117.—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—

(a) Condition A is met; or

(b) Condition B is met, and

(c) Condition C or D is met.

(2) Condition A is that —

(a) the authorised officer has served a notice of intended entry under section 114,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(3) Condition B is that the entry is necessary for one or more of the purposes for which the officer is authorised.

(4) Condition C is that the premises are unoccupied.

(5) Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

Powers of authorised officers of utility companies: application of powers whilst on premises

118.—(1) Section 119 applies where an authorised officer has entered the premises under the power in section 113.

(2) Sections 120 and 121 apply where an authorised officer has entered the premises under the power in section 112 or a warrant of entry.

Powers of authorised officers of utility companies: powers after an entry in relation to an emergency

119. An authorised officer may do anything the officer reasonably believes is necessary—

(a) to prevent loss of life or limb;

(b) to effect the rescue of people or protect them from serious harm;

(c) to prevent or deal with an event or situation that causes or is likely to cause—

(i) one or more individuals to die, be seriously injured or become seriously ill, or

(ii) serious harm to the environment (including the life and health of plants and animals);

(d) to protect property; or

(e) to prevent or limit damage to property resulting from action taken after an entry under section 113.

Powers of authorised officers of utility companies: power to undertake works

120.—(1) An authorised officer may undertake such works as are necessary to achieve the purpose for which they are acting.

(2) Subsection (1) includes a power to—

(a) install, remove or replace a meter including to install a pre-payment meter;

(b) connect supply;

(c) disconnect or discontinue supply.

Powers of authorised officers of utility companies: power to inspect or test things, equipment or installations

121.—(1) An authorised officer may inspect any equipment or installation on the premises which relates to the supply of the utility.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

PART 7

Civil society

CHAPTER 1

Designation as a civil society agency

Designation as a civil society agency

122. A body is a civil society agency for the purposes of this Act if it is listed in column 1 of Schedule 9.

CHAPTER 2

Authorised officers of civil society agencies

Authorised officers of civil society agencies: appointment of officers

123. A civil society agency may appoint authorised officers.

Authorised officers of civil society agencies: purposes for which an officer may be authorised

124. An authorised officer may only use powers under this Act for a purpose listed in the corresponding entry in column 2 of Schedule 9.

CHAPTER 3

Powers of authorised officers of civil society agencies

SECTION 1

Powers of authorised officers of civil society agencies: power to enter premises without warrant

125.—(1) An authorised officer may enter premises without warrant.

(2) The power in subsection (1) may only be used where a notice has been served under section 126.

(3) An authorised officer entering premises under this section may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(4) A person who is accompanying an authorised officer under this section may exercise the same powers as an authorised officer.

Powers of authorised officer of civil society agencies: power to serve a notice of intended entry

126.—(1) An authorised officer may serve a notice of intended entry on the occupier of the premises.

(2) The notice may be served—

(a) by personal service;

(b) by post at the premises the authorised officer intends to enter;

(c) in the case of a business, by post at the registered office of the business;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(3) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(4) An authorised officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

Powers of authorised officer of civil society agencies: contents of a notice of intended entry

127.—(1) A notice under section 126 must be in writing.

(2) The notice must specify—

(a) the purposes for which the authorised officer is acting serving the notice;

(b) the premises which the officer intends to enter;

(c) the date and time at which the officer intends to enter the premises;

(d) a statement warning of the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers on the premises;

(e) a statement of the powers those entering the premises are entitled to use whilst on the premises;

(f) a statement informing the occupiers of their right to refuse entry and informing them that exercising that right may lead to an application for a warrant of entry.

Powers of authorised officers of civil society agencies: power to apply for a warrant of entry

128. An authorised officer may apply for a warrant of entry.

Powers of authorised officers of civil society agencies: conditions for a warrant of entry

129.—(1) A Commissioner for Warrants may issue a warrant of entry to an authorised officer, where they are satisfied that there are reasonable grounds to believe that—

(a) Condition A is met; or

(b) Condition B is met, and

(c) one or more of conditions C to E is met.

(2) Condition A is that —

(a) the authorised officer has served a notice of intended entry under section 126,

(b) the occupier of the premises in question has exercised, or has indicated an intention to exercise, their right to refuse entry, and

(c) the entry is necessary.

(3) Condition B is that the entry is necessary for one or more of the purposes for which the officer is authorised.

(4) Condition C is that the premises are unoccupied.

(5) Condition D is that the occupier of the premises is absent, and it might defeat the purpose of the entry to await the occupier's return.

(6) Condition E is that it is not practicable to communicate with any person entitled to grant entry to the premises.

Powers of authorised officers of civil society agencies: application of powers whilst on premises

130. Sections 131 to 133 apply if an authorised officer has entered premises under the power in section 125 or under a warrant of entry.

Powers of authorised officers of civil society agencies: power to do anything necessary to safeguard a person, an animal or the environment

131.—(1) An authorised officer may do anything necessary to safeguard a person, an animal or the environment.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which officer is acting.

Powers of authorised officers of civil society agencies: power to search premises

132.—(1) An authorised officer may search premises.

(2) The power in subsection (1) may only be exercised where it is necessary to achieve the purpose for which the officer is acting.

Powers of authorised officers of civil society agencies: power to break open

133. An authorised officer may for the purposes of exercising a power under section 132—

(a) break open any door;

(b) break open any container; or

(2) break open anything in which something may be packed, carried, stored or found.

PART 8

Safeguards on the use of certain powers, and rights of persons against whom powers are exercised

CHAPTER 1

Safeguards on the use of certain powers

Safeguards on the use of certain powers: restriction on use of information obtained using a notice requiring the production of information or a warrant of production

134. (1) Where a person has been required to produce information under a notice issued under a power in this Act, in criminal proceedings against the person who has produced the information—

(a) no evidence relating to the information may be adduced by or on behalf of the prosecution, and

(b) no question relating to the information may be asked by or on behalf of the prosecution.

(2) Subsection (1) does not apply if, in the proceedings—

(a) evidence relating to the information is adduced by or on behalf of the person providing it, or

(b) a question relating to the information is asked by or on behalf of that person.

(3) Subsection (1) does not apply if the proceedings are for—

(a) an offence under section 175, or

(b) an offence under section 5 of the Perjury Act 1911.

Safeguards on the use of certain powers: duty to secure entered premises against trespass

135. Where a relevant officer has entered premised under a power in this Act, they must leave the premises as effectually secured against trespass as the relevant officer found them.

Safeguards on the use of certain powers: duty to examine for legal professional privilege

136.—(1) It is the duty of the relevant officer to secure—

(a) that anything which is produced or seized under a power in this Act ("the property") is as soon as reasonably practicable—

(i) examined by an officer ("the examining officer") who is not involved in the investigation,

(ii) that the examination is sufficient to reasonably identify documents, information or items which are LPP material, and

(iii) that anything which is LPP material is kept separate from the remainder of the property ("the sifted material").

(2) The examining officer must serve a notice on any person with an interest in the property informing the person—

(a) of their right to be present or represented at the examination;

(b) of their right to provide a list of search terms for the purposes of an examination of electronic material; and

(c) the date by and manner in which they must indicate—

(i) whether they intend to be present or represented at the examination; and

(ii) the list of search terms for the purposes of an examination of electronic material.

(3) The date in subsection (2)(c) must be no sooner than 21 days from the date on which the notice is served.

(4) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business or at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(5) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(6) The examining officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

(7) Where a person on whom a notice is served does not respond by date in subsection (2)(c)—

(a) the person forfeits the right to be present or represented at the examination;

(b) the person forfeits the right to provide a list of search terms for the purposes of the examination of electronic material; and

(c) the examining officer may, in conjunction with the relevant officer, use their best judgement to produce a list of search terms for the purposes of the examination of electric material.

(8) Upon completion of the examination the examining officer must take steps to ensure the LPP material is kept separate from the sifted material and stored in a manner in which the relevant officer, or anyone else working on the investigation, is unable to access it.

(9) It is the duty of the relevant officer to ensure that if it becomes apparent that the sifted material contains items which are subject to legal professional privilege those items are removed and transferred to the examining officer to be stored with the other LPP material.

(10) In this section LPP and section 139, "LPP material" means material which is subject to legal professional privilege.

Safeguards on the use of certain powers: duty to examine for irrelevant material

137.—(1) It is the duty of the relevant officer to secure—

(a) that anything which is produced or seized under a power in this Act ("the property") is as soon as reasonably practicable—

(i) examined by an officer ("the examining officer") who is not involved in the investigation,

(ii) that the examination is sufficient to reasonably identify documents, information or items which are not relevant to the investigation, and

(iii) that anything which is identified as not relevant to the investigation ("the irrelevant material") is kept separate from the remainder of the property ("the sifted material").

(2) The examining officer must serve a notice on any person with an interest in the property informing the person—

(a) of their right to be present or represented at the examination;

(b) of their right to provide a list of search terms for the purposes of an examination of electronic material; and

(c) the date by and manner in which they must indicate—

(i) whether they intend to be present or represented at the examination; and

(ii) the list of search terms for the purposes of an examination of electronic material.

(3) The date in subsection (2)(c) must be no sooner than 21 days from the date on which the notice is served.

(4) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business or at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or (c);

(e) by facsimile; or

(f) by email.

(5) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(6) The examining officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

(7) Where a person on whom a notice is served does not respond by date in subsection (2)(c)—

(a) the person forfeits the right to be present or represented at the examination;

(b) the person forfeits the right to provide a list of search terms for the purposes of the examination of electronic material; and

(c) the examining officer may, in conjunction with the relevant officer, use their best judgement to produce a list of search terms for the purposes of the examination of electric material.

(8) Upon completion of the examination the examining officer must take steps to ensure the irrelevant material is kept separate from the sifted material and stored in a manner in which the relevant officer, or anyone else working on the investigation, is unable to access it.

Safeguards on the use of certain powers: duty to examine for special material

138.—(1) It is the duty of the relevant officer to secure—

(a) that anything which is produced or seized under a power in this Act ("the property") is as soon as reasonably practicable—

(i) examined by an officer ("the examining officer") who is not involved in the investigation,

(ii) that the examination is sufficient to reasonably identify documents, information or items which are special material, and

(iii) that anything which is identified as special material is kept separate from the remainder of the property ("the sifted material").

(2) The examining officer must serve a notice on any person with an interest in the property informing the person—

(a) of their right to be present or represented at the examination;

(b) of their right to provide a list of search terms for the purposes of an examination of electronic material; and

(c) the date by and manner in which they must indicate—

(i) whether they intend to be present or represented at the examination; and

(ii) the list of search terms for the purposes of an examination of electronic material.

(3) The date in subsection (2)(c) must be no sooner than 21 days from the date on which the notice is served.

(4) The notice may be served—

(a) by personal service;

(b) by post at the last known address of the person;

(c) in the case of a business, by post at the registered office of the business are at any premises on which the business trades;

(d) by affixing the notice to any of the addresses in paragraphs (b) or(c);

(e) by facsimile; or

(f) by email.

(5) Where a notice is served by post the notice shall be deemed as served two days after the date on which it is posted.

(6) The examining officer may issue a certificate of service indicating the date and manner in which the notice was served and such a certificate, unless the contrary is shown, is to be conclusive evidence of service.

(7) Where a person on whom a notice is served does not respond by date in subsection (2)(c)—

(a) the person forfeits the right to be present or represented at the examination;

(b) the person forfeits the right to provide a list of search terms for the purposes of the examination of electronic material; and

(c) the examining officer may, in conjunction with the relevant officer, use their best judgement to produce a list of search terms for the purposes of the examination of electric material.

(8) Upon completion of the examination the examining officer must take steps to ensure the special material is kept separate from the sifted material and stored in a manner in which the relevant officer, or anyone else working on the investigation, is unable to access it.

(9) In this section and section 140, "special material" means—

(a) records relating to an individual's—

(i) physical or mental health,

(ii) spiritual counselling or assistance given, or to be given, to that individual, or

(iii) counselling or assistance given to that individual for the purpose of that individual's welfare by an individual or organisation who has responsibilities by reason of their office, occupation or court order,

which a person has acquired or created in the course of any trade, business, profession or other occupation which that person holds in confidence;

(b) human tissue or tissue fluid which had been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;

(c) material which is acquired or created for the purpose of journalism and which is seized from the possession of the person who acquired or created it for that purpose; or

(d) material which a person has acquired in the course of their business (other than anything subject to legal professional privilege) and which is held by that person under an express or implied undertaking to hold it in confidence or under an obligation of secrecy contained in any Act including any Act passed after this Act.

Safeguards on the use of certain powers: application for access to LPP material

139.—(1) A relevant officer who is an authorised officer of a regulatory body may apply to a Commissioner for Warrants for access to LPP material.

(2) An application under this section must be made in writing and set out why the access is necessary in the public interest.

(3) An application under this section may only be made where the relevant officer is acting for a purpose connected with the regulation of legal professionals.

(4) LPP material which is LPP material because it exists as a result of a relationship between the person under investigation and their legal adviser is exempt from this section.

Safeguards on the use of certain powers: application for access to special material

140.—(1) A relevant officer may apply to a Commissioner for Warrants for access to special material.

(2) An application under this section must be made in writing and set out why the access is necessary in the public interest.

Safeguards on the use of certain powers: limit on retention of seized materials

141. Where a thing, document, information or item has been seized under a power in this Act, it may not be retained—

(a) for a period of more than 6 months beginning with the day on which it was seized, or

(b) where it is reasonably required to be retained for a longer period for the purpose for which it was seized, for longer than it is required for those purposes.

Safeguards on the use of certain powers: restriction on collateral use

142.—(1) Where a thing, document, information or item has been seized under a power in this Act, it must not be used for or in connection with a different purpose than the one for which it was seized.

(2) For the purposes of subsection (1), the prosecution of an offence other than the one being investigated at the time the power is exercised is not a different purpose to the purpose for which the thing, document, information or item is seized.

Safeguards on the use of certain powers: requirement to comply with codes

143. Where a relevant officer exercises a power under this Act, they must have regard to any relevant code of practice issued under section 177.

Safeguards on the use of certain powers: requirement to record the use of powers

144. Where a relevant officer has exercised a power under this Act they must record its use and the reasons for doing so as soon as is reasonably practicable after the exercise of the power.

Rights of persons against whom powers are exercised: application for an order that an arrest or detention were unlawful

145.—(1) A person who is arrested by a constable may apply to the Powers Tribunal for an order that the arrest was unlawful.

(2) A person who is detained by a custody officer may apply to the Powers Tribunal for an order that the detention was unlawful.

Rights of persons against whom powers are exercised: application for a writ of habeas corpus

146.—(1) A person who is currently arrested or detained, or a person acting on behalf of a person who is currently detained, may apply to the Powers Appeals Tribunal for a writ of habeas corpus.

(2) An application under this section must—

(a) be made in writing; and

(b) be supported by a witness statement or affidavit which must—

(i) state the application is made at the instance of the person being detained;

(ii) set out the nature of the detention;

(iii) set out the grounds on which it is said the detention is unlawful; and

(iv) be made by the detained person, or

(v) where the detained person is unable to make it, be made on behalf of the detained person and say why the detained person is unable to make it.

(3) Upon receipt of the application under subsection (1) a judge of the Powers Appeals Tribunal must immediately consider the application, and where satisfied it is arguable that the detention is unlawful, issue a writ commanding the officer in whose custody the detained person is held to produce that person before the Powers Appeal Tribunal.

(4) Where a judge of the Powers Appeal Tribunal declines to issue the writ, the applicant may request consideration of the application at a hearing before a different judge.

Rights of persons against whom powers are exercised: rights relating to examination of seized things

147.—(1) Where a sift is undertaken under sections 136 to 138 a person has a right—

(a) to attend or be represented at the examination, and

(b) to provide a list of search terms for the purposes of the examination of electronic material.

(2) A right under this section is forfeited in accordance with the provisions of sections 136 to 138.

Rights of persons against whom powers are exercised: application for an order that a warrant of production was unlawful

148. Where a warrant of production has been served on a person that person may apply to the Powers Tribunal for an order that the warrant of production was unlawful.

Rights of persons against whom powers are exercised: application for an order that a warrant of entry was unlawful

149. Where a warrant of entry is executed the occupier of the premises entered may apply to the Powers Tribunal for an order that the warrant of entry was unlawful.

Rights of persons against whom powers are exercised: application for an order that the exercise of a power was unlawful

150. Where a power in this Act has been exercised, the person against whom it is exercised may apply to the Powers Tribunal for an order that the exercise of the power was unlawful.

Rights of persons against whom powers are exercised: application for return of seized things

151.—(1) Where a power of seizure has been exercised, a person with an interest in the thing seized may apply to the Powers Tribunal for an order for the return of that thing.

(2) An application under this section may include an application for the destruction of any copies held.

Rights of persons against whom powers are exercised: right to refuse entry under a notice of intended entry

152.—(1) Where a relevant officer services a notice of intended entry, the occupier of the premises in question has a right to refuse entry to the premises.

(2) Where a person has exercised their right under this section an entry without warrant of entry will be unlawful.

Rights of persons against whom the powers are exercised: application for compensation

153. Where a person makes an application under any of sections 145 to 151 the person may additionally apply for compensation.

Rights of persons against whom the powers are exercised: application for interim injunction

154. Where a person is eligible to make an application under any of sections 148 to 151, the person may apply to the Powers Tribunal for an interim injunction requiring relevant officers to do or refrain from doing any acts specified in the interim injunction.

PART 9

Commissioners for Warrants

Commissioners for warrants

155. —(1) Her Majesty may by Letters Patent, on the recommendation of the Lord Chancellor, appoint a person to be one of Her Majesty's Commissioners for Warrants.

(2) A person appointed under subsection (1) may appoint deputies.

(3) A person appointed under subsection (3) to be one of Her Majesty's Deputy Commissioners for Warrants shall have all the powers and privileges of one of Her Majesty's Commissioners for Warrants.

(4) Schedule 10 makes further provision about appointments under this section.

Powers of commissioners for warrants

156.—(1) A Commissioner for Warrants may—

(a) issue a warrant of entry under section 158;

(b) issue a warrant of production under section 161;

(c) grant access to LPP material on application under section 139;

(d) grant access to special material on application under section 140.

(2) When exercising or declining to exercise a power under this section a Commissioner for Warrants must make a written record of their decision and the reasons for that decision.

Protection of commissioners for warrants

157.—(1) No action shall be brought against a Commissioner for Warrants in respect of—

(a) a warrant issued by them;

(b) access granted to LPP material;

(c) access granted to special material.

(2) Subsection (1) does not prevent an application to the Powers Tribunal.

Warrant of entry: power of commissioner for warrants to issue warrants

158.—(1) A Commissioner for Warrants may, where the conditions in subsections (2) to (4) are met, issue a warrant authorising a relevant officer to enter premises.

(2) The first condition is that this Act confers a power on that relevant officer to make an application for a warrant of entry.

(3) The second condition is that the conditions for issuing a warrant of entry to that relevant officer are met.

(4) The third condition is that there are reasonable grounds to believe the entry is necessary and proportionate.

(5) A warrant under this section authorises entry by force if necessary.

(6) Subject to subsection (10) a relevant officer may be accompanied by such persons, and may take onto the premises such equipment, as the officer thinks necessary.

(7) Subject to subsection (10) a person who is accompanying a relevant officer may exercise the same powers as a relevant officer.

(8) Subject to subsection (10) a warrant under this section ceases to have effect at the end of the period of 84 days beginning with the day it is issued.

(9) Subject to sub-section (10) a warrant authorises multiple entries.

(10) A warrant under this section may have conditions placed on its execution by the Commissioner for Warrants including (but not limited to)—

(a) the times and days at which the warrant may be executed;

(b) a shorter period than the period mentioned in sub-section (8);

(c) the number or categories of persons a relevant officer may be accompanied by;

(d) the powers available to persons accompanying a relevant officer;

(e) the maximum number of entries the warrant authorises.

(11) Where the relevant officer is a constable, this section does not confer a power of arrest on any person who is accompanying them under a warrant.

Warrant of entry: content of warrants

159.—(1) A warrant of entry must be in writing and include the information set out in this section.

(2) The information which must be included is—

(a) the name of the relevant officer who applied for the warrant;

(b) the section of this Act that confers a power on the relevant officer to apply for a warrant;

(c) the name of the Commissioner for Warrants who issued the warrant;

(d) the premises to which the warrant authorises entry;

(e) a statement that the warrant authorises entry to those premises, including entry by force if necessary;

(f) the date on which the warrant was issued;

(g) the date on which the warrant ceases to have effect;

(h) any conditions placed under section 158(10) on the execution of the warrant;

(i) a statement warning of the criminal offences under section 175, together with the penalties, which may be committed by an occupier (or others) in relation to the entry or the use of powers by those executing the warrant;

(j) the powers those entering the premises are entitled to use whilst on the premises;

(k) the safeguards which apply to powers mentioned in paragraph (j);

(l) the rights which apply to the powers mentioned in paragraph (j);

(3) The statement of powers must set out a description of the powers, the purpose for which they are being exercised, and state which section of this Act confer them.

Warrant of entry: application by a relevant officer

160.—(1) An application for a warrant of entry under this Act must be made by written information on oath given by a relevant officer.

(2) An application for a warrant of entry under this Act may be made without notice.

(3) An application for a warrant of entry under this Act must state—

(a) the name of the relevant officer;

(b) the basis on which they are a relevant officer and the evidence of their appointment and authority;

(c) the purpose for which the relevant officer is acting;

(d) the section of this Act that confers a power on the relevant officer to make an application for a warrant of entry;

(e) the section of this Act that sets out the conditions for issuing a warrant of entry to the relevant officer;

(f) the premises to which the warrant of entry will authorise entry;

(g) the grounds (supported by relevant exhibits) on which the relevant officer says the conditions for issuing a warrant of entry are met;

(h) any information which may undermine the application for a warrant of entry or otherwise militate against a Commissioner for Warrants issuing it; and

(i) any information which may reasonably assist a Commissioner for Warrants to consider whether or not any conditions should be placed on the execution of a warrant of entry, including (but not limited to)—

(i) the type of premises;

(ii) the identity of known or suspected occupiers of the premises;

(iii) whether any of the known or suspected occupiers of the premises are—

(aa) under the age of 18;

(bb) infirm; or

(cc) otherwise to be considered vulnerable; and

(iv) where the premises are business premises, the ordinary opening hours of the business.

Warrant of production: power for commissioner for warrants to issue warrants

161.—(1) A Commissioner for Warrants may, where the conditions in subsections (2) to (4) are met, issue a warrant requiring a person to produce documents or information to a relevant officer.

(2) The first condition is that this Act confers on that relevant officer a power to make an application for a warrant of production.

(3) The second condition is that the conditions for issuing a warrant to that relevant officer are met.

(4) The third condition is that it is necessary and proportionate to require the information to be produced.

Warrant of production: content of warrant

162.—(1) A warrant of production must be in writing and include the information set out in this section.

(2) The information which must be included is—

(a) the name of the relevant officer who applied for the warrant;

(b) the section of this Act that confers a power on the relevant officer to apply for a warrant;

(c) the name of the Commissioner for Warrants who issued the warrant;

(d) the documents or information which must be produced;

(e) the format in which the documents or information must be produced;

(f) the date by which the documents or information must be produced;

(g) a statement informing the person against whom the warrant is issued of their right to challenge under this Act together with information on how to do so.

Warrant of production: application by a relevant officer

163.—(1) An application for a warrant of production under this Act must be made by written information on oath by a relevant officer.

(2) An application for a warrant of production under this Act must state—

(a) the name of the relevant officer;

(b) the basis on which they are a relevant officer and the evidence of their appointment and authority;

(c) the purpose for which the relevant officer is acting;

(d) the section of this Act that confers a power on the relevant officer to make an application for a warrant of production;

(e) the section of this Act that sets out the conditions for issuing a warrant of production to the relevant officer;

(f) the documents and information sought;

(g) the grounds (supported by relevant exhibits) on which the relevant officer says the conditions for issuing a warrant of production are met.

PART 10

Powers Tribunal and Powers Appeal Tribunal

CHAPTER 1

Powers Tribunal and Powers Appeal Tribunal: establishment and membership

Powers Tribunal and Powers Appeal Tribunal: establishment of the tribunals

164.—(1) There is to be a tribunal, known as the Powers Tribunal, for the purposes of exercising the functions conferred by section 168

(2) There is to be a tribunal, known as the Powers Appeal Tribunal, for the purposes of exercising functions conferred by section 171.

(3) Each of the Powers Tribunal and the Powers Appeal Tribunal is to consist of its judges and other members.

(4) The Senior Judge of the Powers Tribunals is to preside over both of the Powers Tribunal and the Powers Appeal Tribunal.

(5) The Powers Appeal Tribunal is to be a superior court of record.

Powers Tribunal and Powers Appeal Tribunal: Senior Judge of the Powers Tribunals

165.—(1) Her Majesty may, on the recommendation of the Lord Chancellor, appoint a person to the office of Senior Judge of the Powers Tribunals.

(2) Schedule 11 makes further provision about the Senior Judge of the Powers Tribunals.

(3) A holder of the office of Senior Judge of the Powers Tribunals must, in carrying the functions of that office, have regard to—

(a) the need for the tribunals to be accessible,

(b) the need for proceedings before tribunals—

(i) to be fair, and

(ii) to be handled quickly and efficiently,

(c) the need for members of the tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and

(d) the need to develop innovative methods of resolving disputes that are of a type that may be brought before the tribunals.

(4) A person holding the office of Senior Judge of the Powers Tribunals may lay before Parliament written representations on matters that appear to the holder of the office to be matters of importance relating—

(a) to tribunal members,

(b) to the use of powers under this Act, or

(c) otherwise to the administration of justice by the Powers Tribunals.

(5) On appointment, a holder of the office of Senior Judge of the Powers Tribunals must take the oath of allegiance and the judicial oath, as set out in the Promissory Oaths Act 1868, in the presence of the Lord Chief Justice of England and Wales.

(6) Subsection (5) does not apply to a person who has already taken the oaths in pursuance of their appointment in a different judicial office.

Powers Tribunal and Powers Appeal Tribunal: judges and other members of the Powers Tribunal

166.—(1) A person is a judge of the Powers Tribunal if the person is—

(a) appointed under paragraph 1(1) of Schedule 12;

(b) a judge of the Powers Appeal Tribunal.

(2) A person is one of the other members of the Powers Tribunal if the person is appointed under paragraph 2 of Schedule 12.

(3) Schedule 12—

(i) contains provisions for the appointment of persons to be judges, or other members, of the Powers Tribunal, and

(ii) makes further provision in connection with judges and other members of the Powers Tribunal.

(4) On appointment, a judge of the Powers Tribunals must take the oath of allegiance and the judicial oath, as set out in the Promissory Oaths Act 1868, in the presence of the Senior Judge of the Powers Tribunals.

(5) Subsection (4) does not apply to a person who has already taken the oaths in pursuance of their appointment in a different judicial office.

Powers Tribunal and Powers Appeal Tribunal: judges and other members of the Powers Appeal Tribunal

167.—(1) A person is a judge of the Powers Appeal Tribunal if the person is—

(a) the Senior Judge of the Powers Tribunals;

(b) appointed under paragraph 1(1) of Schedule 13.

(2) A person is one of the other members of the Powers Tribunal if the person is appointed under paragraph 2 of Schedule 13.

(3) Schedule 13—

(i) contains provisions for the appointment of persons to be judges, or other members, of the Powers Tribunal, and

(ii) makes further provision in connection with judges and other members of the Powers Tribunal.

(4) On appointment, a judge of the Powers Appeals Tribunals must take the oath of allegiance and the judicial oath, as set out in the Promissory Oaths Act 1868, in the presence of the Senior Judge of the Powers Tribunals.

(5) Subsection (4) does not apply to a person who has already taken the oaths in pursuance of their appointment in a different judicial office.

CHAPTER 2

Powers Tribunal

Powers Tribunal and Powers Appeal Tribunal: Powers Tribunal functions

168.—(1) It is the function of the Powers Tribunal to hear and adjudicate on any application a person has a right to bring before it under this Act.

(2) In exercising its functions, the Powers Tribunal must have regard to the overriding objective of the proper administration of justice, in particular, where relevant, the wider justice system.

Powers Tribunal and Powers Appeal Tribunal: orders of the Powers Tribunal

169.—(1) The Powers Tribunal may, on hearing an application under this Act, make any of the following orders—

(a) a warrant of production was lawfully granted;

(b) a warrant of production was unlawfully granted;

(c) a power was exercised lawfully;

(d) a power was exercised unlawfully;

(e) that unlawfully obtained materials must be returned or destroyed;

(f) that unlawfully obtained materials may be retained;

(g) that compensation is owed;

(h) that compensation is not owed;

(i) that an interim injunction is granted;

(j) that an interim injunction is not granted;

(k) that an interim injunction is varied or discharged;

(l) that costs be paid by a person who has acted unreasonably in making or defending an application.

(2) The Powers Tribunal may order that information relied upon by a relevant officer in respect of any application made by them to a Commissioner for Warrants is not disclosed to a person exercising a right to apply to the Powers Tribunal.

(3) Notwithstanding any order for non-disclosure, the Powers Tribunal may consider the non-disclosed material when making a decision about the lawfulness of the decision of a Commissioner for Warrants.

(4) The Powers Tribunal must give written reasons for a decision within a period of 28 days of the making of an order under this section.

(5) The Powers Tribunal may, on its own initiative or on an application from a party involved in the case, review a decision made by it.

Powers Tribunal and Powers Appeal Tribunal: appeal against decision of the Powers Tribunal

170.—(1) The Powers Tribunal may, on application by a person, give that person leave to appeal to the Powers Appeal Tribunal on any point of law arising from a decision made by the Powers Tribunal.

(2) Where the Powers Tribunal refuses leave to appeal against a decision, the Powers Appeal Tribunal may, on application by that person, grant permission to appeal.

CHAPTER 3

Powers Appeal Tribunal

Powers Tribunal and Powers Appeal Tribunal: Powers Appeal Tribunal functions

171.—(1) It is the function of the Powers Appeal Tribunal to hear and adjudicate on any appeal against a decision of the Powers Tribunal.

(2) It is also the function of the Powers Appeal Tribunal to hear an application for a writ of habeas corpus and determine the lawfulness of the detention in question.

(3) In exercising its functions, the Powers Appeal Tribunal must have regard to the overriding objective of the proper administration of justice, in particular, where relevant, the wider justice system.

Powers Tribunal and Powers Appeal Tribunal: orders of the Powers Appeal Tribunal

172.—(1) The Powers Appeal Tribunal may, on hearing an appeal against an order of the Powers Tribunal, make an order which—

(a) confirms the order,

(b) varies the order (including the amount of compensation or costs (if any) ordered), or

(c) overturns the order; and

(d) orders that costs be paid by a person.

(2) An order which overturns an order of the Powers Tribunal may include an order that the matter is remitted to the Powers Tribunal for rehearing and may also include directions about that rehearing.

(3) The Powers Appeal Tribunal may, on hearing an application to renew an application for a writ of habeas corpus, make an order to—

(a) dismiss the application,

(b) issue the writ; and

(c) order costs of the hearing to be paid by an unsuccessful applicant.

(4) The Powers Appeal Tribunal may, on the occasion of a person being brought before it under a writ of habeas corpus, make an order—

(a) confirming the detention is lawful,

(b) ordering the release of the person; and

(c) in the event that the release of the person is ordered, ordering compensation to be paid for the unlawful detention.

(5) The Powers Appeal Tribunal must give written reasons for its decision within a period of 28 days of the making of an order under this section.

(6) The Powers Appeal Tribunal may, on its own initiative or on application from a party involved in the case, review a decision made by it.

Powers Tribunal and Powers Appeal Tribunal: appeal against a decision of the Powers Appeal Tribunal

173.—(1) The Powers Appeal Tribunal may, on application by a person, give that person leave to appeal to the Court of Appeal on any point of law arising from a decision made by the Powers Appeal Tribunal.

(2) Where the Powers Tribunal refuses leave to appeal against a decision, the Powers Appeal Tribunal may, on application by that person, grant permission to appeal.

(3) Leave to appeal may not be granted under this section unless—

(a) the proposed appeal would raise some important principle of law or practice; or

(b) there is some other compelling reason for the Court of Appeal to hear the appeal.

CHAPTER 4

Powers to create rules of procedure

Powers Tribunal and Powers Appeal Tribunal: powers to create rules of procedure

174.—(1) The Senior Judge of the Powers Tribunals may make rules of procedure relating to the business of the Powers Tribunal and the Powers Appeal Tribunal.

(2) The power in subsection (1) includes a power to amend the rules.

(3) The power in subsection (1) is to be exercised by regulation.

PART 11

Offences

Offences of obstruction and assault

175.—(1) A person commits an offence if the person—

(a) obstructs a person who is exercising or seeking to exercise a power under this Act;

(b) fails to comply with a requirement properly imposed by a person under this Act; or

(c) without reasonable cause fails to give a person any assistance or information the person requires of the person for, or in connection with, a power the officer may exercise under this Act.

(2) An offence under subsection (1)(c) is committed where a person—

(a) makes a statement which the person knows, or should reasonably know, is false or misleading; or

(b) is reckless in making a statement which is false or misleading.

(3) A person who assaults a relevant officer in the execution of their duties or in connection with the officer exercising or seeking to exercise a power under this Act commits an offence.

(4) A person who seeks to influence a judicial office holder or who otherwise undermines the independence of a judicial officer holder commits and offence.

(5) Nothing in this section requires a person to answer any question or give any information if to do so might incriminate that person.

(6) A person who is guilty of an offence under subsections (1), (3) or (4) is liable—

(a) on summary conviction to—

(i) imprisonment for a term not exceeding one month,

(ii) a fine not exceeding level 3 on the standard scale, or

(iii) both

(b) on indictment to—

(i) imprisonment for a term not exceeding three years,

(ii) an unlimited fine, or

(iii) both.

(7) In this section "relevant officer" also includes a person who has been taken onto premises by a relevant officer under a power under this Act.

PART 12

General provisions

General provisions: independence of judicial office holders

176.—(1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of judicial office holders.

(2) The Lord Chancellor, other Ministers of the Crown and all with responsibility for the administration of justice must not seek to influence the decision of a judicial officer holder.

(3) In this section and section 175 "judicial office holder" means—

(a) a Commissioner for Warrants;

(b) a judge of the Powers Tribunal;

(c) a member of the Powers Tribunal;

(d) a judge of the Powers Appeal Tribunal; and

(e) the Senior Judge of the Powers Tribunals.

General provisions: statutory codes

177.—(1) There shall be a committee known as the Powers Codes Committee.

(2) The committee in subsection (1) shall be—

(a) the Senior Judge of the Powers Tribunals;

(b) four judges of the Powers Appeals Tribunal;

(c) four judges of the Powers Tribunal;

(d) four Commissioners for Warrants; and

(e) four lay members, being people who are not legally qualified and not relevant officers under any section of this Act.

(3) The Powers Codes Committee must prepare and issue each of the following codes—

(a) a code of practice relating to the arrest of persons;

(b) a code of practice relating to the detention of persons;

(c) a code of practice relating to the use of powers by relevant officers under the respective Parts of this Act.

(4) The Powers Codes Committee must keep the codes of practice under review and, in doing so, must have regard to issues arising in the Powers Tribunal and the Powers Appeal Tribunal and any judgments or orders issued by them.

(5) The Powers Codes Committee may replace a code of practice either in part or in its entirety.

(6) A failure on the part of any person to act in accordance with a code of practice issued under this section does not of itself make the action of the person unlawful or make them liable to criminal or civil proceedings.

(7) A code of practice issued under this section is admissible as evidence in any such proceedings and a court or tribunal may have regard to such a failure in determining a question in any such proceedings.

General provisions: powers to amend this Act

178.—(1) The Secretary of State may, by regulation, amend Schedules 1 to 9.

(2) The Secretary of State may, by regulation—

(a) add or remove powers under this Act; or

(b) add safeguards or rights under this Act.

General provisions: subordinate legislation

179.—(1) Orders and regulations made by the Secretary of State under this Act are to be made by statutory instrument.

(2) An instrument made under this Act may—

(a) include incidental, supplementary and consequential provision;

(b) make transitory or transitional provisions or savings;

(c) make provision generally, only in relation to specified cases or subject to exceptions;

(d) make different provisions for different purposes; and

(e) different provision for different areas.

Parliamentary control of subordinate legislation

180.—(1) An instrument made under section 178(1) is subject to annulment in pursuance of a resolution of either House of Parliament.

(2) An instrument made under section 178(2) may not be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament.

(3) This section does not apply to instruments made under sections 174 or 182.

General provisions: extent

181. The provisions of this Act extend only to England and Wales.

General provisions: commencement

182. The provisions of this Act other than this section come into force on such day as may be appointed by order of the Secretary of State.

SCHEDULES

SCHEDULE 1

Section 2

Areas of the Queen's peace

[list of areas would be included here]

SCHEDULE 2

Section 3

Areas of specialism

[list of areas of specialism would be included here]

SCHEDULE 3

Section 6

Administration of constabularies

[provisions regarding the administration of constabularies would be inserted here]

SCHEDULE 4

Section 10

Constables: ranks, conduct and investigations

[provisions regarding ranks of constables, rules relating to their conduct and investigations into their conduct would be inserted here]

SCHEDULE 5

Section 44

Regulatory bodies

Column 1	*Column 2*
[list of regulatory bodies would be inserted here]	***[list of corresponding purposes would be inserted here]***

SCHEDULE 6

Section 66

Civil defence agencies

Column 1	*Column 2*
[list of civil defence agencies would be inserted here]	***[list of corresponding purposes would be inserted here]***

SCHEDULE 7

Section 94

Critical national infrastructure operator

Column 1	*Column 2*
[list of critical national infrastructure operators would be inserted here]	***[list of corresponding purposes would be inserted here]***

SCHEDULE 8

Section 109

Utility companies

Column 1	*Column 2*
[list of utility companies would be inserted here]	***[list of corresponding purposes would be inserted here]***

SCHEDULE 9

Section 122

Civil society agency

Column 1	*Column 2*
[list of civil society agencies would be inserted here]	***[list of corresponding purposes would be inserted here]***

SCHEDULE 10

Section 155

Her Majesty's Commissioners and Deputy Commissioners for Warrants

Her Majesty's Commissioners: eligibility for appointment

1.—A person is eligible for appointment as one of Her Majesty's Commissioners for Warrants only if the person —

(a) is a solicitor of the Senior Courts of England and Wales, or

(b) is a barrister in England and Wales,

(c) they have held that qualification for a period of at least 10 years; and

(d) they have been gaining experience in law for at least 7 out of the last 10 years.

(2) A person has been gaining experience of law if they have been—

(a) carrying-out judicial functions of any court or tribunal;

(b) acting as an arbitrator;

(c) practising as a lawyer;

(d) advising (whether or not in the course of practice as a lawyer) on the application of the law;

(e) assisting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of such proceedings;

(f) drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(g) teaching or researching law.

(3) A person is gaining experience regardless of whether the activity—

(a) is done on a full-time or part-time basis;

(b) is or is not done for remuneration;

(c) is done in England and Wales or elsewhere.

Her Majesty's Commissioners: eligibility for appointment

2.—A person is eligible for appointment as one of Her Majesty's Deputy Commissioners for Warrants only if the person —

(a) is a solicitor of the Senior Courts of England and Wales, or

(b) is a barrister in England and Wales,

(c) they have held that qualification for a period of at least 5 years; and

(d) they have been gaining experience in law for at least 5 out of the last 7 years.

(2) A person has been gaining experience of law if they have been—

(a) carrying-out judicial functions of any court or tribunal;

(b) acting as an arbitrator;

(c) practising as a lawyer;

(d) advising (whether or not in the course of practice as a lawyer) on the application of the law;

(e) assisting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of such proceedings;

(f) drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(g) teaching or researching law.

(3) A person is gaining experience regardless of whether the activity—

(a) is done on a full-time or part-time basis;

(b) is or is not done for remuneration;

(c) is done in England and Wales or elsewhere.

Her Majesty's Commissioners and Deputy Commissioners for Warrants: terms of appointment

3.—(1) A person may be appointed as a Commissioner for Warrants on a salaried or a fee-paid basis.

(2) A person appointed as one of Her Majesty's Commissioners for Warrants may be removed from office—

(a) only by the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) a ground specified in the person's terms of appointment, or

(iii) the day on which the person attains the age of 70.

(3) A person appointed as one of Her Majesty's Deputy Commissioners for Warrants may be removed from office—

(a) only by Her Majesty's Commissioner for Warrants for the commission area in which they are appointed or the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) a ground specified in the person's terms of appointment, or

(iii) the day on which the person attains the age of 70.

Her Majesty's Commissioners and Deputy Commissioners for Warrants: remuneration, allowances and expenses

4.—(1) Sub-paragraph (2) applies to a person appointed under paragraphs 1 or 2.

(2) The Lord Chancellor may pay to a person to whom this sub-paragraph applies such amounts (if any) as the Lord Chancellor may determine by way of—

(a) remuneration;

(b) allowances;

(c) expenses.

SCHEDULE 11

Section 165

Senior Judge of the Powers Tribunals

Senior Judge of the Powers Tribunal: duty to fill vacancy

1.—(1) If there is a vacancy in the office of Senior Judge of the Powers Tribunals, the Lord Chancellor must recommend a person for appointment to that office.

(2) Sub-paragraph (1) does not apply to a vacancy while the Lord Chief Justice of England and Wales agrees it may remain unfilled.

Senior Judge of the Powers Tribunal: recommendation for appointment

2.—(1) Before the Lord Chancellor may recommend a person for appointment to the office of Senior Judge of the Powers Tribunals, the Lord Chancellor must consult the Lord Chief Justice of England and Wales.

(2) Where the outcome of the consultation is an agreement between the Lord Chancellor and the Lord Chief Justice of England, the Lord Chancellor must recommend that person.

(3) Where the person recommended declines to be appointed, does not agree within a time specified for that purpose, or is otherwise not available within a reasonable time to be recommended, the Lord Chancellor must, instead of recommending that person, consult afresh under sub-paragraph (1).

(4) Where the outcome of the consultation is that there is not an agreement, the Lord Chancellor must make a request to the Judicial Appointments Commission for a person to be selected for recommendation for appointment as the Senior Judge of the Powers Tribunals.

(5) A person is eligible for appointment under sub-paragraph (1) only if the person —

(a) is a solicitor of the Senior Courts of England and Wales, or

(b) is a barrister in England and Wales,

(c) they have held that qualification for a period of at least 10 years; and

(d) they have been gaining experience in law for at least 7 out of the last 10 years.

(6) A person has been gaining experience of law if they have been—

(a) carrying-out judicial functions of any court or tribunal;

(b) acting as an arbitrator;

(c) practising as a lawyer;

(d) advising (whether or not in the course of practice as a lawyer) on the application of the law;

(e) assisting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of such proceedings;

(f) drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(g) teaching or researching law.

(7) A person is gaining experience regardless of whether the activity—

(a) is done on a full-time or part-time basis;

(b) is or is not done for remuneration;

(c) is done in England and Wales or elsewhere.

Senior Judge of the Powers Tribunal: eligibility for selection by the Judicial Appointments Commission for recommendation for appointment

3.—(1) A person is eligible for selection in pursuance of a request under paragraph 2(4) if the person —

(a) is a solicitor of the Senior Courts of England and Wales, or

(b) is a barrister in England and Wales,

(c) they have held that qualification for a period of at least 10 years; and

(d) they have been gaining experience in law for at least 7 out of the last 10 years.

(2) A person has been gaining experience of law if they have been—

(a) carrying-out judicial functions of any court or tribunal;

(b) acting as an arbitrator;

(c) practising as a lawyer;

(d) advising (whether or not in the course of practice as a lawyer) on the application of the law;

(e) assisting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of such proceedings;

(f) drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(g) teaching or researching law.

(3) A person is gaining experience regardless of whether the activity—

(a) is done on a full-time or part-time basis;

(b) is or is not done for remuneration;

(c) is done in England and Wales or elsewhere.

Senior Judge of the Powers Tribunal: process for selection by the Judicial Appointments Commission for recommendation for appointment

4.—(1) On receiving a request, the Commission must appoint a selection panel.

(2) A selection panel is a committee of the Commission.

(3) The selection panel must consist of the following four members—

(a) the Lord Chief Justice of England and Wales, or their nominee;

(b) a person designated by the Lord Chief Justice of England and Wales;

(c) the chairman of the Commission, or their nominee; and

(d) a lay member of the Commission designated by the chairman.

(4) The panel must—

(a) determine the selection process to be applied,

(b) apply the selection process, and

(c) make a selection accordingly.

(5) As part of the selection process the panel must consult the Lord Chief Justice of England and Wales, if they are not a member of the panel.

(6) In the event of a tie in any vote by the panel, the chairman has an additional, casting vote.

(7) After selecting a person, the Commission must submit a report to the Lord Chancellor stating who has been selected.

(8) After submitting the report, the Commission must provide any further information required by the Lord Chancellor.

(9) Having considered the report, the Lord Chancellor must—

(a) accept the selection;

(b) reject the selection; or

(c) request the Commission to reconsider their recommendation.

(10) The Lord Chancellor may only reject the selection or request the Commission reconsider on the grounds that, in the Lord Chancellor's opinion—

(a) there is not enough evidence that the person is suitable for the office of Senior Judge of the Powers Tribunals, or

(b) there is evidence that the person is not the best candidate on merit.

(11) The Lord Chancellor may only reject the selection or request the Commission reconsider their recommendation twice.

Senior Judge of the Powers Tribunal: terms of office

5.—(1) A person may be appointed as the Senior Judge of the Powers Tribunal on a salaried basis.

(2) A person appointed as the Senior Judge of the Powers Tribunal may be removed from office—

(a) only by Her Majesty, on the recommendation of the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) the day (if any) specified in the terms of appointment as the day on which a fixed-term appointment will come to an end, or

(iii) the day on which the person attains the age of 70.

(3) The Lord Chancellor may only recommend the removal from office on the ground of inability or misbehaviour after an address presented to Her Majesty by both Houses of Parliament.

Senior Judge of the Powers Tribunal: remuneration, allowances and expenses

6. The Lord Chancellor may pay to a person to whom this sub-paragraph applies such amounts (if any) as the Lord Chancellor may determine by way of—

(a) remuneration;

(b) allowances;

(c) expenses.

SCHEDULE 12

Section 166

Judges and other members of the Powers Tribunal

Judges and other members of the Powers Tribunal: power to appoint judges

1.—(1) The Senior Judge of the Powers Tribunals may appoint a person to be one of the judges of the Powers Tribunal.

(2) A person is eligible for appointment under sub-paragraph (1) only if the person —

(a) is a solicitor of the Senior Courts of England and Wales, or

(b) is a barrister in England and Wales,

(c) they have held that qualification for a period of at least 5 years; and

(d) they have been gaining experience in law for at least 5 out of the last 7 years.

(3) A person has been gaining experience of law if they have been—

(a) carrying-out judicial functions of any court or tribunal;

(b) acting as an arbitrator;

(c) practising as a lawyer;

(d) advising (whether or not in the course of practice as a lawyer) on the application of the law;

(e) assisting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of such proceedings;

(f) drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(g) teaching or researching law.

(4) A person is gaining experience regardless of whether the activity—

(a) is done on a full-time or part-time basis;

(b) is or is not done for remuneration;

(c) is done in England and Wales or elsewhere.

Judges and other members of the Powers Tribunal: power to appoint other members

2. The Senior Judge of the Powers Tribunals may appoint a person to be one of the members of the Powers Tribunal who are not judges of the tribunal.

Judges and other members of the Powers Tribunal: terms of appointment of judges

3.—(1) A person may be appointed as a judge of the Powers Tribunal on a salaried or a fee-paid basis.

(2) A person appointed as a judge of the Powers Tribunal may be removed from office—

(a) only by the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) a ground specified in the person's terms of appointment, or

(iii) the day on which the person attains the age of 70.

Judges and other members of the Powers Tribunal: terms of appointment of other members

4.—(1) A person may be appointed to be one of the members of the Powers Tribunal who are not judges of the tribunal on a salaried or a fee-paid basis.

(2) A person appointed as a judge of the Powers Tribunal may be removed from office—

(a) only by the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) a ground specified in the person's terms of appointment, or

(iii) the day on which the person attains the age of 70.

Judges and other members of the Powers Tribunal: remuneration, allowances and expenses

5.—(1) Sub-paragraph (2) applies to a person appointed under paragraphs 1 or 2.

(2) The Lord Chancellor may pay to a person to whom this sub-paragraph applies such amounts (if any) as the Lord Chancellor may determine by way of—

(a) remuneration;

(b) allowances;

(c) expenses.

SCHEDULE 13

Section 167

Judges and other members of the Powers Appeal Tribunal

Judges and other members of the Powers Appeal Tribunal: power to appoint judges

1.—(1) The Senior Judge of the Powers Tribunals may appoint a person to be one of the judges of the Powers Appeal Tribunal.

(2) A person is eligible for appointment under sub-paragraph (1) only if the person —

(a) is a solicitor of the Senior Courts of England and Wales, or

(b) is a barrister in England and Wales,

(c) they have held that qualification for a period of at least 10 years; and

(d) they have been gaining experience in law for at least 5 out of the last 7 years.

(3) A person has been gaining experience of law if they have been—

(a) carrying-out judicial functions of any court or tribunal;

(b) acting as an arbitrator;

(c) practising as a lawyer;

(d) advising (whether or not in the course of practice as a lawyer) on the application of the law;

(e) assisting (whether or not in the course of such practice) as mediator in connection with attempts to resolve issues that are, or if not resolved could be, the subject of such proceedings;

(f) drafting (whether or not in the course of such practice) documents intended to affect persons' rights or obligations;

(g) teaching or researching law.

(4) A person is gaining experience regardless of whether the activity—

(a) is done on a full-time or part-time basis;

(b) is or is not done for remuneration;

(c) is done in England and Wales or elsewhere.

Judges and other members of the Powers Appeal Tribunal: power to appoint other members

2. The Senior Judge of the Powers Tribunals may appoint a person to be one of the members of the Powers Appeal Tribunal who are not judges of the tribunal.

Judges and other members of the Powers Appeal Tribunal: terms of appointment of judges

3.—(1) A person may be appointed as a judge of the Powers Appeal Tribunal on a salaried or a fee-paid basis.

(2) A person appointed as a judge of the Powers Appeal Tribunal may be removed from office—

(a) only by the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) a ground specified in the person's terms of appointment, or

(iii) the day on which the person attains the age of 70.

Judges and other members of the Powers Appeal Tribunal: terms of appointment of other members

4.—(1) A person may be appointed to be one of the members of the Powers Appeal Tribunal who are not judges of the tribunal on a salaried or a fee-paid basis.

(2) A person appointed as a judge of the Powers Appeal Tribunal may be removed from office—

(a) only by the Lord Chancellor, and

(b) only on—

(i) the ground of inability or misbehaviour,

(ii) a ground specified in the person's terms of appointment, or

(iii) the day on which the person attains the age of 70.

Judges and other members of the Powers Appeal Tribunal: remuneration, allowances and expenses

5.—(1) Sub-paragraph (2) applies to a person appointed under paragraphs 1 or 2.

(2) The Lord Chancellor may pay to a person to whom this sub-paragraph applies such amounts (if any) as the Lord Chancellor may determine by way of—

(a) remuneration;

(b) allowances;

(c) expenses.

Appendix 3

Category	Definition
Enter	Power to go on to land, or as the case may be, a vehicle or vessel.
Enter and conceal object	to cover or cause to be concealed or covered, an object.
Enter and cull	to kill or cause to be killed any animal.
Enter and deal with personal property	to deal with personal effects.
Enter and destroy object	to destroy or cause to be destroyed, an object.
Enter and distrain	to take control of possessions for the purposes of securing payment of debt either by the debtor or by auction of those goods.
Enter and excavate	Power to go on to land to excavate. This relates to archaeological works.
Enter and extinguish light	Power to go on to land and extinguish a light. This relates to light on the coast which are likely to confuse shipping.
Enter and give effect to Court order	to do something ordered by a Court..
Enter and inspect	for the purposes of ascertaining whether the person inspected is complying with regulatory requirements or in order to consider whether or not to exercise any function.
Enter and provide treatment	and treat a person or animal.
Enter and remove object	and remove something.
Enter and remove person to safe place	Power to go on to land and remove a person to a safe place. This is of the sort of power used in Mental Health care.
Enter and search	and search, rummage, break open containers or locked drawers and cupboards.
Enter and seize	and take possession of articles.
Enter and survey	Power to go on to land and undertake a survey for the purposes of ascertaining whether it is suitable for, or requires, the undertaking of works.
Enter and take information	Power to go on to land take information.
Enter and take possession	Power to go on to land and take possession of it. This is used either in relation to compulsory purchase or to use it whilst undertaking works on railways etc.
Enter and take samples	and take a sample of produce/soil etc. for testing.
Enter and undertake works	and undertake works. This includes making premises safe etc.
Enter, inspect and seize	for the purposes of ascertaining whether the person inspected is complying with regulatory requirements or in order to consider whether or not to exercise any function and whilst there take possession of articles.
Enter, search and seize	and search, rummage, break open containers or locked drawers and cupboards and whilst there take possession of articles.
Enter, search and take samples	and search, rummage, break open containers or locked drawers and cupboards and take a sample of produce/soil etc. for testing.
Seize	and whilst there take possession of articles.