

# CRIMINAL JUSTICE AND POLICE ACT 2001

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 2: Powers of seizure

156. The decision of the Divisional Court in *R v Chesterfield Justices and Chief Constable of Derbyshire ex parte Bramley*, which was given on 5<sup>th</sup> November 1999, brought into focus the difficulties faced by the police and other law enforcement agencies where material they are entitled to seize is contained within a larger collection of material some of which they might not be entitled to seize. The Bramley case made clear that the Police and Criminal Evidence Act 1984 does not entitle the police to seize material for the purposes of sifting it elsewhere.
157. The background to the judgement is that an application for judicial review was brought by Andrew Bramley, a car dealer, who challenged the seizure by Derbyshire Constabulary of documents, including correspondence with his solicitors, from his premises outside Sheffield. Before the hearing of the judicial review challenge, Derbyshire Constabulary conceded that the search warrant and seizure were unlawful and paid Mr Bramley £1,000 in damages. But, because of the importance of the issues raised by the case and uncertainties in the law, the parties agreed that the Divisional Court should be asked to rule on the legal principles. Both the Attorney General and the Law Society intervened in the case and were represented at the hearing.
158. Lawyers for the police argued that provided the police reasonably believed the material they wished to seize was not legally privileged, they had the right to remove it to examine its contents elsewhere to determine what was and was not within the scope of the warrant. Rejecting this claim, Lord Justice Kennedy, who was sitting with Mr Justice Turner and Mr Justice Jowett, said common sense would suggest that a policeman executing a warrant should be able to do a preliminary sift of documents and then take all, or a large part of them, to sort out properly elsewhere. However, if a police officer seized items which were later found to be outside the scope of the warrant, the current provisions of PACE provided no defence to an action of trespass to goods based on unjustified seizure. In some cases the damages could be “significant”. The Divisional Court suggested that this problem could only be overcome by the introduction of primary legislation.
159. Whilst Bramley concerned the police and PACE, the principle applies to the powers of seizure given to a range of law enforcement agencies. The difficulty facing the police and these other law enforcement agencies is that there are circumstances where it is not practicable to establish on the premises subject to the search, which material can be seized and which cannot. This may be because of the simple bulk of the material. It may be because relevant material is contained within the same document or set of documents as material which is protected from seizure. The most difficult circumstances relate to material held on computer media. It may be impossible to establish which material is relevant and seizable without processing the data forensically. That may involve removing the computer and/or imaging the entire contents of its hard disks and/or removing CD Roms or floppy disks.

## **Outline of proposals**

160. The new sections do two separate things. First they deal with the problem identified by Bramley. They give the police and other law enforcement agencies, powers to remove material from premises so that they can examine it elsewhere, where it is not possible to examine it properly on the premises, due to constraints of time or technology. Second, they recognise the fact that with the advent of modern technology and the expansion in the use of computers, it is often important for investigators to be able to seize and forensically examine an entire disk or hard drive, in order to determine when individual documents have been created, amended and/or deleted. This inevitably means retaining all the material on the hard drive, including possibly legally privileged material. The new sections give the police and others the power to retain this inextricably linked material. The sections also provide for a number of safeguards to prevent abuse and to allow for a mechanism whereby an application can be made to a Judge for the return of material seized. In certain circumstances there will be an obligation on the police and others to secure the material in question pending the determination of such an application.
161. Because the Bramley principle applies equally to all powers of seizure given to the police and other law enforcement agencies the new powers are free standing powers which can only be exercised where a person could have exercised an existing power of seizure. Schedule 1 to the sections lists all these existing powers. There are over 70 of them and in addition to those used by the police they include powers available to the Serious Fraud Office, the Financial Services Authority, the Inland Revenue, Customs & Excise, the Department of Trade and Industry and the Office of Fair Trading. The underlying policy is that whilst the police and others can use the new powers to remove material to examine elsewhere they are only able to retain material which they have power to seize under their existing powers. The only exception to that is the new power to retain inextricably linked material

### ***Section 50: Additional powers of seizure from premises***

162. This section sets out the key additional powers required to deal with the problem identified in Bramley. *Subsection (1)* applies where a constable or other person exercising an existing power of search is unable to determine whether something may be or may contain something for which he is authorised to search, e.g. where there is a large bulk of material. *Subsection (2)* applies to the situation where the constable is unable to separate out the material he is able to seize from that which he is not e.g. where the material is on a computer. If it is not “reasonably practicable” to carry out the determination or separation required by subsections (1) and (2) the material can be seized to be examined elsewhere.
163. *Subsection (3)* defines "reasonably practicable" for the purpose of this section. The definition includes factors such as how long the determination or separation would take if carried out on the premises (e.g. where there was a large bulk of material) or whether carrying out the determination or separation on premises would prejudice the use of the material to be seized (e.g. where quickly printing off computer material rather than imaging a hard drive could lead to other relevant material on that computer being altered or damaged.) *Subsection (4)* excludes section 19(6) of PACE where material is seized under subsection (2). Section 19(6) (and its Northern Irish equivalent) prevent a constable seizing material he has reasonable grounds to believe is legally privileged. In other words *Subsection (4)* means that where the constable cannot separate out the item he is able to seize from an item which is legally privileged he is able to remove both from the premises, e.g. where they are both on a computer disc. *Subsection (5)* sets out the powers of seizure to which section 50 will apply. One of these powers is s.28(2)(b) of the Competition Act 1998. This gives a power to take copies but not to take originals of documents. *Subsection (6)* means that whilst section 50 applies to that power it only enables those exercising it to copy material in order to examine it

elsewhere to determine or separate out what in fact they would be entitled to copy under s.28 itself. It does not give them the power to seize original documents.

164. Part I of Schedule 1 is a list of powers of seizure conferred by various legislation to which section 50 will apply.

***Section 51: Additional powers of seizure from the person***

165. This section gives additional powers of seizure from the person where there is an existing power to search that person. It is almost identical to section 50. It is necessary because, for example, individuals might have on them handheld computers or computer disks which might contain items of electronic data which the police would wish to seize. Alternatively, they could be carrying a suitcase containing a bulk of correspondence which could not be examined in the street.
166. **Part 2** of Schedule 1 is a list of powers of seizure conferred by various legislation to which section 51 will apply.

***Section 52: Notice of exercise of power under section 50 or 51***

167. *Subsections (1)–(4)* deal with the requirement to give the occupier and/or some other person or persons from whom material has been seized under section 50 or 51 a notice specifying what has been seized and the grounds on which it has been seized, as well as information about the scope to apply to a judge for the return of seized material and about applying to attend any examination of the material seized. *Subsections (5)–(7)* gives the power to prescribe that notices may be given to other persons. For example, where the power under section 50 is exercised by the DTI in reliance on the s.447 of the Companies Act 1985 the DTI might wish to provide that notice is also served on the registered office of the company who appears to own the premises.

***Section 53: Examination and return of property seized under s. 50 or 51***

168. This section sets out how the examination of the property seized under sections 50 and 51 should take place and what can be retained. *Subsection (2)* deals with the examination and *subsection (3)* sets out what material does not need to be returned. The aim is to enable the police and others to retain whatever they could have seized had the examination taken place on the premises. *Subsections (3)* and *(5)* permit the retention of inextricably linked material. This is material which it is not reasonably practicable to be separated from material that can be seized without prejudicing the use of that seizable material. For example, it means the police or others may retain a whole computer hard drive which contains a certain document which is evidence of an offence if the rest of the hard drive is needed to prove when that document was created, amended or deleted. *Subsection (4)* refers to giving the occupier or some other person with an interest in the property an opportunity to be present at the examination.

***Section 54: Obligation to return items subject to legal privilege***

169. Legally privileged material is protected from seizure under PACE and other legislation. It includes communications between a professional legal adviser and his client in respect of legal advice or proceedings. However, it is possible to seize it under sections 50 and 51, and under PACE (if the constable making the seizure did not have grounds to believe it was legally privileged when he made the seizure). This section is designed to give specific protection to legally privileged material, to oblige the police and others to return such material if seized and, in conjunction with section 59, to give a judge the power to order its return.
170. *Subsection (1)* sets out the obligation to return and *subsections (2) and (3)* provide that legally privileged material can be retained if it is inextricably linked to other seizable material. The obligation to return legally privileged material and the right to apply to a

Judge for its return applies not only where the powers in sections 50 and 51 are exercised but in most other circumstances where material is seized.

***Section 55: Obligation to return excluded and special procedure material***

171. This section contains similar provisions to section 54 but relating to special procedure and excluded material as defined in PACE. Excluded material includes journalistic material and personal records which are held in confidence. Special procedure material includes confidential material created in the course of a business and journalistic material provided neither is excluded material. PACE gives special procedure material and excluded material a number of different protections and section 55 is similarly designed to give this type of material additional protection whenever it would have had such protection in the relevant underlying power of seizure listed in Schedule 1. Section 55 does not apply where the underlying power of seizure is found in legislation such as the Financial Services and Markets Act 2000 or the Criminal Justice Act 1987 as they do not give special protection to special procedure and excluded material. Some pieces of legislation only give protection to excluded material and not special procedure material. *Subsection (5)* ensures that where the powers in those pieces of legislation are being exercised, or where the powers in section 50 and 51 are being exercised in reliance on those powers, the protections given by this section only apply to excluded material. In legislation enacted prior to PACE protection is only given to special procedure material consisting of documents or records other than documents. For that legislation *subsection (6)* ensures that this section similarly only protects such material.
172. **Part 3** of Schedule 1 is a list of powers of seizure conferred by various legislation to which section 55 will apply.

***Section 56: Property seized by constables etc***

173. This section is referred to in sections 53, 54 and 55 and sets out certain circumstances in which seized property may be retained. It mirrors the power given to a constable under section 19 of PACE which arises independently of a power of search and gives a constable the power to seize evidence of an offence or property obtained in consequence of the commission of an offence if it is necessary to do so to stop it being lost or destroyed etc. Section 56 ensures that where a constable has been involved in the seizure of material under section 50 or 51 it is possible to retain evidence of any offence or property obtained in consequence of the commission of an offence if it is necessary to do so to stop it being lost or destroyed etc, even if this is not material which was being searched for.

***Section 57: Retention of seized items***

174. The provisions listed in *Subsection (1)* of this section set out when property obtained under these powers may be retained. *Subsections (2) and (3)* of this section prevent the retention of property which could not be retained under these provisions if it was seized under the new powers on reliance on one of those powers. *Subsection (4)* ensures that the listed provisions cannot justify the retention of anything which has to be returned under Part 2.

***Section 58: Person to whom seized property is to be returned***

175. This section sets out for the purposes of the Act to whom property which is obliged to be returned under Part 2 should be returned. This is normally the person from whom it is seized unless the police or others consider someone else has a better claim to it. *Subsections (4) and (5)* define the occupier of a premises as being the person from whom property is seized when it is seized from a premises.

**Section 59: Application to appropriate judicial authority**

176. This gives anyone with a relevant interest in the seized property the right to apply to the appropriate judicial authority (as defined in section 64) for its return. It is hoped this will provide a quick and easy mechanism for challenging both the use of the new powers and, in certain circumstances, the exercise of existing powers. *Subsection (3)* sets out the grounds on which an application for the return of the property can be made. On such an application the Court can order the return of material or, amongst other things, order that it be examined, for example, by an independent third party. *Subsections (5) (b), (6) and (7)* enable the police or other body in possession of the property to make an application to keep any material which they would otherwise be obliged to return if it would immediately become appropriate to issue a warrant enabling them to seize that material or to demand its production in the circumstances set out in *subsection (7) (b)*. This means, for example, that the police will not have to return material which might be of value to them and then have to immediately obtain a warrant to seize it back. *Subsection (8)* means that the Court can also authorise the retention of not just what the police or others could seize under a warrant but also any material which is inextricably linked to it.

**Section 60: Cases where duty to secure arises**

177. In certain circumstances an application under section 59 will mean that the police or others will have to secure the material seized pending the hearing of that application. This section sets out the circumstances in which a duty to secure material seized arises. Whilst it can only arise following the seizure of material under section 50 or 51, there is no duty to secure simply where it is alleged that the police or others have possession of irrelevant material. Indeed the whole point of the new powers is that the police can seize a bulk of material in order to separate out the relevant from the irrelevant. The circumstances where the duty to secure arises are where an application under section 59 is made and at least one of the conditions set out in *subsections (2) and (3)* is satisfied. In particular the duty to secure will arise whenever it is claimed that the material seized includes legally privileged material which should be returned. This means that the person from whom the material is seized can, by making such an application, prevent the police or others looking at any material seized under sections 50 or 51 pending the hearing before the judge. This gives further protection to legally privileged material. Similar protection is given to special procedure material and excluded material where the legislation containing the underlying power of seizure itself protects those categories of material.

**Section 61: Duty to secure**

178. This section sets out the duty to secure which arises by virtue of section 60. The duty ensures that the person who has possession of the seized property does not, for example, examine or copy it other than with consent of the applicant or in accordance with the directions of the Court. *Subsection (3)* provides that the duty to secure does not prevent the giving of a notice under section 49 of the Regulation of Investigatory Powers Act 2000 requiring the disclosure of material protected by encryption.

**Section 62: Use of inextricably linked property**

179. This section provides that inextricably linked property should not be examined or copied or used for any purpose other than for facilitating the use in any investigation or proceedings of property to which it is inextricably linked. For example, the Serious Fraud Office may have seized a computer hard drive under section 50 because it contains an undated document they consider is evidence in a fraud prosecution. By virtue of section 53(3)(c) they may retain the whole hard drive if it is required to prove the date the document was created or amended. Section 62 ensures that whilst there will be other material on the hard drive, that material and the drive itself can only be used

to facilitate the use in proceedings of the undated document. *Subsections (6), (7) and (8)* define for the purposes of the section what property is inextricably linked.

***Section 63: Copies***

180. This section provides that almost all of Part 2 shall apply to copies as it does to originals. Accordingly the powers in sections 50 and 51 and the protections in sections 54, 55 and 59 apply to copies of material taken under the powers listed in Schedule 1. The powers listed in *subsection (3)* are powers given to the police and others to obtain production of hard copies of material stored in electronic form. *Subsection (1)(c)* provides that the protections in Part 2 apply to material obtained under those powers too.

***Section 64: Meaning of “appropriate judicial authority”***

181. This section provides a definition for “appropriate judicial authority” to whom applications under section 59 can be made. In most cases it will be a Judge of the Crown Court, but where the power being challenged is the Companies Act 1985 or the Competition Act 1998, or section 50 or 51 exercised in reliance on those powers, the “appropriate judicial authority” is the High Court.

***Section 65: Meaning of “legal privilege”***

182. This section provides a definition of “legal privilege” for Part 2 which is based, in part, on the meaning of “legal privilege” in the relevant power listed in Schedule 1 so that the meaning varies slightly according to which of those powers is being exercised.

***Section 66: Interpretation of Part 2***

183. *Subsections (2) and (3)* provide a definition of something for which a person making the seizure had power to search which is used, for example, to determine what can be retained under section 53. *Subsection (4)* provides that the powers to inspect listed are treated as powers of search for the purposes of Part 2. *Subsection (5)* provides that the powers to take possession listed are treated as powers to seize for the purposes of Part 2.

***Section 67: Application to customs officers***

184. This section provides that Part 2 applies to customs officers.

***Section 68: Application to Scotland***

185. This section provides that the powers in Schedule 1 shall not have effect as including powers exercised by constables in Scotland. Accordingly, other than when exercising the powers set out in the enactments listed in *subsection (2)*, constables in Scotland will not be able to exercise the powers in sections 50 and 51. The enactments set out in *subsection (2)* are all ones where constables exercise powers on behalf of other bodies such as the Financial Services Authority.

***Section 69: Application to powers designated by order***

186. This section provides a power enabling the Secretary of State to add additional powers of seizure to Schedule 1 and to make appropriate consequential amendments to Part 2 and the enactment so added.

***Section 70: Consequential applications and amendments of enactments***

187. This section introduces Schedule 2.