HM Customs & Excise prosecutions

Standard Note: SN/BT/2944
Last updated: 26 November 2004
Author: Antony Seely
Business & Transport Section

In recent years a number of high profile criminal prosecutions by HM Customs & Excise have collapsed, sponsoring a series of official enquiries, culminating in the announcement by the Economic Secretary John Healey in December 2003 that the Government would "separate the prosecution and investigation functions in Customs, and to create an independent Customs and Excise Prosecutions Office during the course of 2004, led by a Director accountable directly to the Attorney-General."[1] This was one of the recommendations of the 'Butterfield review' published in July 2003,[2] set up after the collapse of the London City Bond case in November 2002.[3] This note provides a chronology to these developments.

In his 2004 Budget speech the Chancellor announced that the Government would merge Customs with the Inland Revenue into a single department: Her Majesty's Revenue and Customs.[4] Following this, the Attorney-General (Lord Goldsmith) announced on 12 October 2004 that a single prosecuting authority would be established. The Revenue and Customs Prosecutions Office (RCPO) is to be an entirely separate prosecuting authority, accountable to the Attorney-General, responsible for the prosecution of all HM Revenue and Customs cases in England and Wales.[5] Legislation to this effect is included in the *Commissioners for Revenue and Customs Bill* which was introduced in the Commons on 24 November 2004.[6]

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1 HC Deb 8 December 2003 cc 72-3WS
2 HM Treasury, *Review of criminal investigations and prosecutions conducted by HM Customs and Excise: report by the Honourable Mr Justice Butterfield*, 15 July 2003 [Deposited paper 03/2000] – hereafter referred to as *Butterfield*.
3 HC Deb 26 November 2002 cc 9-11WS
4 HC Deb 17 March 2004 c 331
5 HL Deb 12 October 2004 c 9WS
6 HC Deb 24 November 2004 c 102

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A. The Simon de Danser case and the Hosker Inquiry

The Simon de Danser was a vessel boarded by Customs officers accompanied by members of the Royal Marines Special Boat Squadron on 5 May 1997, 100 miles off the Portuguese mainland. Officers found a very large quantity of cannabis on board, and the crew and the registered shareholders of the company, which owned the vessel, were arrested and later tried for offences relating to conspiracy fraudulently to evade the prohibition on the importation of drugs. The trial began at the Bristol Crown Court on 6 January 1998. Counsel for the defendants submitted that the trial should be stayed as an abuse of process, a view with which the judge agreed, halting the trial on 4 February 1999. Staying the proceedings as an abuse, Judge Foley said:

> "This case has revealed a culture, a climate, of carelessness and recklessness for disregard for the rules of procedures, Convention of Maltese Law, British Law and International Law, a destruction of relative probative evidence. I have to analyse the cumulative effect of all of these matters upon the issue of destination I have to have regard to everything that has gone on here and apply the appropriate burden of proof and perhaps more importantly, however, the appropriate standard of proof and that, I hope, I do. … It gives me no pleasure. The case of stay is overwhelming, there was mal a fides here. The proceedings will be stayed on both limbs of abuse."[7]

The principal grounds advanced by the defence was that Customs had failed to follow the necessary formalities before boarding the craft. The subsequent review of Customs actions summarised these:

> There are a number of formalities that have to be complied with when an enforcement authority in the United Kingdom concludes that there is evidence which justifies stopping, boarding, searching and if appropriate the detention of a vessel and the arrest of persons and the opening and seizure of cargo on board (all such measures collectively referred to in [this] Report as an 'interception') in international waters in circumstances falling within the scope of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1998 ('the Vienna Convention'). [The Criminal Justice (International Co-operation) Act 1990] included provision for the implementation of the Vienna Convention; section 20 requires that in the case of a ship which is registered in the state of a party to the Convention, not only must Customs give authority for the interception on the high seas but also the state of registration (the 'flag state') must either request that such action be taken by the United Kingdom or authorise it to be taken.[8]

In the event although Customs had drawn up a request for interception, this had never been dated. Malta was the flag state of the Simon de Danser, but officers failed to ensure that the

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[7] A short summary of the case and the subsequent enquiry by Sir Gerald Hosker is given in *Butterfield* (see in particular pp 295-9).

[8] Sir Gerald Hosker KCB QC, *Inquiry into HM Customs and Excise aspects of the Simon de Danser case*, 27 July 1999 [Deposited paper 99/1482] p 4 - hereafter *Hosker*.

appropriate Maltese authority had received the request and given its consent. Certain errors were made in the request itself – it had referred to the vessel to be boarded as being "off the coast of the United Kingdom", even though it was quite clear that it had been sailing in the territorial waters of a third state – and there was a failure to keep the Maltese authorities informed. More generally, the review found that "no Customs official who was involved in the Simon de Danser case had both effective control and sufficient knowledge of all the key important Customs aspects of the operation."[9] Offices had failed to keep a minimum level of records over the operation, be it in written or electronic form: this was particularly important once there was a claim of abuse of process because it made it more difficult than it might otherwise have been to prove that Customs had acted in good faith throughout.

An independent inquiry into Customs actions was announced in February 1999:

> **Valerie Davey:** To ask the Chancellor of the Exchequer if he will make a statement concerning the unlawful activities of senior officers of HM Customs and Excise in connection with the seizure of the Simon de Danser vessel; and what action he will take as a result.
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> **Dawn Primarolo:** The Chairman of the Commissioners of HM Customs and Excise has asked Sir Gerald Hosker KCB QC, previously the Treasury Solicitor, to conduct an independent inquiry into the actions of Customs and Excise officials in relation to the case. A summary of the report and its recommendations will be made available to the House.[10]

Sir Gerald completed his report in July 1999:

> **Mr. Caplin:** To ask the Chancellor of the Exchequer if he will make a statement in connection with the independent inquiry, announced on 11 February, by Sir Gerald Hosker KCB QC, into the actions of HM Customs and Excise officials in relation to the seizure of the Simon de Danser vessel.
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> **Dawn Primarolo:** Sir Gerald has completed his independent inquiry and has submitted his report. My commitment was to make available to the House a summary of the report and its recommendations but I have decided to go further and to place a copy of Sir Gerald's full report in the Library of the House. The Chairman of Customs has accepted his conclusions and recommendations in full. The Commissioners are taking action as a matter of priority to implement the report's recommendations in order to remedy the failings identified.[11]

Notably the inquiry acquitted all Customs officers of have acting in bad faith and found no evidence or suspicion of corruption involving any Customs officials concerned with the case. However, it made a number of important recommendations:

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[9] *Hosker* p 30
[10] HC Deb 11 February 1999 c 357W
[11] HC Deb 27 July 1999 c 402W

> The inquiry recommended that where separate teams of investigators are involved a co-ordinator of suitable seniority should be appointed and arrangements made for him to receive details of all the important aspects of the operation. As to the keeping of adequate records, they should be maintained to demonstrate compliance with all relevant legal procedures, following where necessary any prescribed requirements for such records. Senior management should examine the adequacy of current training and guidance given to Customs officers.
>
> In the course of his judgment HHJ Foley referred to a "catalogue of flawed procedures, misleading requests, illegalities and incompetence at a number of levels." Whilst not endorsing the language used by the learned Judge the inquiry did conclude that such was broadly the position.[12]

Customs confirmed in a press notice issued at the time that it had accepted and were implementing all of these recommendations.[13]

B. 'Operation Stealer', the Butler Inquiry, the Gower & Hammond Review

'Operation Stealer' involved a series of seizures by Customs officers of large quantities of cocaine in February 1994, September 1994 and January 1995, following an investigation which began in mid-1993. The Butler Inquiry was established in July 1999[14] following the collapse of the prosecution which arose out of the last of these – 'Stealer 3' – which involved 309 kg of the drug with a street value of around £34 million. (The inquiry was completed in April 2000.[15])

The first trial began in May 1996, during which the judge held a voir dire[16] was established to review evidence presented to the court by one of Customs officers. In the event the jury was discharged and a new trial ordered. This began in November 1996. During the course of the trail counsel enquired if, during its surveillance of the defendants, Customs had bugged hotel premises used by one of the defendants, a question the individual officer refused to answer at the time on the grounds it would not be in the public interest. Customs made application to the judge that details about its eavesdropping activities be withheld from the defence on the grounds of public interest immunity, with which the judge agreed; however, Customs failed to accurately set out serious shortcomings in the process by which authorisation for this activity had been obtained. It was the failure to inform the court of these shortcomings that

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12 *Butterfield* pp 295-6. For the full list of recommendations in the Hosker inquiry, with Customs response, see *Butterfield* pp 297-9.

13 HM Customs & Excise press notice 33/99, 27 July 1999

14 HC Deb 22 July 1999 cc 609-11W

15 Lord Chancellor's Department, *Report of the inquiry into the prosecution of the case of Regina v Doran and Others by His Honour Gerald Butler QC*, 14 April 2000 [Deposited paper 00/971] – hereafter *Butler*.

16 A *voir dire* is "a trial within a trial, held in the absence of the jury in which a judge hears evidence for the purpose of determining the admissibility of evidence or the competence of a witness or juror" (*Butler* p 9).

led, in the last resort, to the prosecution's collapse. In March 1997 the principal defendants were convicted. They appealed to the Court of Appeal on the grounds of alleged deficiencies in the summing up of the trial Judge. The appeals were allowed and retrials were ordered. *Butterfield* summarises the last stage of the prosecution as follows:

> The defence gave notice that they intended to submit that a retrial would be an abuse of the process of the Court and that the proceedings ought to be stayed on the grounds of delay and prejudice to a fair trial. That abuse hearing came before Mr Justice Turner on 28th June 1999. After hearing submissions occupying three days, but no evidence, he held that no retrial could be fairly conducted, and further that it would be unfair that the defendants should be retried. The prosecution had, on the balance of probability, been shown to have been guilty of abusing the process of the Court. He described his own ruling as "a scandalous result". He said:
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> "It is because, and only because, of the failures of the prosecution, … to have followed necessary legal requirements in connect with their evidence gathering techniques, and the obligations to make full and proper disclosure to the Court, that has led to this debacle. These failures strike at the rule of law. They also involve probable breaches of Human Rights Law. … In this case it can be seen that the failures were not just at the operational level, but extended into supervisory and directional positions as well. It is the consequence of these failures that has led to the public being deprived of the protection which a successful trial would have provided. Because of the hierarchical nature of the failures which have taken place, I shall be referring this ruling to Her Majesty's Attorney General so that he may consider what action, if any, should be taken to ensure that no repetition of these failures takes place."
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> Mr Justice Turner articulated the paramount concern of the Courts to ensure that there should be a fair trial. The Court, he said, should not seek to connive at conduct which will either deny, or unduly restrict, the ability of the defence to pursue whatever legitimate tactics it wishes to deploy with a view to challenging the prosecution case. There had been, in his judgment, past and continuing non-disclosure. The defendants had been seriously prejudiced in the conduct of their defence and the prosecution witnesses had been accorded an unfair advantage by the protection of their credibility and integrity, which the conduct in withholding disclosure had achieved.[17]

As noted above, the Government announced an independent inquiry into the handling of the case on 22 July 1999:

> **Mr. Prosser:** To ask the Attorney-General if he will make a statement concerning the judge's ruling in the case of R-v-Doran and others to stay proceedings as an abuse of process; and what action he will take as a result.
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> **The Attorney-General:** The Paymaster General and I have today agreed that an independent inquiry should be commissioned into the actions of HM Customs and

[17] *Butterfield* pp 301-2

> Excise officials and counsel who appeared on behalf of the Prosecution at the abuse of process hearing and at the preceding first and second trials of that case. The inquiry will report to me and the Chairman of Customs and Excise and will have the following terms of reference.
>
> Having regard to the matters set out by The hon. Mr. Justice Turner in his ruling of 6 July 1999 to stay proceedings in the case of R v. Doran and Others as an abuse of process, to examine the actions of HM Customs and Excise officials and Counsel who appeared on behalf of the Prosecution at that hearing and at the first and second trials of that case, in particular in relation to:
> (1) technical surveillance conducted at hotels S, L and R, and in particular whether permission was granted by those hotels for that surveillance, and whether the surveillance was properly authorised;
> (2) the non-disclosure of material relating to those issues, and the related public interest immunity applications made in the course of proceedings;
> (3) the evidence given at the trials in relation to those issues;
> (4) what was said by Counsel in open court in relation to those issues;
> (5) the approach, and the circumstances leading to that approach, taken by Counsel to the abuse hearing before Mr. Justice Turner, and in particular their advice on the hotel issues and on whether additional witness statements should be taken in relation to the surveillance;
> (6) the circumstances which led to the decision to abort the first trial.
> and to make recommendations.
>
> His Honour Gerald Butler QC has been asked to conduct that inquiry and he will report within six months. A summary of the report and its recommendations will be made available to the House.[18]

The report was completed in April 2000; both the report and the Government's response were published on 8 June.[19] On the key question of Customs' failing to follow the proper procedures in obtaining approval for electronic surveillance, and keeping this failure from the court, *Butler* commented as follows:

> I am satisfied that no Customs' officer mentioned in this Report who was involved in the eavesdropping sought deliberately to mislead the court or counsel, and that there was no dishonesty or deceit in their evidence to the court or to me with regard to that issue. But had full disclosure of the relevant documentation been made, and had the defendants not been misled, as they undoubtedly were … the defendants would have been in a position to mount a broad attack upon the credibility of the prosecution evidence and the integrity of the prosecution itself … Whether or not any such attack would have met with success …. I do not know: but it is enough to say that the defendants were, for the reasons I have set out, not in a position to do so.[20]

Although several of the report's recommendations could be implemented forthwith, in their statement to the House on *Butler*, the Solicitor General noted that further work was required

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18 HC Deb 22 July 1999 cc 609-11W

19 The Government's response was given in a short separate paper deposited with *Butler* in the Commons Library (Dep 00/971).

20 *Butler* p 163

concerning the organisation of Customs prosecutions. This was the genesis of the 'Gower and Hammond review'.[21] *Butler* describes the 'tripartite system' – "the investigators; the lawyers; and, in some cases, the administrators" – by which Customs investigates and prosecutes offences:

> Under this system, it is for the investigator to gather the evidence and report to the Solicitor's Office. But the investigators will often be expected to deal with court proceedings of a routine nature (eg, initial remands, guilty pleas and uncontested committals). The Solicitor's Office will advise on the strength of the evidence, the offences (if any) disclosed by the evidence and have a role in handling the court proceedings in most cases. An administrator in the appropriate policy divisions decides whether there should be a prosecution and, where necessary, signs a proceedings order.[22]

Recommendations 26 and 27 of *Butler* were:

> 26. Consideration should be given as to whether or not prosecutions at present conducted by Customs should continue to be conducted by this or by another prosecuting authority.
> 27. If Customs are to continue as a prosecuting authority there should be an independent inspectorate established. This might be made an extension of the powers and duties of the current CPS inspectorate.

The Solicitor General's statement is reproduced below:

Butler Report

> **Mr. Dismore:** To ask the Solicitor-General if the report by His Honour Gerald Butler QC concerning the handling of the case of R v. Doran and others has been delivered; what information concerning it will be published; and what action the Government plans to take in response.
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> **The Solicitor-General:** The report by His Honour Gerald Butler QC was delivered on 14 April. On 22 July 1999, Official Report, columns 607-09, the Attorney-General indicated the Government's intention to make a summary of the report and its recommendations available to both Houses. In the event, it is possible to make the report available in full, and the Attorney-General has therefore today lodged a copy of the report in the Libraries of both Houses, together with a copy of the Government's response. In addition, the summary included in the report and the inquiry's recommendations, together with the Government's response to them, are being made publicly available on the HM Customs and Excise internet site

[21] Solicitor General & HM Customs & Excise, *Report of the review of prosecutions conducted by the Solicitors Office of HM Customs and Excise by His Honour John Gower, QC and Sir Anthony Hammond, KCB, QC*, 5 December 2000 [Deposited paper 01/370] – hereafter *Gower & Hammond*.

[22] *Butler* p 14

(http://www.hmce/gov.uk), and copies of the full report will be available on request to HM Customs and Excise at a cost of £8.

All the recommendations made to the Attorney-General in the report which are capable of acceptance immediately have been accepted. Further work is required by other recommendations and such work is being set in hand. With the agreement of the Chairman of Customs and Excise Commissioners, His Honour John Gower QC, assisted by Sir Anthony Hymenoid KCB QC, has agreed to carry out an immediate review of the role of Customs as a prosecuting authority. The terms of reference are:

Having regard to the Butler Report and the Hosker Report, the tripartite system operated within Customs and Excise in relation to the investigation and prosecution of offences, and to all other relevant considerations, to examine:
(1) whether or not some or all of the prosecutions at present conducted by the Solicitor's Office of HM Customs and Excise should continue to be conducted by that Office;
(2) to the extent that it is concluded that the Solicitor's Office should not continue to conduct some or all of those prosecutions, whether such prosecutions should be conducted by an existing prosecution authority, or by some other body;
and to make recommendations.

The Attorney-General anticipates receiving this report by the end of October this year.[23]

In fact the review was completed in December. Following on from *Butler's* description of the tripartite arrangement, quoted above, one section of *Gower & Hammond* is reproduced below, summarising the way Customs prosecution system works; the authors first set out Customs' statutory powers in this area:

A wide range of criminal, civil and administrative enforcement options are available to Customs and Excise such as prosecution, compounding, seizure, forfeiture and civil penalties. In addition, [the *Customs and Excise Management Act 1979* (*CEMA*)] section 152 gives the Board wide powers. They may stay or compound proceedings for an offence or for the condemnation of anything forfeited under Customs and Excise Acts. They may restore anything forfeited or seized under those Acts. In particular this power to stay proceedings enables the Board to halt a prosecution which is up and running before judge and jury in the Crown Court. Even after judgment they can mitigate or remit any pecuniary penalty imposed under those Acts. Where a Court has sentenced a person to a term of imprisonment for an offence against Customs and Excise Acts, the Board may order that person's release before the sentence has been served. They have similar powers in respect of persons sentenced to imprisonment for the non-payment of penalties or other sums adjudged to be paid or awarded in relation to such an offence, or in respect of the default of a sufficient distress to satisfy such a sum.

The legislation does not require the Board to give reasons for the exercise of any of these far reaching powers, the existence of which amply illustrates the wide-ranging

[23] HC Deb 8 June 2000 cc 330-1W

and unique authority of Customs and Excise. The authority to stay proceedings under section 152 of *CEMA* is delegated to a Divisional Head in the Enforcement Directorate.

In dealing with its prosecutions, Customs and Excise complies with the code for Crown Prosecutors, which states that a criminal prosecution should be brought only where: (i) there is sufficient evidence which affords a realistic prospect of a conviction against each defendant or person to be prosecuted; and, (ii) it is in the public interest to prosecute. The code sets out factors to be taken into account when considering the public interest. For Customs and Excise, in common with other specialist prosecutors, the public interest can extend beyond those factors to embrace policy considerations such as tax management and policy enforcement.

Proceedings can be commenced either by "information and summons" or by the charging of an individual. The first of these requires a proceedings order made on behalf of the Commissioners. The authority to sign these is delegated to certain administrators in Headquarters and Collectors in some types of cases.

Gower & Hammond then go on to describe the operation of the tripartite system:

Customs and Excise separate responsibilities for investigations and prosecutions into a tripartite arrangement, comprising Investigators, the Solicitor's Office and Administrators. This enables an objective judgment to be brought to bear in the handling of criminal cases and also ensures that the Department's wider enforcement policies are taken into account.

Investigators assess whether or not a criminal investigation should be instigated, determine the nature and scope of any investigation acting within the enforcement policies and priorities laid down by administrators, carry out investigations and present the material gathered to the Solicitor's Office.

Lawyers in the Solicitor's Office assess whether or not the evidence gathered by investigators is sufficient to provide a realistic prospect of conviction. They advise on further lines of inquiry which may not have been adequately covered or may be expected to produce material relevant to the issues in the case. They also consider issues relating to disclosure. In addition they advise on decisions which may have to be taken once a prosecution has commenced, including those relating to the public interest, although the decisions are not theirs.

Administrators in the Enforcement Directorate determine departmental enforcement policies which reflect an assessment of the public interest in investigating and prosecuting in the different areas of the Department's work. Branch Heads are responsible for determining the public interest in individual criminal cases in their subject area, by assessing the wide range of issues which have to be considered in the circumstances of the case, and have the final say on whether proceedings should commence or continue. This role is also carried out by Collectors in certain types of case in which authority to issue proceedings orders or to compound proceedings has been delegated to Collectors.

> There are special arrangements for cases which are deemed sensitive. These are subject to regular review and the administrator is the case co-ordinator. In sensitive cases the administrator's role must be assumed by Headquarters staff in the relevant policy area. Whilst the investigators, lawyers and administrators act within the realm of their respective responsibilities, each does not act in isolation but should liaise with and consult the others.
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> It is the essence of the tripartite arrangement that although lawyers decide on the sufficiency or otherwise of the evidence to support a prosecution, the Commissioners of Customs and Excise through the administrators decide whether or not the public interest would be served by a prosecution. Similarly, once a prosecution has been started, it would be an administrator and not a lawyer (including prosecuting counsel) who would take a decision as to whether or not proceedings should be stayed.
>
> The systems in Scotland and Northern Ireland differ fundamentally from that in England and Wales. Whilst in both those jurisdictions it is an administrator who takes the initial public interest decision and signs an order to prosecute, in Scotland it is a Procurator Fiscal or Advocate Depute, and in Northern Ireland the Director of Public Prosecutions, who decides whether or not there should be a prosecution, and whether or not a prosecution already started should be continued. In taking such decisions these lawyers consider not only the sufficiency of evidence, but also the public interest in its widest sense. In relation to the latter they take into account the views of the administrators, but the decision is theirs.[24]

It was *Gower & Hammond's* view that "in its prosecuting function the Solicitor's Office suffers from a malaise"[25] in part due to the poor relations between the three elements of the tripartite system. This finding is neatly summarised in *Butterfield*:

> The Review observed that HMCE lawyers and investigators appeared not to work harmoniously together. Some felt that investigators seemed not to trust the HMCE lawyers and that HMCE's unique powers had contributed to a culture of secrecy, which widened the gap between investigators and lawyers. It was this culture of secrecy which led on occasions to the reluctance on the part of investigating officers to disclose material even to their own lawyers, leading in turn to problems over Public Interest Immunity. There was a perception that HMCE lawyers were regarded as the "poor relations" of the service.
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> There was a further perception that the lawyers lacked independence and felt themselves undervalued within their organisation: that in turn contributed to reduced efficiency and a lowering of morale. Some consultees considered that investigators were reluctant to accept unpalatable advice from lawyers and there were instances of lawyers being unable to attend conferences because they lacked the appropriate security clearance.[26]

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[24] *Gower & Hammond* pp 23-7
[25] *Gower & Hammond* p 53
[26] *Butterfield* p 313

The review went on to analyse the reasons for this state of affairs:

> The Review concluded that in its prosecution function the Solicitor's Office suffered from a malaise. The authors observed: "All is far from well in the performance of the prosecution function of that office." The Review observed that in relation to criminal prosecutions the service provided by the Solicitor's Office fell far short of the standards expected of it. There were inadequate resources with not enough lawyers to cope with the much increased workload and increased responsibilities, especially in relation to disclosure. The support staff were inadequate in quantity and in some instances in quality. The working conditions and accommodation were likely to put unnecessary stress on lawyers dealing with complex high-level cases. The conditions were unsuited to professional people doing demanding work under great pressure and under time constraints. Those factors led in turn to low morale amongst the professionally qualified staff. That low morale is contributed to by the perceived attitude towards them of investigators, the tendency of investigators to by-pass them and the investigators' culture of secrecy causing them to withhold important information from their lawyers. There was further a feeling amongst lawyers that they were little more than post boxes and they experienced frustration at their inability to attend Crown Court trials and to contribute to the conduct of cases there.[27]

The review was published with the Government's response in March 2001, when the Solicitor-General made a statement: in a nutshell, the Government accepted *Butler's* recommendations in principle, but "given the significant resource implications associated with some recommendations, have opted for a phased approach to implementation." The full statement is reproduced below:

> **Mr. Jim Cunningham:** To ask the Solicitor-General if a decision has been reached concerning the future of Customs and Excise as a prosecuting authority.
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> **The Solicitor-General:** The report by His Honour John Gower QC and Sir Anthony Hammond KCB QC was delivered to the Attorney-General on 5 December 2000. I have today placed a copy of the report in the Libraries and copies of the report are available on request to the solicitor for HM Customs and Excise.
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> The report concludes that the Customs and Excise solicitor's office should retain its prosecution function, but that in exercising this function, including the giving of advice to investigating officers, it must be truly independent and be seen to be so. To that end, the report has also concluded that in relation to the prosecution function the solicitor should be accountable to the Attorney-General rather than to the commissioners and that the solicitor/client relationship between the commissioners and the solicitor should cease in relation to this function. Where cases are referred to the solicitor's office with a view to prosecution, the decision on whether to do so will rest with the appropriate lawyer after consultation with, where necessary, an administrator on matters of policy and public interest. These recommendations are

[27] *Butterfield* pp 313-4

supported by a number of associated recommendations on detailed structural and financial aspects.

The Government have carefully considered all these recommendations. They accept all the recommendations in principle, but, given the significant resource implications associated with some recommendations, have opted for a phased approach to implementation. The Government have had particular regard to the need to ensure that adequate resources are made available to the solicitor's office to enable it properly to conduct the large and complex drugs and other prosecutions which were the main focus of the report, and which are conducted by the special casework division of that office (SCD). They have therefore decided to afford this area of work the greatest priority.

Accordingly, it has been decided that, with effect from 1 April 2001, Customs and Excise will invest sufficient extra resources in the solicitor's office to enable it to implement the recommendations in the report which bear directly on the cases conducted by the SCD. This will mean that, taken with additional resources already provided to the solicitor's office in relation to the Butler report, the number of staff working on those cases in the SCD will almost double. These additional resources will enable recommendation 10 of the report (the attendance at conferences with counsel, and attendance at hearings in the Crown court) to be implemented quickly in relation to all SCD cases, and in over 60 per cent. of the cases conducted by the solicitor's office in total. The implementation of the remainder of that recommendation will be subject to local trials to evaluate the benefits and costs. Recommendation 15 (the conduct of magistrates courts proceedings) will not be implemented immediately and will also be subject to such local trials.

The report concludes that Customs and Excise lawyers are dedicated professionals with valuable skills and expertise, and the Government believe that making the changes in accountability, responsibility and resourcing referred to above will ensure public confidence in the solicitor's office as a prosecuting authority. To enable detailed consideration to be given to the implementation of the remaining recommendations in the report, particularly where these have structural and budgetary implications, the change in accountability will have effect on 1 April 2002.[28]

One year on – in March 2002 – the Government set out progress in implementing *Gower & Hammond*, in a second written statement:

Mr. Dismore: To ask the Solicitor-General what progress has been made in implementing the recommendations made by his Honour John Gower QC and Sir Anthony Hammond KCB QC in their report on prosecutions conducted by the Solicitor's Office of HM Customs and Excise.

The Solicitor-General: In the Parliamentary Answer given by the then Attorney General on 12 March 2001, *Official Report,* column WA68, he announced that the

[28] HC Deb 12 March 2001 cc 416-7W

Government had accepted all the recommendations in principle, but had opted for a phased approach to implementation. Since that announcement, the Prosecutions Group of the Solicitor's Office has forged ahead with a rapid programme of change, to enable it to deliver legal services of a high quality in a responsive and flexible way. New managers and staff have been recruited, the organisation has been restructured, and working practices are being reformed.

The Parliamentary Answer also referred to accountability for the prosecutions function moving from the Commissioners to the Attorney General on 1 April 2002. Final agreement has not yet been reached on the implementation of Recommendation 4 of the Gower/Hammond Recommendations, which recommended that in relation to the prosecution function the Solicitor for the Customs and Excise should not be funded by the Commissioners, but should have his own ring fenced budget and be accountable for his own expenditure.

This Recommendation is accepted in principle by the Government, but there are technical issues relating to the establishment of a separate vote which require further time to resolve. The Government is committed to the full implementation of Recommendation 4 no later than 1 April 2003, but in the meantime the Prosecutions Group budget will remain as part of the Customs and Excise vote, though it will be separately identified and managed by the Solicitor for the Customs and Excise, and financial Accounts/Reports will be produced as if that budget has been established as a separate vote.

As a consequence of these revised arrangements, the Attorney General will not assume full accountability for the prosecutions function from 1 April. Instead, from that date the following arrangements will apply:

(1) The Commissioners (and Treasury Ministers) will be responsible for, and accountable to Parliament for:

- anything done in the course of an investigation;
- enforcement policy, including the resources to be deployed;
- prosecution policy ie the seriousness with which offences should in general be treated and wider issues of Departmental policy such as the disclosure of informants;
- decisions on alternatives to prosecution such as compounding, civil evasion action etc.

(2) The Law Officers will be responsible for, and accountable to Parliament for:

- the quality of legal advice given by Investigation Legal Advisers;
- the quality of the Prosecutions Group casework decision making in relation to cases referred to that Group for prosecution;
- the application (the Prosecutions Group having consulted with Customs Administrators, as appropriate) of prosecutions policy and public interest factors to individual defendants in cases referred to the Prosecutions Group for prosecution.

> Inspection of the Prosecutions Group by the CPS Inspectorate will commence on 1 April 2002, and the Prosecution Group will proceed with the trials referred to in the previous Parliamentary Answer.
>
> The Government is satisfied that the arrangements that will apply from 1 April strengthen the involvement of the Attorney General with the difficult and complex criminal casework conducted by the Solicitor's Office, maintain the momentum of change that has been established and preserve an appropriate position on Parliamentary accountability.[29]

In his review – which is discussed below – Justice Butterfield took the opportunity to report what progress had been made in taking on board *Gower & Hammond's* recommendations:

> The Review recommended that the HMCE Solicitor's Office should retain its prosecution function, and remain part of HMCE. However in relation to his prosecution function the Solicitor should be accountable to the Attorney General and not to the Commissioners or their Chairman. The basis for the recommendation was that the perception and reality of the Solicitor's independence was so vital that he must no longer be responsible to the Board for the exercise of his prosecution function nor should he be dependent upon the Board for resources. The Attorney General and not the Board of HMCE should be accountable for the management and conduct of the cases. My understanding of the report, augmented as it is by my meeting with both the authors, is that it was their hope and expectation that the supervisory function to be undertaken by the Attorney General would be broadly similar to that which he accepted following the recommendations contained in the Report of Sir Richard Scott's Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq.
>
> The main purpose of consultation in individual cases was intended to enable the Solicitor to draw to the Attorney's attention and to seek his advice on:
>
> - significant features of potential interest or sensitivity and in particular;
> - matters of legal novelty and legal or factual difficulty; and
> - to seek the Attorney's opinion as to the public interest in the case.
>
> The process of consultation, it was hoped, would enable the Attorney General to be consulted, and to give advice and guidance, on some of the difficult areas of law which HMCE encounter in individual cases, particularly those relating to disclosure and how best to provide for proper protection of intelligence sources while making available all documents and information properly necessary for a fair trial.
>
> As part of my review I have considered the extent to which those objectives have been achieved and how the new arrangements, which were put in place following acceptance by the Government of the recommendations, are working in practice. The new arrangements were intended to ensure that there is proper ministerial accountability in respect of all prosecutions brought by HMCE whether by the

[29] HC Deb 26 March 2002 cc 886-8W

> Attorney General or a Treasury Minister. The Attorney General is answerable for all actions taken by HMCE in relation to decisions to initiate and sustain a prosecution. Treasury Ministers remain accountable to Parliament for anything done in the course of the investigation, enforcement policy and prosecution policy. However the Attorney General is responsible for the application of the prosecution policy in individual cases, which he supervises.[30]

C. Excise duty fraud and the Roques Inquiry

There are a number of types of excise fraud, including:

- the smuggling of duty paid goods (the 'white van trade'), where goods bought ostensibly for personal use are sold on in the UK without payment of UK duty and VAT;
- 'diversion fraud', where goods destined for export are in fact diverted to the UK home market without payment of VAT or UK duty;
- large-scale smuggling of alcohol and, particularly, tobacco from countries outside the EU by concealment or misdescription in order to evade duty and VAT.[31]

Focusing on diversion fraud, under the Single Market Member States are required to operate a system of duty suspension in order to facilitate alcohol trade.[32] The system allows registered traders or warehousekeepers to produce, process, store and move goods without payment of duty – keeping them in an approved excise warehouse, so they can time the payment of the duty nearer to the time when they actually sell the goods. Duty only becomes payable when the goods are released for consumption, or acquired by an unregistered individual. 'Outward' diversion fraud occurs when duty suspended goods destined for export, or for another UK excise warehouse, are illegally diverted from an excise warehouse on to home or overseas markets without payment of duty. 'Inward' diversion fraud occurs when duty suspended goods imported to an excise warehouse are illegally diverted on to the UK market – once they clear frontier controls – without payment of duty.

The duty-suspended movement of tobacco is more restricted than alcohol. UK manufactured tobacco products must be removed to home-use directly from the manufacturer's premises. Also, most exports are made directly from the manufacturers premises.[33] As a consequence there are distinct differences in the pattern of revenue fraud involving alcohol as opposed to tobacco; this issue was discussed in a paper on measuring indirect tax fraud published by Customs in November 2001:

> The majority of cigarette fraud involves large-scale smuggling by freight – principally in either deep-sea containers or 'roll on roll off' lorries. Most of the remainder is smuggled in light vehicles through the Channel ferry ports and the

[30] *Butterfield* p 314

[31] Treasury Committee, *HM Customs & Excise*, 8 February 2000 HC 53 1999-2000 para 46

[32] For details see National Audit Office, *Losses to the revenue from frauds on alcohol duty*, 19 July 2001 HC 178 2001-02 pp 1-5

[33] HM Customs & Excise, *Tax stamping of spirits*, December 2001 p 7

Channel Tunnel (the so-called 'white van trade') … In the case of beer and wine, revenue losses from fraud are relatively small and are largely the result of cross-Channel smuggling from duty paid sources in other Member States. In the case of spirits, the principal feature of the fraud involves the diversion of duty suspended goods moving between excise warehouses for consumption on the domestic market. These goods are mostly manufactured in the UK and distinguishing between legitimate and illicit spirits at the retail stage is difficult. Customs estimate that about half of all illicit spirits are sold to consumers through retail outlets at legitimate retail prices.[34]

In June 2000 there was an important development in relation to excise fraud involving alcohol. The Paymaster General commissioned a full independent investigation, headed by John Roques, an ex senior partner of Deloitte and Touche, into the collection of excise duties, following an internal Customs assessment which had found serious weaknesses in the Department's control of excise duty collection, in particular the mechanisms for releasing dutiable spirits and wine from bonded warehouses over the period 1995-1998.[35] It has been estimated that frauds between 1993 and 2000 led to alcohol duty evasion of £668 million from diversion onto UK markets.[36]

It is notable that at this time the *Financial Times* reported speculation that one consequence of this case would be the merger of Customs with the Revenue: "Customs & Excise could see its powers to collect revenue taken away after the revelation that it lost up to £2bn in excise duties through lax controls between 1995 and 1998. According to Whitehall officials, the exposure of the revenue black hole will revive consideration of plans to hive off or merge some of Customs' operations with Inland Revenue."[37] In an editorial two days later the newspaper argued that this made the case for a merger very clear:

> The fact that lorry drivers were easily able to persuade Customs officials that their loads were for export, pay no tax, and then divert the bottles of spirits for sale in the UK is a serious failing of Customs & Excise. It has undermined the integrity of tax collection, encouraged criminality and distorted the legitimate market for alcoholic drinks. The extent of the black hole in alcohol taxes is uncertain, but figures as high £2bn between 1995 and 1998 should not be ruled out, given previous underestimates by Customs & Excise. This failure makes Kenneth Clarke's 1996 Budget promise, to spend £88m to save over £2bn from Customs-related fraud, more than a little hollow. Sadly, this is just the latest Customs failure in a long list.
>
> The government must now decide how to tackle the evidently severe problems within the Customs service. It has two choices: to do nothing and hope that Richard Broadbent, the new chairman of Customs & Excise, will sort out the department; or merge the Customs department with the Inland Revenue. It should choose the latter.

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[34] *Measuring Indirect Tax Fraud*, November 2001 p 2

[35] HM Customs & Excise press notice PR26/2000, 30 June 2000

[36] Another £216 million was accounted for which involved goods diverted overseas where duty would have been due in the country of import had the goods not been fraudulently diverted (HC 178 2001-02 p 2).

[37] "Threat to Customs' excise collection", *Financial Times*, 5 July 2000

> Mr Broadbent, a former corporate finance director of Schroders, was appointed to reform the department. His efforts have already shown signs of progress. He has appointed a new director of operations from the private sector and has streamlined management structures. But it is unlikely this will be enough to bring about the change of culture needed. Above all, success would still mean that there is unnecessary duplication in the responsibility for tax collection.
>
> The separation of the duties of Customs & Excise and the Inland Revenue is a historical accident and now looks like an anachronism. Merger was discussed in parliament as far back as 1862. Much of the information supplied by companies to the two departments is the same. There are also as many differences in responsibility within Customs as there are between it and the Revenue. A merger would benefit business, by reducing the compliance costs of taxation, and benefit government, by reducing its revenue collection costs. The shock of a merger would be far more likely to produce the needed shift in the culture of Customs & Excise than internal reform. Elsewhere, the government has already accepted this logic. The Contributions Agency and parts of the Benefits Agency are part of the Inland Revenue. Customs should be next. Yet a merger to create a single tax revenue collection agency for the UK is not enough. It must be accompanied by clearer lines of responsibility and accountability. The new structure for monetary policy shows that this can be done. Revenue collection is next.[38]

The Roques Report was presented to Ministers in December 2000. It made 65 recommendations designed to strengthen the excise holding and movements systems, improve controls on investigations and establish clearer lines of accountability for revenue issues at senior levels within Customs. The Treasury Committee looked at this issue in March 2001, requesting that both the report and the Government's response to it should be published,[39] which occurred in July.[40] In its response, the Government set out the key measures that had been implemented, or were being considered, in the wake of the report:

> The Roques report made 65 recommendations of which Customs fully or partially accept 62. The majority of these recommendations were implemented by July 2001. Key measures include:
>
> - A more rigorous approach to the approval of warehouses,
> - Tightening the registration procedures for warehousekeepers and the owners of goods,
> - Improving the information on the holding and movement of excise goods where the duty has not been paid,
> - Improving the exchange of information with other Member States,
> - Increasing the checks on warehousekeepers' compliance with holding and movement regulations,

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[38] "Leader: last orders for Customs", *Financial Times*, 7 July 2000

[39] *HM Customs & Excise: collection of excise duties*, 22 March 2001 HC 237 2000-01 para 9

[40] HM Treasury, *The collection of excise duties in HM Customs and Excise: report by Mr John Roques and the response by Her Majesty's Government to the recommendations in the report*, Cm 5239 July 2001 – hereafter *Roques*.

- Tightening controls on hauliers,
- Considering the use of tax stamps for alcohol, and,
- The deployment of additional staff for excise warehouse controls.[41]

In November 2001 the Treasury Committee took evidence on *Roques* and the Government's response to it,[42] and in December 2003 the NAO published further work on managing the risks of alcohol fraud.[43]

D. The London City Bond case

Roques noted that the scale of diversion fraud that had been practised at one particular warehouse – the London City Bond – had been quite extraordinary, accounting for about £340 million of the total £668 million estimated to have been lost over the period. This may be an underestimate: as *Butterfield* comments, "the full extent of the revenue lost in consequence of the frauds emanating from London City Bond will never be known. At the very minimum the revenue evaded was £340 million but the reality, from all the information now available, suggests that the true figure is substantially higher than even that staggering total."[44] In this particular case there had also been a major breakdown in the processes for record keeping that underpin the system of excise warehouses – the 'AAD system'. *Roques* provides a short explanation:

> When duty-suspended goods are removed to a warehouse in another member state, the movement must be underwritten by a guarantee, valid throughout the EU, to safeguard the potential amount of excise duty payable. This is supported by an Accompanying Administrative Document (AAD), which provides documentary evidence to support movement guarantees and is required to be produced for audit by Customs & Excise and/or when a vehicle carrying a consignment is stopped en route. Customs & Excise do not hold copies of each AAD: these are maintained by the warehousekeeper (the consignor). If the goods are removed to another approved warehouse in the UK, they must be accompanied by a form W81 (or trader generated equivalent). The system governing the use of both documents, which contain the same core information, is identical.
>
> The warehousekeeper is responsible for completing and monitoring the AAD for each export consignment. Warehousekeepers are required to confirm (via their local Excise Advice Centre) that the destination warehouse as notified by the owner of the goods is an approved warehouse and must ensure that a valid financial guarantee is in place for the movement of the goods. I discuss the guarantees system in more detail later in

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41 *The Government's response to the Committee's sixth report of session 2000-01*, 30 October 2001 HC 315 2001-02 p iv

42 *HM Customs and Excise - the Roques report: Minutes of evidence*, 14 & 28 November 2001 HC 371-ii 2001-02

43 "Part 3: Managing the risks of alcohol fraud" in *Audit of HM Customs & Excise systems and accounts 2002-03*, 18 December 2003 HC 52 2003-04.

44 *Butterfield* p 25

> this Chapter. The Department suggests that warehousekeepers carry out a number of checks (not mandatory) including confirming that the owners of the goods are bona fide traders; that the receiving warehouse is expecting delivery of the goods (and confirming that by requesting a fax); and that the haulier is not a man of straw.[45]

In *Roques'* view, the AAD system had proved fatally susceptible to fraud:

> As a control system, the AAD is fatally flawed as it will only work satisfactorily if all the parties involved are honest. It is therefore not a system of control. The exporting warehousekeeper must act responsibly in checking and monitoring the movement of duty suspended goods; the haulier must be genuinely removing the goods for export and not diverting them to the home market; and the receiving warehousekeeper must actually be outside the UK.[46]

The ability to exploit these weaknesses of the AAD system underpinned the successful fraud at London City Bond:

> **6.3.4 London City Bond** One of the key warehouses in the investigation of outward diversion fraud was London City Bond (LCB). In June 1997, local excise officers carried out an audit of the despatch system at LCB covering the period from April 1996 to February 1997. It was discovered that 1,900 AADs were missing from the warehouse. In mid-December 1997, Kathy Davies (Higher Executive Officer) at NIS[47], was asked to determine the whereabouts and reason for the absence of these documents. This "audit" started in January 1998. NIS were given this task as several NIS investigations were on-going at LCB. The resulting report was issued in March 1998 and includes the following findings: "We have been able to quantify the amount of AADs that were discharged with false stamps which relate to NIS operations and also established that further instances will arise in the future . . . The total revenue evaded figure is in the region of £300 million."
>
> Within the excise duty loss of £565 million … is £340 million relating to cases involving LCB. This is consistent with the £300 million identified by Ms Davies in early 1998. The difference of £40 million is due to cases which arose or continued in late 1997 and early 1998 – after this time, outward diversion fraud largely ceased. "Due to the logistical difficulties in checking every AAD in order to establish an actual revenue loss figure through LCB we have attempted to quantify the revenue by way of an exercise using actual numbers of removals from the warehouse over a representative period . . . it is likely that the actual amount of annual revenue loss is somewhere between the £386 and £579 million estimate."
>
> It seems remarkable that a warehouse could operate throughout the period of this fraud in a way which allowed product to be diverted in such high volumes.[48]

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[45] *Roques* p 51

[46] *Roques* p 53

[47] [National Investigation Service. Criminal investigation arm of Customs & Excise.]

[48] *Roques* pp 124-5

As it transpired, the frauds perpetrated at this particular warehouse were significant in another way. On 25 November 2002 the case prosecuted by Customs against 15 defendants all connected with London City Bond collapsed, when the prosecution failed to produce any evidence. The prosecution's decision followed an application made by each defendant to stay the proceedings as an abuse of the process of the court. As *Butterfield* notes, "Mr Justice Grigson had by then heard lengthy and detailed evidence about the circumstances surrounding the investigations leading to the prosecutions, the conduct of the investigating officers and their superiors, and the way in which the prosecutions had been conducted by the Solicitors and Counsel acting for HMCE."[49] As the *Times* reported, "the investigation, pre-trial hearing, and previous trials connected with the case are believed to have cost up to £30 million."[50] Indeed Justice Grigson anticipated a major review in Customs practices, after he had acquitted the defendants, when he addressed the counsel for the prosecution:

> "The evidence before me is incomplete. The course that the Crown has taken seems to me proper but, recognising the realities of the situation, the evidence was taking a particular turn which I think would have been difficult for the Crown to resist. I think it is inevitable that there will be some sort of inquiry into what has happened. I think it appropriate for me to say, even though the evidence is incomplete, that from what I have seen there is an urgent need to examine the role of the NIS in relation to other branches of Customs & Excise and also in their relationship to the solicitors for Customs & Excise. I would hope that such an inquiry would deal with the problems that you and I and all defence counsel have experienced over disclosure. It is closing one's eyes to the obvious that there has been material nondisclosure in this case."[51]

E. The Butterfield Review

On 26 November 2002 – the day after the collapse of the London City Bond (LCB) prosecution – the Economic Secretary, John Healey, announced a review into Customs criminal investigations and prosecutions.[52] A few days later Mr Justice Butterfield was confirmed head of the review.[53] In brief, what the trial had revealed was that officers in the Customs' National Investigation Service (NIS) had been actively involved in encouraging the frauds at London City Bond to take place. The duty-suspended product held at the warehouse – rather than being exported – was simply being sold to local cash and carry stores at an enormous profit. The owner of the warehouse was acting as an informant to the NIS, but this fact had not been revealed to the defence.

As the *Guardian* reported at the time, "it appeared that customs officers, underfunded and desperate for results, were encouraging crimes to take place, in collusion with informants, in order to boost their arrest rates … A Customs officer for 25 years told the court … that she wanted to change policy to prevent and disrupt the activities of fraudsters, but was told by an

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49 *Butterfield* p 1

50 "Customs' role in fraud inquiries to be examined", 26 November 2002

51 *Butterfield* p 1

52 HC Deb 26 November 2002 cc 9-11WS

investigator … that it was not possible "because the NIS has targets to achieve which had been agreed by the board."[54] One of the solicitors for the defence was quoted at the time as saying, "it is now high time that the authority to prosecute is removed from Customs and placed firmly under the umbrella of the CPS (crown prosecution service)."[55]

The full text of the Minister's statement setting up *Butterfield* is reproduced below:

Customs and Excise

> **The Economic Secretary to the Treasury (Mr. John Healey):** As the Minister responsible for HM Customs and Excise, I can confirm that in the light of the circumstances that yesterday led to the prosecution offering no further evidence in a series of linked prosecutions relating to London City Bond which were being heard at Liverpool Crown Court, the Attorney-General (as Minister responsible for Customs and Excise prosecutions) and I will be asking a High Court judge to consider:
>
> - The circumstances that led to the termination of those cases and, having regard to changes in relevant procedures and guidelines and to changes in practice within HM Customs and Excise that have taken effect since 1995,
> - To review the practices of HM Customs and Excise in the recording, retention, revelation and disclosure of material which may be relevant to the prosecution of its criminal cases; and in respect of HM Customs and Excise criminal investigations
> - To review current compliance with best practice in the use of investigation techniques and the management and control of cases to the extent these are relevant to the discharge of the prosecution's obligations in any subsequent criminal proceedings.
>
> The full terms of reference for the review are attached and a copy of the statement made by prosecuting counsel in court will be placed in the Libraries of both Houses.
>
> REVIEW OF CURRENT PRACTICES AND PROCEDURES RELATING TO DISCLOSURE, ASSOCIATED INVESTIGATION TECHNIQUES AND CASE MANAGEMENT IN HM CUSTOMS AND EXCISE'S CRIMINAL CASES
>
> **Terms of Reference**
>
> To consider the circumstances that led to the termination of the LCB cases heard by Grigson J in Liverpool Crown Court and the lessons to be learnt from those circumstances. And, having regard to changes in the law or practice as indicated below, changes in relevant procedures and guidelines and to changes in practice within HM Customs and Excise that have taken effect since 1995:
>
> To review the practices of HM Customs and Excise in the recording, retention, revelation and disclosure of material which may be relevant to the prosecution of its

[53] HM Treasury/Attorney Generals Office press notice 127/02, 29 November 2002
[54] "Lies, frauds and pressure on Customs to boost arrests", *Guardian*, 26 November 2002
[55] "Inquiry into Customs scandal", *Guardian*, 26 November 2002

criminal cases. In respect of HM Customs and Excise criminal investigations, to review current compliance with best practice in the use of investigation techniques (e.g. the classification and handling of individuals providing information) and the management and control of cases to the extent these are relevant to the discharge of the prosecution's obligations in any subsequent criminal proceedings.

To make recommendations.

The review will be conducted by a High Court Judge.

Scope of the review

The review:

- Will have regard to the relevant statutory framework (such as the Criminal Procedure and Investigations Act 1996 and the Regulation of Investigatory Powers Act 2000), the Attorney General's Guidelines on disclosure, relevant legal precedent and best practice.
- Will focus on current departmental provisions and practice while having regard to the conduct of past cases and lessons to be learnt from them insofar as not already incorporated in current practice; and
- Will examine the parts that should be played by officers, solicitors and counsel in the preparation for and the presentation of cases for court and in the disclosure process.

The Review will report to the Economic Secretary to the Treasury, as the Minister responsible for HM Customs and Excise and to the Attorney General.

The Review will have unrestricted access to HM Customs and Excise staff, papers and facilities. It is being asked to report not later than June 2003. A summary of the Report and its recommendations will be laid before Parliament.[56]

The collapse of the LCB case had wider ramifications, leading to the failure of a second prosecution in January 2003:

In the Court of Appeal today, the prosecution decided not to resist appeals by seven individuals who had pleaded guilty to, or been convicted of, excise fraud, following an investigation known as Operation Stockade, conducted in 1997 by HM Customs and Excise. This is one of a long series of cases linked to London City Bond (LCB). The Crown made it clear that this decision was reached following an assessment of the evidence given in the abuse of process hearing at Liverpool Crown Court in another LCB case in September / October last year, which revealed that there had been disclosure failures in relation to Operation Stockade. In the Stockade case, the Crown did not accept that any of the material demonstrated that any of these defendants was innocent of the offences with which they had been charged.

[56] HC Deb 26 November 2002 cc 9-11WS

> Similar consideration will be given to other linked cases and some are still to be heard. Each case will be decided on its merit having full regard to the evidence given in the Liverpool LCB case.[57]

The completion of this review process was noted in a written answer in May 2004; an extract is given below:

> 24 London City Bond-related cases have been reviewed. There are no further cases to be reviewed. 48 convictions, in 8 cases, have to date been overturned on appeal, of which 5 appeals (totalling 35 convictions) had been heard before the Customs and Excise Prosecutions Office launched its wider review of cases following the decision in November 2002 to offer no evidence in London City Bond-related cases before Liverpool Crown Court.[58]

In February 2003 the Economic Secretary announced that six customs officers had been suspended pending criminal investigations.[59] The Minister also gave a statement to the House at this time, when he summarised the Government's efforts to deal with the consequences of LCB; an extract is given below:

> **The Economic Secretary to the Treasury (John Healey):** With permission, Mr. Deputy Speaker, I wish to make a statement on this week's Court of Appeal case, known as Stockade, arising from investigations into the Fort Patrick bonded warehouse in 1996–97. Stockade is linked to the London City Bond—LCB—cases, which were investigated by Customs and Excise from 1995 onwards. I wish to inform the House of the actions that the Government have taken to deal with this series of frauds when organised criminal gangs took advantage of weaknesses in the Excise regime.
>
> I can confirm to the House that since 1997 we have tightened Excise controls and made fundamental changes to the management of Customs cases. I can report that the independent inquiry that the Attorney-General and I jointly established in November, which anticipates the implications of LCB for cases like Stockade, is already under way. In 1998, we tightened the regulation of Excise warehouses to tackle the specific loopholes that the criminals were using in the Stockade and LCB frauds, but fraudsters and smugglers constantly change their methods, so the law enforcement challenge is continuous. In 2000, we commissioned the independent Roques review to look at Excise losses and Customs' methods of control. We accepted 62 of the 65 recommendations, and have continued to tighten the duty suspension regime since.
>
> For the first time ever, Customs has made comprehensive estimates of the revenue losses facing all the main indirect taxation regimes, and we now have detailed strategies with substantial new resources in place to tackle smuggling and indirect tax avoidance and fraud. Investigations in Excise cases are necessarily long and complex,

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[57] HM Customs & Excise press notice NR 04/03, 21 January 2003

[58] HC Deb 10 May 2004 cc 145-6W

[59] HC Deb 12 February 2003 c 755W

> reflecting the scale and sophistication of the criminal organisations involved, but the prosecutions that followed in the LCB-related cases have highlighted for Customs issues about the status of informants, the handling of documentation and disclosure of information to the courts. The Government have already put in place important changes to reduce the risk from such problems, which date from the 1990s, but of course in such complex criminal investigations there will always be some cases that fail.
>
> In legislation, we passed the Regulation of Investigatory Powers Act 2000 to establish a surveillance commissioner and set common guidelines on the use of informants for all law enforcement agencies. Statutory codes of practice enforced under the Criminal Procedure and Investigations Act 1996 govern the process of disclosure in criminal investigations. Far-reaching changes have also been made within Customs. A new chairman was appointed from outside the organisation in January 2000, and new senior staff on law enforcement have been appointed. With new case controls, training programmes and professional standards, the management of Customs investigations is being thoroughly overhauled.
>
> In addition, from April last year and following the recommendation of the Gower-Hammond report, which the Government commissioned, responsibility for prosecution decisions and accountability for Customs' prosecution function has been taken away from Customs and placed with the Attorney-General. Following the collapse of the London City Bond cases in the Court of Appeal two months ago, the Attorney-General and I jointly established the independent Butterfield review. Its terms of reference are to consider the circumstances that led to the termination of the LCB cases, examine the wider issues and advise on whether Customs' current criminal case handling meets statutory requirements and best professional practice. The review has unrestricted access to Customs staff, facilities and papers, and Mr. Justice Butterfield has been asked to report to us by June this year.
>
> The Government are still dealing with the fallout from events that date from the mid-1990s. We have commissioned and acted on independent reports from Roques, Butler and Gower-Hammond. We have made important changes to the way in which Customs investigations and prosecutions are handled, and the independent inquiry to deal with the concerns from this week's case is already up and running. Wherever necessary, we will do more, and the Butterfield review will play an important part in any further reform. It will be of great interest to the House, and I can confirm that a summary of the report and its recommendations will be laid before Parliament.[60]

In its discussion of the price of this failure, *Butterfield* notes “quite apart from the loss of revenue from the diversion of duty-suspended goods there have been other substantial financial losses”:

> First, there is the cost of the investigations themselves. HMCE have been unable to provide the Review with any estimate of the total costs incurred in the investigations

[60] HC Deb 23 January 2003 cc 453-4

arising out of diversion frauds involving London City Bond as their management information systems are not designed to produce information of this kind. On any view those costs must have been colossal …

The cost of the prosecutions themselves to the public purse in the form of legal fees payable to counsel for the prosecution, and legal aid fees payable to solicitors and counsel for the defendants was also very substantial. All but one of the defendants who appeared before Mr Justice Grigson at Liverpool were legally aided. The total legal aid cost of the previous trials involving those defendants, and the Liverpool hearing, amounted to £14.3million. The Review has been informed that prosecuting counsel's fees in Operations Manpower, Chamfer, Techo, Fajita, Fusion, Paleface and Fallover totalled almost £3.5million, with estimated staff costs in the Prosecutions Group of around £850,000.

There will be yet further public monies paid out to those defendants who successfully apply for compensation for having been wrongly convicted or charged under the provisions of Section 133 of the Criminal Justice Act 1988.[61]

Butterfield goes on to comment on the wider costs of the case:

But beyond all that there is the human cost involved – the effect on the investigators who devoted months and sometimes years of their lives working on the operations only to find all their efforts set at nought through the failures identified above, failures for which they may well bear no personal responsibility. The investigators are professionals and recognise that they must accept what has happened, but inevitably these events have had a significant impact on their morale and left a legacy of bitter disappointment which takes time to heal.

When the cost of the recommendations I make are considered by those who have to decide on their implementation I express the hope that the true cost of the London City Bond cases will not be forgotten.[62]

On 4 July 2003 the Economic Secretary confirmed that Justice Butterfield had completed his review[63] and it was published later that month.[64] The review's findings – with the Government's response – were set out in a long written statement, reproduced in full below:

Butterfield Review

The Economic Secretary to the Treasury (John Healey): Further to my written statement to the House on 4 July 2003, Official Report, column 40WS, I can announce that today the Government are publishing in full the independent report, its

[61] *Butterfield* pp 163-4
[62] *Butterfield* p 164
[63] HC Deb 4 July 2003 c 40WS
[64] HM Treasury/Office of the Attorney General press notice 87/03, 15 July 2003

summary and recommendations, of the hon. Mr. Justice Butterfield following the completion of his review.

The Attorney General and I asked Mr. Justice Butterfield to examine the circumstances that led to the termination of the London City Bond (LCB) prosecutions in Liverpool Crown Court on 25 November 2002, the changes in practice within HM Customs and Excise (HMCE) since the time of the cases to which those prosecutions related, and HMCE's compliance with best practice in the use of investigation techniques. The full terms of reference for this review were announced in the written statement I made to the House on 26 November 2002, Official Report, column 9WS. In addition the House will be aware that the Government are looking at the links between law enforcement agencies which investigate serious crime, alongside the review the Chancellor has announced on the future of the tax institutions. The Government welcome the report, and are grateful to Mr. Justice Butterfield and his team for completing the study so promptly and for the extensive research that underpins his conclusions.

The Review's main findings are:

- that there were major failings in the investigation into and prosecution of the LCB cases, investigated by HMCE from 1995 to 1998;
- but that, since then, there have been significant changes, including:
    - far-reaching improvements in management, structure and culture within HMCE;
    - changes to the legal framework controlling the regulation of Excise warehouses, which have closed the loopholes used by the criminals in the LCB frauds; and
    - following the Gower/Hammond Review, the separation of responsibility for the conduct of prosecutions from responsibility for the conduct of investigations, by making the Customs and Excise Prosecutions Office (CEPO) accountable to the Attorney General, and not to the Commissioners of Customs & Excise, since April 2002;
- that these changes have gone a long way towards dealing with the problems within HMCE underlying the LCB cases, and Mr Justice Butterfield makes a number of recommendations designed to reinforce this change process.

Mr. Justice Butterfield also identifies three important areas of concern in criminal law and practice highlighted by the LCB cases, all of which have a wider application than HMCE cases. These are:

- the use of "abuse of process" in trials as a mechanism for attacking investigation processes;
- the challenges investigators and prosecutors face in complex cases in meeting their disclosure obligations under the Criminal Procedure and Investigations Act 1996; and
- aspects of informant handling.

HMCE INVESTIGATION AND PROSECUTION

The Government welcome Mr. Justice Butterfield's conclusion that significant progress has already been made by HMCE in dealing with the issues underlying the

failure of the LCB cases, and the unequivocal finding that there is no evidence in the LCB cases of improper enticement or encouragement to commit crimes or of entrapment. Most importantly, the Government welcome Mr. Justice Butterfield's conclusion that "HMCE should now put the events of the London City Bond cases behind them and move forward, but not in a spirit of complacency", and the recommendations he makes on how this process, already substantially underway, can be reinforced.

Mr. Justice Butterfield makes a number of important recommendations that encourage HMCE and the CEPO to continue the programme of reform underway in the department. These recommendations relate to:

- HMCE's role as an independent investigating force—the Government accept Mr. Justice Butterfield's finding that, under the current arrangements, HMCE should continue in its present role;
- the handling of human intelligence sources—the Government accept these recommendations, and HMCE will promptly implement the new guidelines and procedures which are outlined in the Report;
- training for investigators—the Government accept these recommendations, and HMCE will incorporate them into an improved training programme for specialist investigators;
- external scrutiny of investigations work—the Government accept the principle of external scrutiny of HMCE investigations work, and HMCE has been asked to undertake a study to identify how additional external scrutiny can best be introduced; and
- HMCE's regional structure, and in particular expertise in Scottish law—the Government agree with the analysis in the Review, and has asked HMCE to ensure that proper and informed legal advice is available to Scottish investigators and intelligence officers.

In addition, the Review recognises that CEPO has been revitalised since the Gower/Hammond Review and welcomes the changes that have taken place, in particular the increased independence that followed the transfer of accountability for HMCE's prosecution function to the Attorney General in April 2002. However, Mr. Justice Butterfield draws a number of conclusions, which include recommendations:

- that, in order to make its independence from HMCE even more transparent, CEPO should become an entirely separate prosecuting authority accountable to the Attorney General;
- that there should be an increase in the number of Investigation Legal Advisers employed within Customs, who play no part in the prosecution process but are available to provide advice to investigators; and
- that a more systematic dialogue between HMCE and other Government Departments responsible for related practical and policy issues would be desirable.

The Government strongly agree that the ability of prosecutors to exercise their decision making and other prosecution functions independently should be ensured. The Government will be considering the full practical implications of these recommendations, and in particular how the independence of the prosecutors in

> CEPO can best be strengthened further. The Government will provide a detailed response to all these recommendations in the autumn.
>
> CRIMINAL JUSTICE SYSTEM
> The Review concludes that the criminal justice system does not work as effectively as it should, but recognises that some of the problems identified are being addressed in the Criminal Justice Bill currently before Parliament. The Review recommends that consideration is given to:
>
> - reforming the operation and rules of the disclosure regime in complex criminal cases;
> - the power of judges to control proceedings before them relating to abuse of process; and
> - the operation of the Regulation of Investigatory Powers Act 2000.
>
> These recommendations have potential implications across the criminal justice agencies and departments. While accepting that they highlight important areas of concern, the Government will give them further detailed consideration before deciding whether to accept them.[65]

As noted above, on the particular question of Customs prosecuting function, *Butterfield* recommended that CEPO should become an entirely separate prosecuting authority accountable to the Attorney General. In the report, Justice Butterfield argued that the independence of the office was a critical issue:

> True independence from the Commissioners of those charged with the responsibility of prosecuting cases for HMCE is vital if the prosecutors are to fulfil their role effectively. The prosecutors must be free from any authority or control or taint of control from the Commissioners. Independence is a state of mind, and is not necessarily dependent on physical or even organisational and structural separation, but it must be patent, clear and obvious.[66]

Although improvements had been made since the publication of *Gower & Hammond*, this aim had not been achieved:

> I have found in my dealings with some of the Prosecutions Office over an intensive five months in the course of my Review a reluctance to acknowledge the mistakes of the past, attempts to defend systems and procedures which were inadequate, and a tendency to blame others when things go wrong – the judges, the defence lawyers, the criminal justice system. Some of the Prosecutions Office identify strongly with Law Enforcement and have found it very difficult to shake off decades of their solicitor/client relationship with investigators. All this suggests to me that whilst there has been a significant improvement in the Prosecutions Office there is more to be done if HMCE prosecutions are to regain their reputation for excellence. The cultural change identified by Gower/Hammond as essential has only partially been achieved

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[65] HC Deb 15 July 2003 cc 18-20WS

[66] *Butterfield* p 225

> and in my view at the heart of the difficulty lies the issue of independence … Just as it is not possible to be a little bit pregnant, it is not possible to be a little bit independent. The prosecutors either are independent or they are not. [67]

The key fault – as Justice Butterfield saw it – lay in the position of the Solicitor; if prosecutors were to be truly independent, then this had to be reformed:

> The difficulty, in my view, starts at the very top of the organisation. The Solicitor, whilst now reporting directly to the Attorney General and being financially independent of HMCE so far as the Prosecutions Office is concerned, is a member of the Board and a member of the Management Committee. It is right that he should be so. The Board of HMCE plainly requires one of its number to be the Solicitor, to be party to and jointly responsible for the decisions which may have considerable legal importance on the operations of HMCE. The Solicitor and the legal team under him must conduct civil litigation, advise on the legal effect of policy, identify the primary and secondary legislation required to implement those policies and provide the whole range of legal services required by the Department. He and the other members of the Board also have a corporate responsibility for all Customs officers.
>
> There is the potential for significant conflict of interest in such a position. The Solicitor's duty extends at present not only to the conduct of prosecutions but he also shares responsibility with other Board members for the Customs officers who investigate the offences leading to prosecutions. As a member of the Board he is party to all the decisions taken in connection with law enforcement generally. It is as if the Director of Public Prosecutions was also a member of the Board of the Police Authorities whose investigations he was responsible for prosecuting.
>
> In my view the position of the Solicitor is an anomalous consequence of the implementation of the Gower/Hammond recommendations and impossible to justify if true independence is to be achieved by the Prosecutions Office. Whatever structure and reporting lines are put in place, the position at present is that the same Solicitor remains ultimately responsible, along with other members of the Board, for both those who investigate and those who prosecute. No Chinese wall can be built high enough to conceal that reality.
>
> A repeated refrain from those within the existing Prosecutions Office and those outside the Department with experience of HMCE prosecutions was the need for independence. The prosecution solicitors want independence to give them added authority and control over the prosecution process. Judges, barristers and solicitors outside HMCE universally identified real independence as the essential ingredient absent from the Prosecutions Office. It is particularly important that the Prosecutions Office is not only actually independent but transparently seen to be so. There must be clear blue water between the investigators and those responsible for prosecuting. The deep mistrust and suspicion in which HMCE are presently held, something which has been clearly evident from the observations of many judges and lawyers to whom I

[67] *Butterfield* pp 226-7

have spoken, can only be effectively addressed by urgent and radical change. A vital element in restoring confidence in HMCE within the criminal justice system is the assurance that prosecutions are conducted by lawyers who are wholly independent. I have no doubt that such a change will also give considerable impetus to the continuing cultural change required.

I recommend that the Solicitor should no longer retain any responsibility for prosecutions brought by HMCE. All prosecuting functions should be removed from HMCE Solicitor's Office and prosecutions conducted by a separate prosecuting authority.[68]

On 4 December 2003 the Attorney-General announced that this recommendation had been accepted, explaining that, "the Government consider it is essential that there should be full confidence in prosecutors acting on behalf of Customs and accept the case for radical change."[69] Details were given in a press notice,[70] and the Economic Secretary confirmed the change in a second written statement a few days later: this is reproduced below:

Butterfield Review

The Economic Secretary to the Treasury (John Healey): On 15 July 2003 the Government published in full the independent report of Mr. Justice Butterfield on the current practices and procedures relating to disclosure, associated investigation techniques and case management in HM Customs and Excise's criminal cases. The Attorney-General and I had asked Mr. Justice Butterfield to examine the circumstances that led to the termination of the London City Bond prosecutions in Liverpool Crown Court on 25 November 2002, the changes in practice within Customs since the time of the cases to which those prosecutions related, and Customs' compliance with best practice in the use of investigation techniques. Mr. Justice Butterfield also examined the preparation for and presentation of cases for Court on behalf of Customs.

On publication of the report, as I said in my written statement on 15 July, Official Report, Columns 18–20WS, the Government accepted in full a number of Mr. Justice Butterfield's recommendations, many of which have now been implemented. On the recommendation that—in order to make its independence from Customs even more transparent—the Customs and Excise Prosecution Office (CEPO) should become an entirely separate prosecuting authority accountable to the Attorney-General, the Government undertook to provide a response in the autumn.

In his report, Mr. Justice Butterfield acknowledged the revitalisation of CEPO following the injection of additional resources and the improvement in the engagement with investigators. He referred to a palpable and detectable improvement in morale in CEPO. He went on to recommend that the Solicitor for Customs and

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[68] *Butterfield* pp 227-8
[69] HL Deb 4 December 2003 cc 32-3WA
[70] HM Treasury press notice 131/03, 5 December 2003

Excise should relinquish responsibility for prosecutions resulting from Customs investigations.

The Government agree that, to be most effective, these prosecutors must be independent, and be seen to be independent by judges, barristers and solicitors in the wider criminal justice system. The Government consider it essential that there should be full confidence in prosecutors acting on behalf of Customs and accept the case for radical change. The Government accordingly accept the recommendation of Mr. Justice Butterfield to separate the prosecution and investigation functions in Customs, and to create an independent Customs and Excise Prosecutions Office during the course of 2004, led by a Director accountable directly to the Attorney-General. The Office will be subject to a regular, independent and thorough inspection regime. The Government intend to move to appoint a Director as soon as practicable, who will be closely involved in the creation of an independent CEPO.

The Government also accept the recommendation that Investigation Legal Advisers should now move to become the responsibility of HM Commissioners of Customs and Excise, and that these advisers will not be involved in the prosecution process. This arrangement will be reviewed after two years.

The creation of an independent CEPO will require the resolution of a number of practical issues, to which the Attorney-General and I are giving careful consideration.[71]

In May 2004 Mr Healey confirmed that "legislation will be required to establish fully the independent prosecuting authority and we aim to introduce this in the course of this year." The Minister also gave details of the arrangements being made prior to the new authority being set up:

Prior to legislation being put in place, it is our aim to continue as far as possible the separation of the prosecution function from Customs and Excise begun following the Butler report of 14 April 2000. Various options are currently being examined with several steps already agreed, including appointing a new director for the organisation and amending the Memorandum of Understanding agreed on 9 January 2003—in line with the Gower Hammond report of 5 December 2000—between myself, the Attorney-General and the Commissioners of Customs and Excise.

This Memorandum of Understanding concerns the conduct, resourcing and accountabilities for Customs and Excise prosecutions under the auspices of the Attorney-General as well as the arrangements for the prosecution of offences investigated by Customs officers. That Memorandum can be found at Appendix 9 of the Butterfield Report and makes it clear that since 1 April 2002 those lawyers who prosecute criminal cases arising from Customs investigations are accountable to the Attorney-General for the conduct of those prosecutions rather than to Treasury

[71] HC Deb 8 December 2003 cc 72-3WS

> Ministers or the Commissioners of Customs and Excise. The amendments envisaged include the role of the new director.
>
> Among the practical issues presently under discussion with the Attorney-General are the future relationship between the independent prosecuting authority, the new revenue department and the Serious and Organised Crime Agency (SOCA).[72]

In February 2004 the Home Office announced the creation of a new agency – the Serious and Organised Crime Agency (SOCA) – to bring together the responsibilities which currently fall to the National Criminal Intelligence Service, the National Crime Squad, Home Office responsibilities for organised immigration crime, as well as the investigation and intelligence responsibilities of Customs and Excise in tackling serious drug trafficking and recovering related criminal assets.[73] Full details were given in a white paper published in March,[74] and legislation to set up the new agency is expected in the 2004-05 session. As a written answer in June 2004 explained, Customs role at the UK's frontiers will remain with the new revenue authority, when the Customs and the Revenue merge:

> **Mr. Paice:** To ask the Chancellor of the Exchequer if he will make a statement on the future role of HM Customs and Excise at UK sea and airports after its investigation and intelligence work is brought under the control of the Serious and Organised Crime Agency.
>
> **John Healey:** HM Customs and Excise's expertise in working at the borders to protect national security, collect revenue, facilitate trade and prevent smuggling will continue to play a vital role in the new integrated revenue department, HM Revenue and Customs (HMRC). Revenue from customs and excise duties, which raise almost £17 billion each year, are heavily dependent upon the protection afforded at the border. Equally important is the economic imperative to ensure that international trade is facilitated in a way that ensures the UK remains a good place to do business.
>
> The nature of indirect taxes makes them more vulnerable to attack by fraudsters than direct taxes. Customs has developed strategies for countering such attacks which depend heavily upon their expertise in frontiers work, investigation, and disruption. For these reasons HMRC will maintain its frontier role while working with the other agencies that undertake controls at UK borders. Following the creation of the Serious Organised Crime Agency, HMRC will continue to deliver Customs' full range of import and export controls at the UK's frontiers, retaining intelligence resources to support the enforcement of prohibitions and restrictions.[75]

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72 HC Deb 10 May 2004 c 145W

73 Home Office press notice, *New UK-wide organised crime agency pooling expertise to track down the crime bosses*, 9 February 2004

74 Home Office, *One step ahead: a 21st century strategy to defeat organised crime*, Cm 6167 March 2004

75 HC Deb 10 June 2004 cc 486-7W

F. Recent developments

Parallel to these developments, the Metropolitan police have been conducting an investigation into the LCB case – as the Minister noted in part of a written answer in February 2004:

> Mr. Justice Butterfield received total co-operation from Customs officers, as he recognised in his report. In the course of its review of London City Bond-related convictions last year Customs continued to trawl all areas of the Department for any material of potential relevance both to ongoing appeals against conviction and to the issues examined by Mr. Justice Butterfield. Further disclosable material that was uncovered was passed directly to the Metropolitan Police to assist their investigation into the circumstances of the collapse of the London City Bond cases and to Mr. Justice Butterfield for his consideration. Although Customs had already indicated that it would not be contesting their appeals, Customs also disclosed that material to all the appellants in the Operation Puma case on 28 January 2004.[76]

In September two senior Customs officials subject to this investigation were suspended;[77] the Economic Secretary set out the current position in a long letter to the chairman of the Treasury Select Committee, the main part of which is reproduced below:

> **London City Bond**
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> I am writing to update you on the latest position with the Metropolitan Police Service (MPS) investigation - Operation Gestalt - into Customs and Excise's handling of a series of excise diversion frauds focused on the London City Bond in the mid-1990s. I believe it is important that this information is available to Parliament, and as we are in recess am therefore also placing a copy of this letter in the Libraries of both Houses.
>
> As you know, as part of their established procedure for such investigations the police produce impact assessments as the investigation develops, which are intended to assist the Department in discharging its disclosure obligations. I promised to write to you once the Chairman of Customs and Excise, David Varney, had decided what action was necessary following receipt on 24 September of the MPS's fourth Operation Gestalt impact assessment. David Varney has today informed me of his decision, and that he has completed the sequence of management actions necessary since receiving the impact assessment, including contacting all individuals potentially affected as agreed with the police, taking legal advice and consulting with the Cabinet Secretary and Attorney General. I should emphasise that these are Civil Service management decisions, taken in line with established Departmental policy, which are a matter for the Chairman, not ministers.

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[76] HC Deb 12 February 2004 cc 1552-3W

[77] "Two senior Customs officials suspended", *Financial Times*, 30 September 2004; "Duty and Customs column", *Tax Journal*, 18 October 2004

20 retired or serving Customs officials have been named in the fourth impact assessment. Two of the serving officials named as being under investigation hold very senior positions in the Department, and have been confirmed by Customs today as: Terry Byrne, Director General, Law Enforcement; and David Pickup, Solicitor. The police are conducting further investigations into allegations of non-disclosure to determine whether any offences have been committed. I must emphasise, as have the MPS, that the investigation is far from complete and that the term "under investigation" should not be taken to mean that charges will follow. The investigation is at an early stage and will take some time to complete, and it would be wrong and unjust to prejudge the outcome.

The Chairman has considered carefully the position of all the named officials. 6 of them have left the Department and have been informed. In relation to the other 14 serving officials, he has reached the following conclusions:

* 1 officer has been reclassified as a potential witness and therefore no further action is required for the moment.
* 6 officers can continue in their present posts because their duties have no bearing on the evidential chain in this investigation or ongoing Customs and Excise operations.
* 5 officers have been moved from their current posts to other duties to ensure the integrity of this investigation and ongoing Customs and Excise operations.
* 2 officers - Terry Byrne and David Pickup - have been suspended from duty with immediate effect, as the Chairman is announcing to the Department today.

The seniority of these officers and the broad scope of their responsibilities make it impossible for them to remain in their posts pending investigation. There are no other appropriate roles available and the Chairman has decided that the public interest is best served by suspension. I repeat, the term "under investigation" should not be taken to mean that charges will follow, and it would be wrong and unjust to prejudge the outcome of the investigation.

David Varney's priorities, which I entirely share, are to ensure: the full and active cooperation of the Department with the investigation, in order that it may be brought to a conclusion as soon as possible; that the rights of all individuals involved are protected, in full accordance with UK employment law; and that the Department's ongoing law enforcement, prosecution and legal operations are maintained while the investigation is ongoing.

In order to secure the latter, David Varney has appointed Mike Eland as Acting Director General Law Enforcement; and the Attorney General, in consultation with David Varney, has asked Sir David Calvert-Smith QC to act as Acting Director with specific responsibility for prosecutions and casework issues for the Custom Prosecution Office, on the grounds of his significant credibility and experience. He will be working part time in order to honour his existing commitment as a CRE Nominated Commissioner. Alongside these moves, David Hogg has been appointed as Acting Solicitor to Customs and Excise. The legal implications for cases currently before the courts are a matter for the Attorney General, who is considering this issue.

In parallel with the Operation Gestalt investigation the Metropolitan Police have also provided advice on a number of other Customs and Excise investigations concerning

money service bureaux. The Chairman has asked the police to extend their investigation to cover these additional issues. This aspect of the investigation is still at a very early stage which means I am unable to say any more at present; however, I will keep Parliament informed - to the extent that I am able - as the investigation progresses.

The decisions above are rightly a Civil Service matter for the Chairman. My ministerial responsibility is for policy decisions and for maintaining an overview of the work of the Department. Within this context, as you will recall the Attorney General and I asked Mr Justice Butterfield to conduct a review of the circumstances which led to the termination of certain Customs and Excise prosecutions in 2002 and to advise on whether Customs' handling of criminal cases met statutory requirements and best professional practice. His report was published in full alongside a written statement from the Attorney General and myself on 15 July 2003, and the Government has accepted his recommendations. These included handing over responsibility for the prosecution of Customs cases to an entirely independent prosecutions authority, for which work on legislation is progressing which the Attorney General and I hope will be completed by April 2005. The Attorney General has also already put in place an exercise to recruit a Director.

Another key Butterfield recommendation was that: "a separate study is undertaken with a view to identifying how additional external scrutiny can best be introduced into HMCE investigation work. The review might start with looking at how the existing professional standards team could be enhanced and its reputation reinforced through external input. But a review should not necessarily confine itself to that limited scope."

Having undertaken this study, taking account of the future requirements of Her Majesty's Revenue and Customs (HMRC), we decided that the new department should be established with tough mechanisms for independent external scrutiny. Following necessary preliminary work, including discussions with Home Office and other relevant bodies, I can now confirm that we have decided to proceed with this move.

As the first stage of implementing this I have agreed with the Chairman that with immediate effect Perry Nove, former Commissioner of the City of London Police, will provide independent expert advice to the Chairman on the handling of investigations, including the Department's liaison with police forces on ongoing police investigations.

As the second stage, we have decided that the scrutiny mechanisms for HMRC will match those already in place for the Police. HM Inspectorate of Constabulary (HMIC) will scrutinise how HMRC ensures compliance with the requirements of the criminal justice system. The remit of the Independent Police Complaints Commission (IPCC) will be extended to cover serious complaints against HMRC officials. They will provide independent advice, supervision or management of complaint investigations and have the power to investigate directly where such action is necessary. In addition to these moves for HMRC, the Customs and Excise Prosecution Office have also subjected themselves to external scrutiny: the London office is currently undergoing

an inspection by Her Majesty's Crown Prosecution Service Inspectorate. In the future this inspection process will be a regular one with published inspection reports.

Legislation will be necessary to bring these new arrangements into effect and this will take some time. However, in order to ensure that change is as robust and swift as possible I have agreed with the Chairman that Bill Taylor, Chief HMIC in Scotland and Chief Police Officer for 8 years, will with immediate effect advise him on the development of the external scrutiny arrangements with the IPCC and HMIC. In addition, Mr Taylor will provide advice on the development of professional standards in Customs and Excise and, in the longer term, in HMRC.[78]

The Attorney General also made a statement, announcing the appointment of a new acting director of CEPO:

"I would emphasise that the police investigation is far from complete. It is at an early stage and it would be wrong and unjust to prejudice the outcome or to look at it as any more than it is, an investigation. However, it is important that action is taken to ensure that the work which Customs Prosecutions staff carry out is not compromised, that statutory obligations are fulfilled and that the investigation receives the full and open co-operation necessary to bring this matter to a conclusion as quickly as possible.

I am determined to carry on the momentum in setting up the new independent CEPO and ensuring the credibility of the Customs and Excise Prosecutions Office is maintained. To this end, I am currently recruiting a new Director. Interviews for the post are being held today. A new Director will be in post as soon as possible. Drafting of legislation to set up the new, independent Customs Prosecutions Office is continuing. I hope this will mean the process will be completed by April 2005.

I have given serious thought to how to deal with the current situation, in order both that the very important work of the Prosecutions Office, prosecuting some of the most serious crimes, can continue, and to demonstrate that the public can have confidence in the credibility and integrity of those working within the Office. I have therefore asked Sir David Calvert-Smith QC, previously Director of Public Prosecutions, to take on the role of acting Director of CEPO. I am very pleased to announce that he has agreed to do so. Sir David is a man of the highest standing amongst all those involved in the criminal justice process. He is a highly regarded member of the Bar. His prosecution experience makes him invaluable and his oversight of prosecutions will contribute much to the difficult and complex cases prosecuted by the Office."[79]

In July 2003 the Chancellor had announced a review of the three organisations dealing with tax policy and administration, to be chaired by Gus O'Donnell, Permanent Secretary to the Treasury.[80] The 'O'Donnell review' was published at the time of the 2004 Budget[81] and

78 HM Treasury press notice 80/04, 29 September 2004
79 Office of the Attorney General press notice, 29 September 2004
80 HM Treasury press notice 78/03, 2 July 2003; HC Deb 2 July 2003 cc 270-1W

recommended the merger of Customs with the Inland Revenue into a single department – Her Majesty's Revenue and Customs (HMRC) – a proposal which the Government accepted.[82] Following this, the Attorney-General (Lord Goldsmith) announced on 12 October 2004 that a single prosecuting authority would be established. The Revenue and Customs Prosecutions Office (RCPO) is to be an entirely separate prosecuting authority, accountable to the Attorney-General, responsible for the prosecution of all HM Revenue and Customs cases in England and Wales:

Customs and Excise and Inland Revenue Prosecutions

> The Attorney-General (Lord Goldsmith): On 4 December 2003 (Official Report, cols. WA 32–3) I announced that the government had decided to accept the recommendation of the review conducted by Mr Justice Butterfield, that the Customs and Excise Prosecutions Office should become a fully independent prosecuting authority, accountable to me.
>
> Subsequent to that announcement the Chancellor of the Exchequer announced on 17 March 2004, in his Budget Statement, that the Government were accepting the recommendations of the Review of the Revenue Departments led by the Permanent Secretary to the Treasury, Gus O'Donnell. One of the key recommendations of that review was to integrate the Revenue and Customs into a single department.
>
> I can now announce that the Government have decided to create a single prosecuting authority to deal with Revenue and Customs prosecutions work, in line with the creation of Her Majesty's Revenue and Customs. The new prosecuting authority, which will be known as the Revenue and Customs Prosecutions Office (RCPO) will be an entirely separate prosecuting authority, accountable to me, and responsible for the prosecution of all H M Revenue and Customs cases in England and Wales. This is an important step which will ensure that we have an effective and fully independent prosecuting authority dealing with many of the most important cases in the criminal justice system. Work to create a fully independent prosecuting authority is under way and the legislation required to complete the establishment of the new office will be brought forward as soon as parliamentary time permits.[83]

Prior to this statement, the Attorney General had said that it was the Government's intention for the process to be completed by April 2005.[84] Lord Goldsmith announced recently that David Green QC had been appointed director of RCPO.[85]

As part of the Queen's Speech on 23 November 2004 Her Majesty said, "my Government is committed to reducing bureaucracy and the costs of Government, and to promoting efficiency. A Bill will be introduced to integrate the Inland Revenue and Her Majesty's

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[81] HM Treasury, *Financing Britain's future: review of the revenue departments*, Cm 6163 March 2004

[82] HM Treasury press notice 27/04, 17 March 2004

[83] HL Deb 12 October 2004 c 9WS. The Solicitor General (Harriet Harman) made a similar statement to the Commons (HC Deb 12 October 2004 cc 21-2WS).

[84] Office of the Attorney General press notice, 29 September 2004

[85] Office of the Attorney General press notice, 10 November 2004

Customs and Excise."[86] The *Commissioners for Revenue and Customs Bill*, Bill 3 of 2004-05 was introduced in the Commons on 24 November 2004. Provision for the establishment of the RCPO is made in clauses 3-37, 44 and schedule 3 of the Bill. The explanatory notes to the Bill provide a short summary:

> **Revenue and Customs Prosecutions Office (clauses 30 to 37, 44 and Schedule 3)**
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> These clauses put the new independent prosecutions office (RCPO) on a statutory footing. A Director, appointed by the Attorney General, will head the Office and he will employ all RCPO staff. The remit of the Office will be to provide legal advice and institute and conduct criminal prosecutions (and related proceedings such as the restraint and confiscation of assets) in England and Wales where there has been an investigation by HMRC. It will do so in accordance with the Code for Crown Prosecutors and will publish an Annual Report detailing the exercise of the Director's functions during the previous financial year. The Director will exercise his functions under the superintendence of the Attorney General.
>
> Clause 36 sets out that RCPO may not disclose information relating to an identifiable person except in specified circumstances. It provides that unauthorised disclosure is an offence carrying a maximum penalty of two years' imprisonment and an unlimited fine.
>
> The Office will also be the subject of external inspections by HM Crown Prosecution Service Inspectorate. The Bill (clause 44) also makes provision for the Treasury to identify Customs and Excise and Inland Revenue property, rights and liabilities which should transfer to RCPO, and not to HMRC.[87]

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[86] HL Deb 23 November 2004 c 3
[87] *Explanatory Notes* [Bill 3-EN] p 5