

**REVIEW OF CRIMINAL INVESTIGATIONS AND PROSECUTIONS**  
**CONDUCTED BY HM CUSTOMS AND EXCISE**

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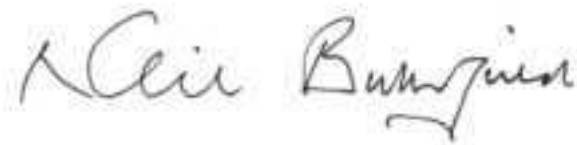
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## FOREWORD

1. The completion of this Review within the time constraints imposed would have been impossible without the assistance and co-operation of all involved.
2. My thanks go first to the Chairman and staff of HM Customs and Excise for the help which they have given to the Review team at all stages. A Review such as this, examining critically the working practices of an organisation, is inevitably an uncomfortable experience for all those involved. Nonetheless, we have throughout received only courtesy and co-operation. Special thanks go to the staff of the Internal Liaison Unit headed by Lance Railton, who have throughout responded to our innumerable requests for information promptly and professionally.
3. I also wish to thank all those many busy people outside Customs who have so generously given of their time, knowledge and experience in various ways to assist me in the Review. Their contributions have been enormously helpful.
4. The Review team was small but perfectly formed. There were but three members of it: each played a vital part in ensuring that the work was completed on time. The Secretary to the Review, Jenny Rowe, has given me dedicated and skilful support throughout. She has been immensely hardworking and highly efficient, not only as administrative leader of the Team but also in tendering advice on the contents of the Report. I owe her a considerable debt of gratitude for her invaluable services to the Review and her unfailing good humour.
5. I owe a like debt, too, to Peter Kiernan, the Solicitor to the Review, whose inquiring mind and infectious enthusiasm has been a great benefit. Last, but by no means least, Grainne Hawkins has provided immaculate secretarial assistance to us all, remaining unfailingly cheerful even under the most intense pressure. We also benefited from temporary assistance from Yeen Cheung, a Case Manager in the Solicitor's Office. I could never have completed the task without them and I am deeply grateful to them all.

## FOREWORD

6. I make it clear, however, that the opinions and conclusions expressed in the Review are all mine and that the contents of the Review in every detail are my responsibility and mine alone.

A handwritten signature in black ink, reading "Neil Bunting". The signature is written in a cursive style with a large initial 'N' and a prominent 'B'.

**The Honourable Mr Justice Butterfield**

## Introduction

1. On Monday 25<sup>th</sup> November 2002 at the Crown Court at Liverpool before Mr Justice Grigson the prosecution, conducted by HM Customs and Excise, (HMCE) offered no evidence against 15 defendants who were before the court on indictments alleging conspiracy to cheat the public revenue of duty chargeable on spirits and beer. All the defendants were alleged to have been concerned in diversion frauds centred on a bonded warehouse trading as London City Bond. Mr Justice Grigson ordered that verdicts of Not Guilty be entered and made Defendant's costs orders under Section 16 of the Prosecution of Offences Act 1985 in respect of each defendant before the court.
2. The announcement of the decision to offer no evidence came on Day 35 of an application made by each defendant to stay the proceedings as an abuse of the process of the court. 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<sup>1</sup>.
3. Following the verdicts and in the light of the circumstances disclosed in the course of the applications to stay the proceedings Mr Justice Grigson, addressing Counsel for the Prosecution Mr Lawson-Rogers QC, said:

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 [National Investigation Service] 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.

4. On 26<sup>th</sup> November 2002 a written Ministerial statement was made in the House of Commons by the Chancellor of the Exchequer (The Rt. Hon. Gordon Brown MP). He announced that in the light of the circumstances that led to the prosecution offering no evidence in the Liverpool cases the Attorney General (as Minister responsible for Customs and Excise prosecutions) and he would 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 HMCE that have taken effect since 1995,

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<sup>1</sup> Throughout the Report the abbreviation HMCE will normally be used to describe HM Customs & Excise. The exceptions are (i) where direct speech is reported; and (ii) where staff employed by HMCE are referred to eg Customs officers/Customs investigators.

- to review the practices of HMCE in the recording, retention, revelation and disclosure of material which may be relevant to the prosecution of its criminal cases; and in respect of HMCE 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
- to make recommendations.

The full terms of reference for the Review are attached at Appendix One.

5. On 29<sup>th</sup> November 2002 the Economic Secretary and the Attorney General announced that I had been appointed to undertake the review.
6. In January 2003 HMCE did not seek to resist the appeal in the Court of Appeal (Criminal Division) of R v Grant and others (known as the Stockade case). That case is linked to the cases heard before Mr Justice Grigson in Liverpool and I agreed to consider the issues raised in the Stockade case as part of my review.
7. I have reached the clear conclusion that it would not be appropriate for me to express any view on the conduct of anyone involved in the investigation or prosecution of the London City Bond cases where such views might suggest that the individual was or was not guilty of a criminal offence. My reasons for that conclusion are:
  - When offering no evidence against the defendants in the abuse hearing Mr Lawson-Rogers made it clear that the action by the prosecution should not be construed by anyone as in any sense an acceptance of the existence of *mala fides* or conspiracy within HMCE.
  - This review is not a Public Inquiry where the competing evidence and arguments can be advanced, tested and considered, and where a person suspected or accused of crime can be represented and his interests properly protected.
  - The resources available to me, the informal nature of the review and the time constraints quite properly imposed on me make it impossible fairly for me to reach conclusions on such matters.
  - Further, and in my judgment critically, a number of defendants in the application to stay the proceedings and Mr Gordon Smith, a solicitor until recently employed as a Senior Lawyer of the Specialist Casework Unit in the Manchester office of HMCE, allege that certain customs officers have committed criminal offences in the course of investigating and prosecuting the London City Bond cases. Specifically it is alleged that those officers may be guilty of perjury, attempting to pervert the course of public justice and offences under Section 15 of the Customs and Excise Management Act 1979. Those complaints have been referred to the Police.
  - Additionally the Chairman of Customs and Excise has himself referred the conduct of one customs officer to the police. The Metropolitan Police have begun an investigation into those matters. For me to express any views on the very matters the subject of a police investigation would self-evidently be grossly prejudicial and wholly improper.

8. On the other hand I am satisfied that the material to which I have had access and the enquiries I have made are quite sufficient for me to express clear conclusions on the conduct of those involved in the investigation and prosecution without any question of the commission of criminal offences. In all cases where I have been critical of the conduct of an individual he or she has been informed of the proposed criticism and has been invited to respond. I have offered the opportunity to respond either in writing or in person and have given full weight to those responses in reaching my final conclusions.
  
9. In conducting the review I have had access to and considered all the material that was before Mr Justice Grigson in the abuse of process application, including the transcripts of the proceedings. In relation to those proceedings I have further consulted with Mr Justice Grigson, with Counsel and solicitors for both prosecution and defence and with Sir John Nutting QC, who was retained by HMCE in an advisory capacity in relation to London City Bond cases. On the wider issues raised in my terms of reference I have received much additional material from HMCE and submissions from many sources, including members of the judiciary, government departments, the Bar Council, the Law Society, and the Criminal Cases Review Commission. I also met and discussed the issues with many busy people who generously gave up their time to help me. Appendix 2 sets out a list of those who made written submissions and those with whom I met and consulted. I also met many members of staff of HMCE, investigators, administrators and lawyers. To each I gave an assurance that their confidentiality would be respected and accordingly I shall not, save where express permission was given, refer to them by name or set out their comments with sufficient particularity to enable them to be identified.



## **Executive Summary**

1. The starting point for my Review was an examination of the way HMCE operated in the field of investigation and prosecution of serious crime, in particular excise diversion fraud, in the mid to late 1990s. The first three chapters of the Report seek to set the background to the way HMCE operated in law enforcement, explain the circumstances in which excise diversion frauds took place and provide an account of excise diversion fraud emanating from London City Bond between 1995 and 1998. Chapters Four and Five contain a detailed summary of the events surrounding a number of trials which were heard between the autumn of 1998 and 2001 concerning allegations of excise diversion fraud centred on London City Bond, and the subsequent successful appeals against conviction which resulted in orders for retrials. In Chapter Six I provide a detailed account of the evidence given at the hearing before Mr Justice Grigson in Liverpool, the early termination of which led directly to the commissioning of my Review.
2. One allegation raised in the Liverpool hearings which has attracted considerable publicity is whether HMCE incited the commission of criminal offences at London City Bond so as improperly to entrap defendants or those from whom they obtained diverted goods. I found no evidence that officers of HMCE or any employee of London City Bond incited or persuaded any trader to commit fraud, or that they actively encouraged crime which would not otherwise have been committed. A full account of my findings on this issue is to be found in the commentary on the collapse of the Liverpool hearings in Chapter Six.
3. I have also examined the linked case of Operation Stockade which Ministers referred to me subsequently. That trial, the appeal, and other later proceedings are considered in Chapter Seven. In subsequent chapters I analyse the problems arising in the investigation and prosecution of the London City Bond cases, what changes have been put in place since those events, and what further changes are required.
4. It is clear that a number of things went badly wrong. I cover this in more detail in Chapter Eight. The issues I identify include the absence of a strategic approach to excise diversion frauds; poor communications; serious deficiencies in the handling of informants; and failure to comply with disclosure obligations.
5. But the London City Bond events took place in the mid to late 1990s and they must be seen in perspective. Since those events there have been four independent reviews other than my own. There have been significant changes in the external environment, including statutory changes, and major alterations in the way HMCE is structured and managed, including a much clearer strategic direction for the whole organisation. I deal with these changes in Chapter Nine.
6. One of the most striking differences in recent years is the increase in the size and complexity of many of the cases investigated and prosecuted by HMCE.

HMCE do not walk alone in this changed environment. Similar changes have been experienced by other investigators and prosecutors. Many major cases investigated and prosecuted by HMCE fall squarely within the definition of serious and organised crime. They often involve long and complex investigations whose tentacles extend widely and sometimes link with investigations being conducted by other agencies. The investigations generate huge quantities of paper which have to be processed and managed. HMCE also deals with a large number of less complicated cases which generally proceed relatively satisfactorily through the criminal justice system. The statistics for HMCE prosecutions demonstrate that they are an organisation which enjoys considerable success in investigating and prosecuting less serious crime which falls within its remit.

7. HMCE is a many-faceted organisation. It is a tax collection agency and a frontier control agency, as well as a law enforcement agency. I accept that this does mean some issues are more complex for HMCE than they might be, for example, for some police forces and prosecuting authorities. Nevertheless, HMCE is an important part of the law enforcement community and it is in the public interest for it to be as effective as possible, and equally importantly for it to be seen to be effective. In examining the impact of the changes that have taken place within HMCE since the events of London City Bond I have borne these points very much in mind. However, one of the things that has struck me most forcibly during the course of this Review is the negative perception of HMCE within the criminal justice community in particular; and the fact that perception and reality are somewhat out of step. One investigator to whom I spoke said: "The most valuable thing that we have lost is our reputation". I agree. I will not repeat what is said elsewhere in the Report, in particular in Chapter Nine, but I am very clear that the perception issue is one that can only be addressed by radical action.
8. Ministers, and senior management at HMCE, are understandably anxious to "draw a line in the sand" so that the events of the London City Bond cases can be put behind them and they can move forward unencumbered by the detritus of the past. I understand that anxiety.
9. It is often said that the most important asset of an organisation is its staff. That is no less true of HMCE than elsewhere. Those staff I saw welcomed the Review as necessary, recognised the perception problems and appreciated the greater strategic direction they were receiving. Amongst them I detected no lack of integrity or commitment to the change process. In many I saw a deep-seated desire to regain their reputation so that they were able to operate in an atmosphere where their word was trusted by both the courts and those representing defendants. I have no doubt that these views are widely shared by staff at all levels within HMCE.
10. To be an effective organisation the staff need leadership, management and a culture and systems that foster and reward integrity, high standards and professionalism. I am satisfied that much of the necessary ground work has been done and that personnel and machinery has been, or is being put in place to achieve the changes HMCE need to make. There is much that is good and

some that is excellent within the present department. But the task is not yet complete and in some areas there is a considerable distance yet to travel. I agree 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. I cannot give an unqualified assurance that all is now well. The recommendations I make are designed to reinforce the change process, and in some cases to accelerate it or take it in a slightly different direction.

11. My detailed analysis of the further changes required, along with recommendations, can be found in Chapters 10, 11 and 12. A summary is given below. For most people my most significant recommendation so far as HMCE itself is concerned will be that HMCE should continue to have a separate role as an investigating force; and so far as the Solicitor's Office is concerned, that there should be a complete separation of the prosecuting function for HMCE's criminal cases from the organisation itself, through the creation of a separate prosecuting authority. I realise this will be regarded by some as a far-reaching step, but my researches show that only a radical move such as this is likely to be sufficient for HMCE to overcome the negative perceptions that exist within the criminal justice system. An associated recommendation is that the investigators should be provided with more dedicated expert legal advice to help improve the quality of cases that reach the new prosecuting authority.
12. In Chapter 12 I consider a number of criminal justice issues which have been thrown into prominence by the facts surrounding the London City Bond cases. These all have wider application than simply to HMCE. No one could claim that our criminal justice system works as effectively as it should. I have been particularly struck in the London City Bond cases by the considerable emphasis given to attacks on the process by which cases were investigated; and by the challenges facing prosecutors in these large and complex cases in meeting the demands of the Criminal Procedure and Investigations Act. I make recommendations in both these areas. I have also examined, and made separate recommendations on, the operation of the Regulation of Investigatory Powers Act 2000.

## **Summary of recommendations**

### Law enforcement

- (i) I have considered carefully whether HMCE should retain its role as an independent investigating force. I have concluded that it should. I believe that any organisational change to remove HMCE's investigation role would hinder the progress that has already made to put right what has gone wrong. It might also hinder the fight against serious and organised crime. (Paras 10.1 to 10.16.)
- (ii) I make three recommendations about the handling of human sources of information. In so doing I have considered the statutory regime provided by the Regulation of Investigatory Powers Act 2000, and the action that HMCE has taken to comply with that regime. My recommendations are:

- a. *The proposed new procedures for handling and managing human sources are implemented as a matter of urgency and that clear guidance is issued to all law enforcement officers about their responsibilities under the regime. (Chapter 10 para 95.)*
  - b. *When the proposed new procedures for handling and managing human sources are implemented, consideration should be given to putting in place a system which ensures that all those who deal at any level with any source keep records in a durable and retrievable form, compliant in all respects with the Paragraph 3 contents requirements of the Regulation of Investigatory Powers (Source Records) Regulations 2000 (Chapter 10 para 100.)*
  - c. *Consideration is given to expanding the role of the SMUs and the NSU in the control and management of all human sources of intelligence posing potential risk (Chapter 10 para 104.).*
- iii. It is of considerable importance that investigators are both well trained, and regularly trained. In the course of my Review I have found deficiencies, particularly in the regularity of training provided. The basic training provided to investigators is reasonably thorough and comprehensive and is regularly updated. However, subsequent training is somewhat ad hoc and not systematic. I have not been prescriptive about the solution, but have recommended that HMCE give consideration to the following:
  - a. *Regular refresher training for investigators every five years.*
  - b. *Specific training geared to particular key jobs within investigation, to include a written test before an officer is allowed to take up the new post.*
  - c. *Training to reflect changes in the criminal justice system. (Chapter 10 para 115.)*
- iv. Customs investigators are not currently subject to systematic external scrutiny. I believe they should be. This would be of benefit to them internally; and would also contribute to improving the perceptions of HMCE held by those outside the department. I have suggested 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. (Chapter 10 para 128.)*
- v. As part of the recognition by senior management at HMCE that there were serious problems which had to be tackled, a number of quality and management assurance systems have been introduced since the mid-1990s. Whilst I welcome that development, I do have some concerns that there

may be too many and that some rationalisation would be of benefit. I have recommended:

*That a review should be established to examine the full range of new assurance systems put in place in law enforcement since the events of the late 1990s; and that HMCE practice should be compared with that in the Police and other investigators, with a view to streamlining, where possible, the number of assurance systems in place whilst ensuring that HMCE are fully able to comply with the requirements on them as a professional investigating force. (Chapter 10 para 133.)*

- vi. I have spent a little time looking at the way Customs is structured. It is a UK-wide organisation with a regional structure. I have made one general recommendation here and two which apply particularly to Scotland. There is a separate legal system in Scotland and it is important that investigators identify at an early stage of their investigations whether any subsequent prosecution is to take place in Scotland, or elsewhere in the United Kingdom. It is also important that Customs staff have available to them dedicated expert advice about the Scottish legal system. With all these issues in mind I have made the following recommendations:

- a. *That HMCE management keep the issues of regional organisation under review to ensure that it best fits the needs of the organisation. (Chapter 10 para 138.)*
- b. *That arrangements are put in place to provide specialist qualified legal advice for the investigators and intelligence officers operating in Scotland. (Chapter 10 para 152.)*
- c. *That a system is put in place to ensure, so far as possible, that an early decision is taken in each investigation with a Scottish dimension as to whether the legal requirements of the Scottish system should be applied. Such a decision would be case specific. (Chapter 10 para 154.)*

#### Solicitor's Office

- vii. The structure of the Solicitor's Office has been subject to considerable change over the last few years, most recently as a result of the Gower/Hammond Review (see Chapter Nine and Appendix Six). These changes have rightly been directed towards increasing the independence of the prosecuting lawyers within the Office so that they can more easily and perceptibly exercise their role as prosecutors. I welcome the changes that have been made and recognise that the effect of those changes is being felt. However, I have concluded that these changes do not go far enough. Prosecuting solicitors at HMCE must be in a position where they are able to exercise their "minister of justice" role without fear or favour; and as importantly they must be seen by others as in a position to do this. I have concluded that 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 therefore recommended that:

*The Solicitor should no longer retain any responsibility for prosecutions brought by Customs & Excise. All prosecuting functions should be removed from the Customs & Excise Solicitor's Office and prosecutions conducted by a separate prosecuting authority. (Chapter 11 para 14.)*

viii. I have also made what I consider to be complementary recommendations to the above. There has now been in existence for some time a small corps of what are known as Investigation Legal Advisers. These are lawyers who are dedicated to providing advice to investigators pre-knock – that is to say before any criminal proceedings are commenced. I welcome this development; but believe that more is needed, both in terms of additional lawyers and their greater use by the investigators. This should improve the quality of cases which are presented to the new prosecution authority and ensure that the investigators receive regular and professional legal advice. My detailed recommendations are:

- a. *The number of ILAs should be substantially increased to enable the objectives of Customs identified in paragraph 11.36 to be achieved (the appointment of an ILA at the outset of all sensitive, complex or substantial investigations)*
- b. *ILAs should continue to have no part in the prosecution process.*
- c. *The CPS Inspectorate should inspect and report on the ILAs to give an assurance as to the quality of their work.*
- d. *Consideration is given to the transfer of responsibility for the ILAs to the Economic Secretary to the Treasury.*
- e. *A review is conducted of the procedures for the recording and retention of advice given by the ILAs in the course of investigations, and the assurance of the quality of that advice given. (Chapter 11 para 58.)*

ix. Another welcome development since the Gower/Hammond review has been the introduction of independent inspection of the Prosecution Office by Her Majesty's Crown Prosecution Service Inspectorate. I believe the work already done should be built on and my recommendations are as follows:

- a. *HMCPPI be given a clear and defined role in inspection and assuring the new prosecution organisation.*
- b. *This relationship should ideally be placed on a statutory basis.*
- c. *Specific and adequate resources are made available to HMCPPI for this purpose.*

- d. *If appropriate, and this will depend on whether the Prosecutions Office remains part of Customs, joint inspection should be undertaken involving HM Customs & Excise internal assurance division and HMCPPI.*
  - e. *As part of the further definition of HMCPPI's role, it should specifically have the function of quality assuring the work of and advice given by the Investigation Legal Advisers. (Chapter 11 para 76.)*
- x. HMCE is a major prosecutor in both the Crown Court and the Magistrates' Court. As such I think HMCE representatives should be more systematically involved with the Court Service and with other players in the criminal justice system. I make the following recommendation to that effect.

*I consider that more regular and systematic dialogue between, for example, HMCE and the Court Service on practical issues, and HMCE and the Home Office on policy issues, would be a profitable and fruitful development for all involved. I recommend that the Head of the new Prosecuting Authority takes the lead in putting suitable arrangements in place. (Chapter 11 para 80.)*

#### Criminal Justice System

- xi. I have spent some time considering, and discussing with a number of practitioners, how the current disclosure regime operates in cases of the size and complexity of the London City Bond cases. I do not believe the system works satisfactorily and neither do any of the judges or practitioners to whom I have spoken. I am aware that the Government is presently making changes to that regime through the Criminal Justice Bill now before Parliament. I hope that those changes are sufficient to address the problems prosecutors have in determining what is relevant against wholly inadequate defence case statement. If those measures do not achieve the desired outcome, I make the following recommendation:

*That if appropriate the disclosure regime is reconsidered and consideration given to effecting secondary disclosure by providing to the defence the schedule of non-sensitive material held or inspected by the prosecutor in connection with the case for the prosecution against the accused and permission granted to the defence to inspect any material so disclosed that appeared relevant. (Chapter 12 para 48.)*

- xii. One of the striking features about many of the London City Bond cases was the extent of the attacks by the defence on process issues. Whilst it is vital that the defence has the ability to raise issues of abuse of process, it is clear that a significant number of applications are ill-founded and take up extensive, disproportionate and valuable court time. Although a Practice Direction already exists, its provisions are not universally followed. I have therefore recommended that:

*Consideration be given by the new Criminal Rules Procedure Committee to the introduction of rules, or alternatively issuing by the Lord Chief Justice of practice directions, giving judges greater power to control the proceedings before them on all applications in criminal proceedings to be determined by the judge alone. (Chapter 12 para 77.)*

- xiii. Finally I have considered another aspect of the Regulation of Investigatory Powers Act 2000: the sections dealing with interception of communications. I believe there is a lacuna in the present regime so that where all intercepted material has been destroyed there is no procedure for the prosecutor to be assured that nothing the interceptors have heard undermines the prosecution case or assists the defence. In the light of that I recommend that:

*a. Consideration is given to amending the Code of Practice [issued pursuant to Section 17 of the Regulation of Investigatory Powers Act 2000] to make provision for the assurance of the prosecutor where all intercepted material has been destroyed. (Chapter 12 para 115.)*

It has also become apparent that many judges do not have sufficiently regular experience of cases involving intercept evidence necessarily to be fully acquainted with all the implications of RIPA. I therefore additionally recommend that:

*b. Consideration is given to including the topic (RIPA Part 1) within the syllabus of the Judicial Studies Board refresher course on criminal law. (Chapter 12 para 117.)*