

# 立法會 *Legislative Council*

立法會LS24/05-06號文件

## 保安事務委員會

### 檢討有關搜查及檢取新聞材料的 現行法定條文小組委員會文件

### 在英國可處理手令申請的法官 及就其決定進行司法覆核的事宜

本文件旨在提供資料，說明英國《2005年嚴重有組織罪行及警察法令》(下稱“《2005年法令》”)第113及114條，對英國《1984年警察及刑事證據法令》(下稱“《1984年法令》”)所作出的修訂。該等修訂涉及哪些類別法官可處理和新聞材料有關的交出令或搜查令申請，以及可否就此等法官作出的決定進行司法覆核。保安局已於2006年1月提交的文件(立法會CB(2)888/05-06(01)號文件)中，就上述首項事宜提供資料。本文件則就此提供補充資料，協助小組委員會進行研究。

### 對英國《1984年警察及刑事證據法令》所作出有關法官類別的修訂

2. 在小組委員會上次會議上，小組委員會得悉關於哪些類別的法官可處理交出令及搜查令申請，業已作出修訂。在作出修訂前，可處理此等申請的“法官”指“巡迴法官或區域法院法官(裁判法院)”。經修訂後，“法官”指“高等法院法官、巡迴法官、特委法官或區域法院法官(裁判法院)”。政府當局提出，英國的執法機關可選擇向哪一法院提交搜查令申請。

3. 為方便委員參考關於涉及新聞材料的交出令及搜查令申請的現行英國法例，法律事務部已就《2003年法院法令》及《2005年法令》對《1984年法令》第8至16條及附表1所作的修訂，擬備該等條文的標明修訂事項文本，有關文本載於附錄1(只備英文本)。為了糾正在草擬方面出現的錯誤而對《2005年法令》作出的若干修訂(藉《〈2005年嚴重有組織罪行及警察法令〉2005年(修訂)令》(英國2005年從屬法例第3496號)作出)，亦已包括在內。英國司法機構(Her Majesty's Courts Service)網址所載的法院架構圖，則載於附錄2(只備英文本)。( <http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm> )

4. 根據英國《1981年最高法院法令》，英國的最高法院由上訴法院、高等法院及刑事法院組成。刑事法院主要處理刑事案件。除若干條文規限之外，刑事法院具有和高等法院相若的權力、權利、特權及權限。根據《1981年最高法院法令》第8條，可行使刑事法院管轄權的法官為：——

- (a) 任何高等法院法官；或
- (b) 任何巡迴法官、特委法官或區域法院法官(裁判法院)；或
- (c) 高等法院法官、巡迴法官或與不多於4名太平紳士一起進行聆訊的特委法官。

請委員注意，經修訂後的《1984年法令》附表1第17段所指的法官類別(即高等法院法官、巡迴法官、特委法官或區域法院法官(裁判法院))，與根據第8條可在刑事法院進行聆訊的法官類別完全相同。在此情況下，將高等法院法官納入可處理有關申請的法官行列內，似乎未必具有為執法機關提供選擇的效力。法律事務部已要求政府當局就此點作出澄清。

#### **可否就刑事法院法官作出的決定進行司法覆核**

5. 根據英國《1981年最高法院法令》第29條，英國高等法院具有訂立履行義務令、禁止令及移審令的管轄權。同一條文訂明，在有關於刑事法院的管轄權方面，除了該法院對於循公訴程序審訊的有關事宜的管轄權以外，高等法院將一如其對下級法庭所具有的管轄權一般，對刑事法院擁有發出履行義務令、禁止令及移審令的管轄權。此等條文使高等法院可藉着進行司法覆核，對刑事法院行使監管管轄權。看來刑事法院法官所作出的決定，可被司法覆核。

連附件

立法會秘書處  
高級助理法律顧問  
李裕生  
2006年1月18日

Search warrants

8 Power of justice of the peace to authorise entry and search of premises [821]

(1) If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing—

- (a) that a serious arrestable offence has been committed; and
- || (b) that there is material on premises ~~specified in the application~~ which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
- (c) that the material is likely to be relevant evidence; and
- (d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and
- || (e) that any of the conditions specified in subsection (3) below applies.

he may issue a warrant authorising a constable to enter and search the premises.

|| < >

Amendments to Police and Criminal Evidence Act 1984 by sections 113 and 114(1)-(8) of the Serious Organised Crime and Police Act 2005 (Commenced operation on 1.1.2006 (SI 2005 No.3495))

↑ mentioned in subsection (1A) below .

↓ in relation to each set of premises specified in the application

△ (1A) The premises referred to in subsection (1)(b) above are—

- (a) one or more sets of premises specified in the application (in which case the application is for a “specific premises warrant”); or
- (b) any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an “all premises warrant”).

(1B) If the application is for an all premises warrant, the justice of the peace must also be satisfied—

- (a) that because of the particulars of the offence referred to in paragraph (a) of subsection (1) above, there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application in order to find the material referred to in paragraph (b) of that subsection; and
- (b) that it is not reasonably practicable to specify in the application all the premises which he occupies or controls and which might need to be searched.



(1C) The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant.

(1D) If it authorises multiple entries, the number of entries authorised may be unlimited, or limited to a maximum.

(2) A constable may seize and retain anything for which a search has been authorised under subsection (1) above.

(3) The conditions mentioned in subsection (1)(e) above are—

- (a) that it is not practicable to communicate with any person entitled to grant entry to the premises;
- (b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;
- (c) that entry to the premises will not be granted unless a warrant is produced;
- (d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

(4) In this Act "relevant evidence", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.

(5) The power to issue a warrant conferred by this section is in addition to any such power otherwise conferred.

[(6) This section applies in relation to a relevant offence (as defined in section 28D(4) of the Immigration Act 1971) as it applies in relation to a *serious arrestable offence*.]

## 9 Special provisions as to access

[822]

(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.

(2) Any Act (including a local Act) passed before this Act under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches—

- (a) for items subject to legal privilege; or
- (b) for excluded material; or
- (c) for special procedure material consisting of documents or records other than documents.

[(2A) Section 4 of the Summary Jurisdiction (Process) Act 1881 (c 24) (which includes provision for the execution of process of English courts in Scotland) and section 29 of the Petty Sessions (Ireland) Act 1851 (c 93) (which makes equivalent provision for execution in Northern Ireland) shall each apply to any process issued by a ~~circuit judge~~ <sup>judge</sup> under Schedule 1 to this Act as it applies to process issued by a magistrates' court under the Magistrates' Courts Act 1980 (c 43).]

↑ judge

( amended by Courts Act 2003 S.65. The amendments commenced operation on 1.4.2005 (SI 2005 No910 )

10. Meaning of "items subject to legal privilege" [823]

(1) Subject to subsection (2) below, in this Act "items subject to legal privilege" means—

- (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
- (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
- (c) items enclosed with or referred to in such communications and made—
  - (i) in connection with the giving of legal advice; or
  - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.

**11 Meaning of "excluded material" [824]**

(1) Subject to the following provisions of this section, in this Act "excluded material" means—

- (a) personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;
- (b) human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;
- (c) journalistic material which a person holds in confidence and which consists—
  - (i) of documents; or
  - (ii) of records other than documents.

(2) A person holds material other than journalistic material in confidence for the purposes of this section if he holds it subject—

- (a) to an express or implied undertaking to hold it in confidence; or
- (b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after this Act.

(3) A person holds journalistic material in confidence for the purposes of this section if—

- (a) he holds it subject to such an undertaking, restriction or obligation; and
- (b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.

**12 Meaning of "personal records"****[825]**

In this Part of this Act "personal records" means documentary and other records concerning an individual (whether living or dead) who can be identified from them and relating—

- (a) to his physical or mental health;
- (b) to spiritual counselling or assistance given or to be given to him; or
- (c) to counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who—
  - (i) by reason of his office or occupation has responsibilities for his personal welfare; or
  - (ii) by reason of an order of a court has responsibilities for his supervision.

**13 Meaning of "journalistic material"****[826]**

(1) Subject to subsection (2) below, in this Act "journalistic material" means material acquired or created for the purposes of journalism.

(2) Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purposes of journalism.

(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.



**14 Meaning of "special procedure material"**

[827]

(1) In this Act "special procedure material" means—

- (a) material to which subsection (2) below applies; and
- (b) journalistic material, other than excluded material.

(2) Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who—

- (a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and
- (b) holds it subject—
  - (i) to an express or implied undertaking to hold it in confidence; or
  - (ii) to a restriction or obligation such as is mentioned in section 11(2)(b) above.

(3) Where material is acquired—

- (a) by an employee from his employer and in the course of his employment; or
- (b) by a company from an associated company,

it is only special procedure material if it was special procedure material immediately before the acquisition.

(4) Where material is created by an employee in the course of his employment, it is only special procedure material if it would have been special procedure material had his employer created it.

(5) Where material is created by a company on behalf of an associated company, it is only special procedure material if it would have been special procedure material had the associated company created it.

(6) A company is to be treated as another's associated company for the purposes of this section if it would be so treated under section 302 of the Income and Corporation Taxes Act 1970.

15 Search warrants—safeguards

(1) This section and section 16 below have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after this Act, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

(2) Where a constable applies for any such warrant, it shall be his duty—

(a) to state—

(i) the ground on which he makes the application; ~~and~~

(ii) the enactment under which the warrant would be issued; ↑

~~(b) to specify the premises which it is desired to enter and search; and~~

(c) to identify, so far as is practicable, the articles or persons to be sought.

↑ and

△ (iii) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired;

↓ (b) to specify the matters set out in subsection (2A) below; and

□

(2A) The matters which must be specified pursuant to subsection (2)(b) above are—

↗ ~~(a) if the application is for a specific premises warrant made by virtue of section 8(1A)(a) above or paragraph 12 of Schedule 1 below, each set of premises which it is desired to enter and search;~~

↓ ~~(b) if the application is for an all premises warrant made by virtue of section 8(1A)(b) above or paragraph 12 of Schedule 1 below—~~

- (i) as many sets of premises which it is desired to enter and search as it is reasonably practicable to specify;
- (ii) the person who is in occupation or control of those premises and any others which it is desired to enter and search;
- (iii) why it is necessary to search more premises than those specified under sub-paragraph (i); and
- (iv) why it is not reasonably practicable to specify all the premises which it is desired to enter and search.

↑ " (a) if the application relates to one or more sets of premises specified in the application, each set of premises which it is desired to enter and search; "

↓ if the application relates to any premises occupied or controlled by a person specified in the application -

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|| >

(3) An application for such a warrant shall be made ex parte and supported by an information in writing.

(4) The constable shall answer on oath any question that the justice of the peace or judge hearing the application asks him.

(5) A warrant shall authorise an entry on one occasion only. ↑

(6) A warrant—

(a) shall specify—

- (i) the name of the person who applies for it;
- (ii) the date on which it is issued;
- (iii) the enactment under which it is issued; and

|| (iv) ~~the premises to be searched; and~~ ↓

(b) shall identify, so far as is practicable, the articles or persons to be sought.

|| □ > ~~(7) Two copies shall be made of a warrant.~~

(8) The copies shall be clearly certified as copies.

↑ unless it specifies that it authorises multiple entries

△ (5A) If it specifies that it authorises multiple entries, it must also specify whether the number of entries authorised is unlimited, or limited to a specified maximum.

↓ (iv) each set of premises to be searched, or (in the case of an all premises warrant) the person who is in occupation or control of premises to be searched, together with any premises under his occupation or control which can be specified and which are to be searched; and

□

(7) Two copies shall be made of a <sup>↑</sup>specific premises warrant (see section 8(1A)(a) above) which specifies only one set of premises and does not authorise multiple entries; and as many copies as are reasonably required may be made of any other kind of warrant.

↑ warrant

## 16 Execution of warrants

(1) A warrant to enter and search premises may be executed by any constable.

(2) Such a warrant may authorise persons to accompany any constable who is executing it.

[(2A) A person so authorised has the same powers as the constable whom he accompanies in respect of—

- (a) the execution of the warrant, and
- (b) the seizure of anything to which the warrant relates.

(2B) But he may exercise those powers only in the company, and under the supervision, of a constable.]

(3) Entry and search under a warrant must be within <sup>↑</sup>~~one month~~ from the date of its issue.

↑ three months

△ (3A) If the warrant is an all premises warrant, no premises which are not specified in it may be entered or searched unless a police officer of at least the rank of inspector has in writing authorised them to be entered.

□ (3B) No premises may be entered or searched for the second or any subsequent time under a warrant which authorises multiple entries unless a police officer of at least the rank of inspector has in writing authorised that entry to those premises.

(4) Entry and search under a warrant must be at a reasonable hour unless it appears to the constable executing it that the purpose of a search may be frustrated on an entry at a reasonable hour.

(5) Where the occupier of premises which are to be entered and searched is present at the time when a constable seeks to execute a warrant to enter and search them, the constable—

- (a) shall identify himself to the occupier and, if not in uniform, shall produce to him documentary evidence that he is a constable;
- (b) shall produce the warrant to him; and
- (c) shall supply him with a copy of it.

(6) Where—

- (a) the occupier of such premises is not present at the time when a constable seeks to execute such a warrant; but
- (b) some other person who appears to the constable to be in charge of the premises is present,

subsection (5) above shall have effect as if any reference to the occupier were a reference to that other person.

(7) If there is no person present who appears to the constable to be in charge of the premises, he shall leave a copy of the warrant in a prominent place on the premises.

(8) A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued.

(9) A constable executing a warrant shall make an endorsement on it stating—

- (a) whether the articles or persons sought were found; and
- (b) whether any articles were seized, other than articles which were sought.

~~(10) A warrant which~~

<ul style="list-style-type: none"> <li>(a) has been executed; or</li> <li>(b) has not been executed within the time authorised for its execution,</li> </ul>	<p>shall be returned—</p> <ul style="list-style-type: none"> <li>(i) if it was issued by a justice of the peace, to the [designated officer for the local justice area in which the justice was acting when he issued the warrant]; and</li> <li>(ii) if it was issued by a judge, to the appropriate officer of the court from which he issued it.</li> </ul>
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(11) A warrant which is returned under subsection (10) above shall be retained for 12 months from its return—

- (a) by the [designated officer for the local justice area], if it was returned under paragraph (i) of that subsection; and
- (b) by the appropriate officer, if it was returned under paragraph (ii).

(12) If during the period for which a warrant is to be retained the occupier of the premises to which it relates asks to inspect it, he shall be allowed to do so.

and, unless the warrant is a ~~specific premises~~ warrant specifying one set of premises only, he shall do so separately in respect of each set of premises entered and searched, which he shall in each case state in the endorsement.

(10) A warrant shall be returned to the appropriate person mentioned in subsection (10A) below—

- (a) when it has been executed; or
- (b) in the case of a specific premises warrant which has not been executed, or an all premises warrant, or any warrant authorising multiple entries, upon the expiry of the period of three months referred to in subsection (3) above or sooner.

(10A) The appropriate person is—

- (a) if the warrant was issued by a justice of the peace, the designated officer for the local justice area in which the justice was acting when he issued the warrant;
- (b) if it was issued by a judge, the appropriate officer of the court from which he issued it.

↑ premises

## SCHEDULE 1

Section 9

## SPECIAL PROCEDURE

[906]

Making of orders by ~~circuit judge~~

1. If on an application made by a constable a ~~circuit judge~~ is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.

2. The first set of access conditions is fulfilled if—

- (a) there are reasonable grounds for believing—
- (i) that a *serious arrestable offence* has been committed;
  - (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application; <sup>△</sup>
  - (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and
  - (iv) that the material is likely to be relevant evidence;
- (b) other methods of obtaining the material—
- (i) have been tried without success; or
  - (ii) have not been tried because it appeared that they were bound to fail; and
- (c) it is in the public interest, having regard—
- (i) to the benefit likely to accrue to the investigation if the material is obtained; and
  - (ii) to the circumstances under which the person in possession of the material holds it,
- that the material should be produced or that access to it should be given.

3. The second set of access conditions is fulfilled if—

- (a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application; <sup>△</sup>
- (b) but for section 9(2) above a search of ~~the premises~~ <sup>△</sup> for that material could have been authorised by the issue of a warrant to a constable under an enactment other than this Schedule; and
- (c) the issue of such a warrant would have been appropriate.

△ , or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);

↑ such premises

↓ judge

( amended by Courts Act 2003 s.65. The amendments commenced operation on 1.4.2005 (SI 2005 No 910 )

4. An order under this paragraph is an order that the person who appears to the ~~district judge~~ to be in possession of the material to which the application relates shall—

- (a) produce it to a constable for him to take away; or
- (b) give a constable access to it,

not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify.

5. Where the material consists of information [stored in any electronic form]—

- (a) an order under paragraph 4(a) above shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible [or from which it can readily be produced in a visible and legible form]; and
- (b) an order under paragraph 4(b) above shall have effect as an order to give a constable access to the material in a form in which it is visible and legible.

6. For the purposes of sections 21 and 22 above material produced in pursuance of an order under paragraph 4(a) above shall be treated as if it were material seized by a constable.

*Notices of applications for orders*

7. An application for an order under paragraph 4 above shall be made inter partes.

8. Notice of an application for such an order may be served on a person either by delivering it to him or by leaving it at his proper address or by sending it by post to him in a registered letter or by the recorded delivery service.

9. Such a notice may be served—

↑ judge

( amended by Courts Act 2003 s.65. The amendments commenced operation on 1.4.2005 (SI 2005 No 910 )

- (a) on a body corporate, by serving it on the body's secretary or clerk or other similar officer; and
- (b) on a partnership, by serving it on one of the partners.

10. For the purposes of this Schedule, and of section 7 of the Interpretation Act 1978 in its application to this Schedule, the proper address of a person, in the case of secretary or clerk or other similar officer of a body corporate, shall be that of the registered or principal office of that body, in the case of a partner of a firm shall be that of the principal office of the firm, and in any other case shall be the last known address of the person to be served.

11. Where notice of an application for an order under paragraph 4 above has been served on a person, he shall not conceal, destroy, alter or dispose of the material to which the application relates except—

- (a) with the leave of a judge; or
- (b) with the written permission of a constable,

until—

- (i) the application is dismissed or abandoned; or
- (ii) he has complied with an order under paragraph 4 above made on the application.

|| Issue of warrants by ~~constable~~ <sup>judge</sup>

12. If on an application made by a constable a ~~constable~~ <sup>judge</sup>—

- (a) is satisfied—
  - (i) that either set of access conditions is fulfilled; and
  - (ii) that any of the further conditions set out in paragraph 14 below is also fulfilled; or
- (b) is satisfied—
  - (i) that the second set of access conditions is fulfilled; and
  - (ii) that an order under paragraph 4 above relating to the material has not been complied with,

he may issue a warrant authorising a constable to enter and search the premises.

↑ in relation to each set of premises specified in the application

↓ or (as the case may be) all premises occupied or controlled by the person referred to in paragraph 2(a)(ii) or 3(a), including such sets of premises as are specified in the application (an "all premises warrant")

△

12A. The judge may not issue an all premises warrant unless he is satisfied—

- (a) that there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application, as well as those which are, in order to find the material in question; and
- (b) that it is not reasonably practicable to specify all the premises which he occupies or controls which might need to be searched.

△ judge

( amended by Courts Act 2003 s.65. The amendments commenced operation on 1.4.2005 (SI 2005 No 910 )

|| →



13. A constable may seize and retain anything for which a search has been authorised under paragraph 12 above.

14. The further conditions mentioned in paragraph 12(a)(ii) above are—

- (a) that it is not practicable to communicate with any person entitled to grant entry to the premises ~~to which the application relates;~~
- (b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;
- (c) that the material contains information which—
  - (i) is subject to a restriction or obligation such as is mentioned in section 11(2)(b) above; and
  - (ii) is likely to be disclosed in breach of it if a warrant is not issued;
- (d) that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation.

15. (1) If a person fails to comply with an order under paragraph 4 above, a ~~judge~~ <sup>judge</sup> may deal with him as if he had committed a contempt of the Crown Court.

(2) Any enactment relating to contempt of the Crown Court shall have effect in relation to such a failure as if it were such a contempt.

*Costs*

16. The costs of any application under this Schedule and of anything done or to be done in pursuance of an order made under it shall be in the discretion of the judge.

*Interpretation*

17. In this Schedule "judge" means ~~a Circuit judge~~ <sup>a Circuit judge</sup> or a District Judge (Magistrates' Courts)."

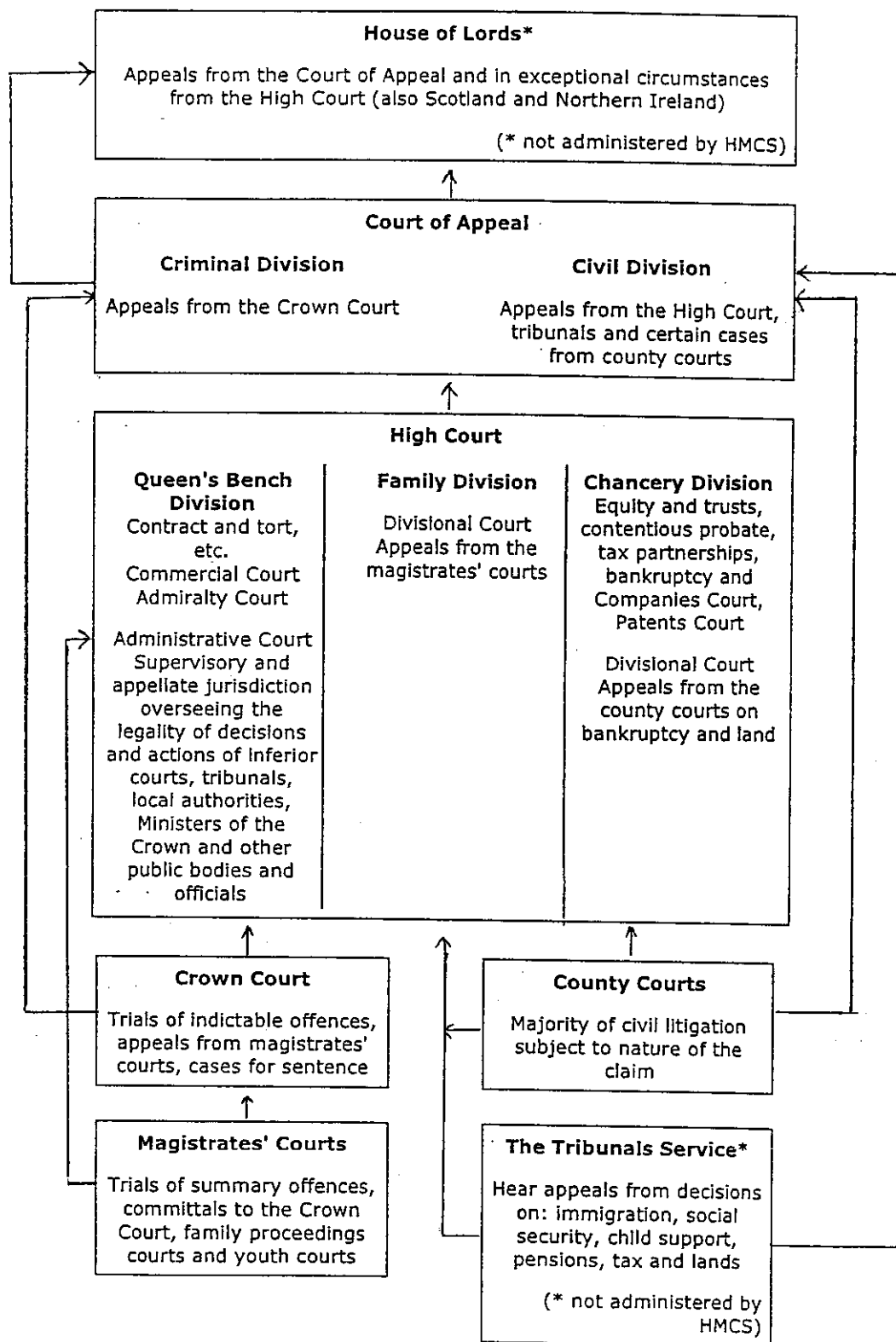
↓ judge

( amended by Courts Act 2003 s.65. The amendments commenced operation on 1.4.2005 (SI 2005 No 910 )

↑ 'a judge of the High Court, a Circuit judge, a Recorder'

( amended by Serious Organised Crime and Police Act 2005 s.114(9). Not yet in operation )

## The Court Structure of Her Majesty's Courts Service (HMCS)



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