

An Inspector calls: the new investigation regime

by

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I. Introduction

1. After a fairly detailed consultation process,¹ Finance Act 2007 changed the powers available to HMRC in relation to investigating certain criminal offences. The need for amendment arose because of the unification of the Inland Revenue and Customs and Excise in 2005.² Before unification, the two departments had different powers of investigation. Following their combination into a single body, it was regarded as anomalous for powers of investigation to depend on whether the offence being investigated was a Revenue or a Customs offence. So the new regime lays down a single set of powers that may be exercised where a Revenue and Customs offence is suspected.
2. The changes have been effected by amending the Criminal Law (Consolidation) (Scotland) Act 1995³ ('the 1995 Act'). Sections 24 to 26 of the 1995 Act previously governed powers of detention and questioning granted to Customs & Excise.
3. Broadly speaking, a 'Revenue and Customs offence' is an offence in relation to any matter for which HMRC has any functions.⁴
4. Perhaps not surprisingly, the general approach taken has been to extend the more restrictive powers of the former Inland Revenue by giving the new body the more extensive powers formerly conferred on Customs & Excise.

¹ The relevant consultation papers were Modernising powers, deterrents and safeguards: Criminal Investigation Powers: A Technical Consultation document (30th March 2006) and Modernising powers, deterrents and safeguards: Criminal Investigation Powers (17th January 2007). A further document, Modernising powers, deterrents and safeguards: Safeguards for taxpayers (17th May 2007), is now lapsed, and the results awaited.

² By the Commissioners for Customs and Revenue Act 2005 ('CRCA 05').

³ All references are to provisions of this Act, unless otherwise stated.

⁴ Criminal Law (Consolidation) (Scotland) Act 1995, section 23A(1) and (2). There are a number of exceptions. These are offences relating to prohibitions on the movement of goods (section 23A(3)), and various matters listed in Schedule 1 to CRCA 05, namely disabled person's tax credit, working families tax credit, child benefit, guardian's allowance, the issue of bank notes, the national minimum wage, oil and gas royalties, the payment of rates, rating lists, statutory adoption, maternity, paternity and sick pay, student loans, and council tax valuation lists. Note that working tax credit and child tax credit offences are subject to the new regime.

5. But it should be emphasised that the relevant provisions of FA 07 have not yet been brought into force, and it is at the moment not clear when they will be.

6. It should also be noted that if an act under the new provisions is invalid, for example a production order has not been properly obtained, it is important to challenge this before HMRC obtains any evidence. This is because the fact that evidence is obtained illegally is not necessarily enough to make it inadmissible: it depends whether, in all the circumstances, allowing the Crown to rely upon it would be unfair.⁵ This applies even where the illegality constitutes a breach of one's human rights.⁶ Moreover, any evidence obtained can be used in prosecuting any other crime,⁷ again whether or not the evidence has been obtained legally. So it is important to know the rules and to act as soon as HMRC seeks to do anything it has no power to do, rather than wait until trial and hope for success in arguing that evidence is inadmissible.

7. The new powers can be sub-divided into four categories, namely production orders, entry and search warrants, detention and questioning, and arrest. I shall consider each of these in turn.

II. Production orders

8. A production order is the means by which HMRC can have a person ordered to produce documents which may be required as evidence in relation to a Revenue & Customs offence. The definition of document is wide: it includes anything in which information is recorded, and any part of such a thing.⁸

⁵ *Lawrie v. Muir* 1950 J.C. 19. In relation to a former Customs & Excise matter, see in particular *Singh v. H.M. Advocate* 2001 J.C. 186.

⁶ *McGibbon v. H.M. Advocate* 2004 J.C. 260.

⁷ *H.M. Advocate v. Shepherd* 1997 J.C. 131.

⁸ Section 23K(1)(a) and (b).

9. An officer can obtain a production order by applying to the Sheriff⁹ and swearing on oath (presumably by affidavit) that he has reasonable grounds for suspecting that a Revenue & Customs offence has been, or is being, committed, and that the person named in the application has a document which may be required as evidence.¹⁰ It should be noted that the second limb of the test is higher: the officer must swear that the person in fact has relevant documents, and not merely that the officer has reasonable grounds for suspecting that he does.

10. The application 'may' be made *ex parte*, in chambers:¹¹ thus, not only without the presence of the person against whom the order is to be directed, but also in private. Presumably, the Sheriff to whom the application is made will have to decide whether it is appropriate to proceed in this manner. It will therefore be for the applicant officer to persuade the Sheriff of this. The test is likely to be that unless the application is made in this way, there is at least a real risk that documents will be concealed or destroyed. It is implicit from the permissive nature of this provision that the legislation envisages something more than the fact that what is suspected is a criminal offence. Although it may be difficult in practice for HMRC to provide much more (for example, evidence of previous concealment or destruction by the person in question), this does not mean they need not do so in order to justify a private hearing. In any event, where there is a fear that documents will be lost or destroyed, it is far more likely that HMRC will proceed by way of search warrant rather than by way of production order.

⁹ Any Sheriff in Scotland: section 23B(5).

¹⁰ Section 23B(2)(a) and (b).

¹¹ Section 23C(1).

11. A production order requires the addressee to deliver the relevant documents or to give access to them and allow copies to be made or the documents to be removed.¹² The way the legislation is drafted¹³ suggests that the order can require one or the other but not both: so either delivery or access plus copying and removal rights. The only exception to producing documents required by a valid order is legal professional privilege.¹⁴

12. The production order must include a time limit on compliance, namely 10 (working) days,¹⁵ or such other period as the Sheriff considers appropriate.

13. Failure to comply with a production order may be dealt with as contempt of court.¹⁶ This means, in effect, by way of fine or imprisonment.¹⁷ Moreover, the intentional falsification, concealment, destruction or disposal of documents falling with the order are criminal offences.¹⁸ It is not clear to what the intention must relate: whether merely that the concealment is intentional, or whether the person must in addition know (or at least should know) that the document falls within the order. Presumably the latter: otherwise, a person could commit an offence before even being served with the order, and (on one interpretation) before even the order is granted. No offence is committed by anything done after the document has been delivered or an officer has been given access, provided one has the written permission of the officer or the Sheriff who made the order, or by anything done more than two years after the date the order was granted, unless within the period an officer gives written notice to the person in question that the order

¹² Section 23B(3).

¹³ See in particular sections 23D(2) and 23K(2).

¹⁴ Section 23B(6).

¹⁵ Section 23B(4)(a); excepted days are Saturdays, Sundays and public holidays in the relevant area (section 23B(8)). The relevant area is the area the documents are to be found, as opposed to the Sheriffdom in which the order is granted.

¹⁶ Section 23B(7).

¹⁷ Although in theory unlimited, in practice imprisonment for contempt of court is never more than a couple of months.

¹⁸ Section 23D(1).

has not been complied with to that officer's satisfaction.¹⁹ Although it is likely to be cheaper and more practical simply to keep the documents, it may in certain circumstances be appropriate to apply to have the certificate set aside by judicial review. This is because the certificate in effect states that the officer believes an offence has been committed. A particular client might not want to have such a certificate in place.

14. Falsification etc. may be prosecuted either summarily or on indictment. In the case of summary proceedings, the possible penalties are a fine of up to £5,000, one year's imprisonment, or both;²⁰ on indictment, the penalties increase to an unlimited fine, two years' imprisonment, or both.²¹

15. Both the addressee and the applicant officer may apply to the Sheriff for the order to be varied or discharged.²² There is as of yet no specific procedure laid down,²³ so the application would be by petition. The form of this is laid down by Act of Adjournal.²⁴

III. Entry and search warrants

16. These should properly be called entry, search and removal warrants: their purpose is to allow an HMRC officer, with various others, to enter premises, search them, and remove certain things they might find there.

17. The officer must swear on oath²⁵ that he has reasonable grounds to suspect that a Revenue & Customs offence has been, or is being, committed,²⁶ and that evidence of the

¹⁹ Section 23D(3) and (4).

²⁰ Section 23D(5)(a), in conjunction with section 225(1) of the Criminal Procedure (Scotland) Act 1995 ('CPSA 95').

²¹ Section 23D(5)(b).

²² Section 23C(2) and (3).

²³ The legislation allows specific provision to be made: section 23C(4).

²⁴ See CPSA 95 section 134 and Act of Adjournal (Criminal Procedure Rules) 1996 (S.I. 1996 No. 513), Form 16.4-A.

²⁵ Section 23E(1).

²⁶ Section 23E(2)(a).

offence is to be found in or on specified premises.²⁷ Again, it appears to be insufficient for the officer merely to have reasonable grounds to suspect that such evidence may be found on the premises, but it is difficult to say what more a Sheriff is likely to require.

18. Presumably, the application may be made *ex parte* in chambers, although this is not specified in the legislation. The nature of entry and search warrants makes it much more likely that HMRC will apply for them than for productions orders where the factors that might suggest such a hearing obtain. But it is likewise reasonably clear that the legislation envisages something more being relied upon than simply the nature of the offence to justify a suspicion that any notice given to the addressee will lead to the destruction or concealment of documents or other items.

19. The application may certainly be made to any Sheriff in Scotland.²⁸

20. If granted, a warrant authorises an officer to enter (if necessary by force) and search the premises²⁹ specified in the warrant.³⁰ It is not clear whether the warrant must identify the officer; presumably not. But it must specify the premises with sufficient certainty so that, on examining the warrant, the occupier of any premises will be able to satisfy himself that the officer has permission to search those premises.³¹

21. The officer may take with him such persons as appear to him to be necessary.³² It appears that these persons need not be named in the application or in the warrant. But the

²⁷ Section 23E(2)(b).

²⁸ Section 23E(8).

²⁹ 'Premises' is defined to include any place, vehicle, vessel, hovercraft, aircraft, offshore installation (as to which, see the Mineral Workings (Offshore Installations) Act 1971, section 12(1), in conjunction with regulation 3 of and Part II of Schedule 1 to the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995 (S.I. 1995 No. 738)), and any tent or other moveable structure.

³⁰ Section 23E(3).

³¹ *Bell v. H.M. Advocate* 1988 J.C. 69.

³² Section 23E(5)(a).

Sheriff may impose conditions on the warrant,³³ and these may limit the number of persons the officer may take.

22. In addition, the warrant authorises the seizure and removal of any document or other thing that an officer finds that he has reasonable cause to believe may be required as evidence for proceedings in relation to the relevant offence.³⁴ Also authorised is the search of any person found on the premises whom the officer has reasonable cause to believe is in possession of such documents or things.³⁵ Any document or thing found may be copied.³⁶ It is not clear whether this allows photographs to be taken of anything other than documents; presumably it is envisaged that it should.³⁷

23. As mentioned, the Sheriff may impose conditions on the warrant.³⁸ It may be that standard conditions will be laid down by Act of Adjournal, but the sort of things that might be included are restrictions on the time of day at which the warrant may be enforced, the number of persons who may enter and their qualifications, a requirement on the officer executing the warrant to inform whoever is found at the premises of the contents of the order, and about, for example, legal professional privilege, to allow the person a reasonable time to obtain the presence of a solicitor before any search or seizure is done, and so on.

24. The warrant has a limited lifespan: it is valid for one month.³⁹ So check the date.

³³ Section 23E(4).

³⁴ Section 23E(5)(b).

³⁵ Section 23E(5)(c). The search must be carried out by a person of the same sex.

³⁶ Section 23E(6).

³⁷ But see section 23G(4)(b), which refers specifically to copies and photographs.

³⁸ Section 23E(4).

³⁹ Section 23E(3).

IV. Common provisions

25. There are further provisions in relation to production orders and search and entry warrants that are common to the two.

26. First, a list of things removed must be supplied to the person from whom they have been removed, or the occupier of the premises from which they were removed, but only if a request is made.⁴⁰ It is to be noted that an accused cannot make such a request. Although there are other safeguards for an accused, there may be a difficulty if documents are returned before an accused is charged with any offence. The existence of such documents may not be disclosed by the Crown.

27. The list must be provided 'within a reasonable time' of the request.⁴¹ As regards search and entry warrants, it seems that if the request is made during the search the list need not be provided before the documents are actually removed from the premises. Indeed, the drafting suggests that the list cannot be provided until after removal. So far as possible, the person should keep his own list at the time.

28. A more restricted category of persons may apply for access to the documents or things in question or to make copies or take photographs of them. This is the haver or a person acting on his behalf (in the case of a production order) or the person from whose control the documents were removed (in the case of a search and entry warrant; the occupier of the premises has no independent right).⁴² The application is to be made to the officer in charge of the investigation.⁴³ It is far from clear how one should actually address the letter, unless one happens to know the name of that officer.

⁴⁰ Section 23F(3).

⁴¹ Section 23F(4).

⁴² Section 23G(3).

⁴³ Section 23G(2).

29. The application must be granted,⁴⁴ unless the officer in overall charge has reasonable grounds to believe that this would prejudice the investigation of the relevant offence or of any other Revenue & Customs offence, or any criminal proceedings which may follow either.⁴⁵ Again, it is not clear what 'prejudice' means. But it is submitted that the fact that an accused might improve his defence is not enough. There should be some element of unfairness to Revenue & Customs beyond simply an increase in the possibility that their suspect might be found not guilty.

30. Any access is supervised: so some HMRC person will always be there.⁴⁶

31. Provision is made where HMRC fail to comply with a request to provide a list of documents and things or fail to provide access or copies. The person who made the request⁴⁷ may apply to the Sheriff⁴⁸, who may order compliance with the request at such time and in such manner as he thinks fit.⁴⁹ One difficulty arises out of what appears to be a wrong reference. As regards production orders, it is provided that an application may be made for a failure to comply with 'section 23F(2) or (3)'.⁵⁰ These are, respectively, the obligation to provide a list and the list of persons entitled to apply. How there can be a failure to comply with the latter provision is not easy to understand. Easier is the concept of a failure to comply with section 23F(4): this requires the officer to provide the list within a reasonable time or the request. But one cannot apply for an order in relation to a failure to comply with this requirement. So will an application for failure to comply ever

⁴⁴ Section 23G(4)(b).

⁴⁵ Section 23G(5).

⁴⁶ Section 23G(4) and (6).

⁴⁷ Section 23H(3).

⁴⁸ Section 23H(2).

⁴⁹ Section 23H(4).

⁵⁰ Section 23H(2)(a).

succeed in the context of production orders? The defence could simply be that there has been no failure, no matter how much time has gone by since the request was made.

32. Apart from that, the Sheriff merely ‘may’ order compliance.⁵¹ This suggests that the power is discretionary. The factors that a Sheriff is likely to take into account will include the amount of work HMRC would have to do to comply with the request, the time elapsed since the request, what steps HMRC have actually taken in that time towards compliance, and what remains to be done.

33. Finally, confidentiality: the only ground of confidentiality available is ‘legal privilege’.⁵² Documents falling within it are those between legal adviser and client and those created in contemplation of legal proceedings if, in either case, they would be protected from disclosure in legal proceedings because of confidentiality. Again, the important point is that legal privilege should be claimed before documents are handed over.

V. Detention and questioning

34. The third category of powers is detention and questioning. There are two levels of powers. The first is where an authorised officer has reasonable grounds to suspect that a person has committed or is committing a Revenue & Customs offence at any place. The second, higher level is where the offence is punishable by imprisonment. I shall consider each in turn.

35. In respect of any suspected offence, the actual suspect must first be informed of the suspicion and of the general nature of the offence, and also that failure to comply with

⁵¹ Section 23H(4).

⁵² Section 23J(1).

the officer may be an offence.⁵³ This creates a serious danger. This is because in addition to personal details needed to establish the person's identity (name, address, date of birth, and nationality, and also place of birth in such detail as the officer may consider necessary or expedient to establish the person's identity),⁵⁴ the person may also be asked for an explanation of the circumstances giving rise to the officer's suspicion, in other words, to disclose his defence. It is not an offence to fail to give an explanation.⁵⁵ Yet no warning need be given that a person is not under any obligation to give an explanation. Worse still, the warning that failure to provide information may constitute an offence may well suggest that failure to explain may constitute an offence. The position cannot be justified by reference to the word 'may': this is because even in relation to the other matters, a reasonable excuse constitutes a defence.⁵⁶ Finally, no warning is given that a failure to give an explanation may be commented on at trial, which it presumably will be. It will be interesting to see whether HMRC improve the position in practice. If not, convictions that rely on any explanation given at the time, or on the failure to give an explanation, may well be put at risk.

36. One further point is that the provision allowing an explanation to be requested pre-supposes that in practice something more than the general nature of the offence is stated: the person will presumably have to be told the specific circumstances giving rise to the suspicion.

37. In addition to being questioned, the person suspected⁵⁷ may be detained. There are three purposes for detention. The first is verifying any personal details he has given,⁵⁸ but

⁵³ Section 23M(7)(a).

⁵⁴ Section 23M(2).

⁵⁵ See section 23P.

⁵⁶ Section 23P(1).

⁵⁷ Section 23M(3).

only if the officer considers such verification may be completed quickly.⁵⁹ ‘Quickness’ is obviously a fairly elastic concept. The second is to establish whether the person may be suspected of having committed some other Revenue & Customs offence,⁶⁰ but only if the person has given a name and address⁶¹ and the issue can be established ‘quickly’.⁶² The third is for the officer to note any explanation proffered of the circumstances giving rise to the suspicion.⁶³ The suspect must be told of the reason for the detention,⁶⁴ and that failure to comply may be an offence.⁶⁵ The officer may use reasonable force to detain him.⁶⁶

38. The particularly controversial power is fingerprinting. If a suspect⁶⁷ gives his name and address,⁶⁸ an officer may require fingerprints to be given, for the purpose of verifying the person’s name and address⁶⁹ or establishing whether he may be suspected of another Revenue & Customs offence.⁷⁰ The officer must inform him of the existence of the power, why he proposes to exercise it in the particular case (it is not clear whether this means simply which of the two purposes are being sought to be achieved, or the reasons why it is appropriate to seek to achieve them by means of fingerprinting), and that failure to comply may constitute an offence.⁷¹ It is provided that as soon as the

⁵⁸ Section 23M(3)(a).

⁵⁹ Section 23M(4).

⁶⁰ Section 23M(3)(b).

⁶¹ Section 23M(5)(a).

⁶² Section 23M(5)(b).

⁶³ Section 23M(3)(c).

⁶⁴ Section 23M(7)(c).

⁶⁵ Section 23M(7)(d).

⁶⁶ Section 23M(6).

⁶⁷ Section 23N(1).

⁶⁸ Section 23N(1).

⁶⁹ Section 23N(2)(a).

⁷⁰ Section 23N(2)(b).

⁷¹ Section 23N(3).

relevant purpose has been achieved, the fingerprints taken are to be destroyed.⁷² It is not clear how this is to be policed: certainly, there is no provision for the person fingerprinted to be informed that the prints have been destroyed, nor any provision allowing him to find that information out or to obtain an order for destruction. But most controversially, this power was not taken by HMRC for England and Wales. Apparently, fingerprinting was objected to by some of the consultation responses coming from England and Wales, but not by any of the responses from Scotland.⁷³ So HMRC took the view that in Scotland no-one was too concerned about fingerprinting, and that they would accordingly take that power. This rather seems to fly in the face of the avowed purpose of the consultation in aligning powers throughout not just the combined department but also throughout the United Kingdom.

39. As regards persons other than suspects, if believed by an officer to have information relating to the offence they may be required to provide the same personal details as suspects.⁷⁴ Equally, they must first be informed of the suspicion, the general nature of the offence, and the belief that they have relevant information,⁷⁵ as well as the fact that failure to comply may constitute an offence.⁷⁶

40. Finally, offences. As mentioned above, it is an offence to comply, in short, with any requirement an officer makes under the detention and questioning powers, except a failure to provide an explanation.⁷⁷ A 'reasonable excuse' is a valid defence, but what

⁷² Section 23N(2).

⁷³ See Modernising powers, deterrents and safeguards: Criminal Investigation Powers (17th January 2007), page 37.

⁷⁴ Section 23M(2).

⁷⁵ Section 23M(7)(b).

⁷⁶ Section 23M(7)(d).

⁷⁷ Section 23P(1).

will be regarded as a reasonable excuse is not easy to imagine. Where the person is a suspect, the maximum fine is £1,000; where not, it is £500.⁷⁸

41. The second level of detention is where the crime suspected is punishable by imprisonment. The additional powers are available only in relation the suspect himself.

42. At the time of detention, the same information must be given to the accused, and again reasonable force may be used.⁷⁹ But the person may be taken to an HMRC office or any other place,⁸⁰ for the purpose of investigating the offence and whether to institute proceedings.⁸¹ There is a specified time limit on detention, namely six hours⁸² (which suggests that ‘quickly’, although elastic, must mean less than six hours), less any time spent in detention under any other provision but on the same grounds.⁸³ But detention must be ended earlier if the person is arrested, is detained under some other legislation, or where there are no longer any grounds for suspecting him of the offence in question.⁸⁴

43. The person is entitled to have a solicitor and one other person informed of the fact of detention and of the place to which he is taken, in general without delay. But there may be delay if necessary in the interests of investigation or prevention of crime, or the apprehension of offenders.⁸⁵

44. A record must be kept of various matters. These are the place the detention begins and any place to which the suspect is taken; the general nature of the suspected offence; and the time the detention begins, of arrival at any place to which the suspect is taken, the

⁷⁸ These amounts are, respectively, levels 3 and 2 on the standard scale at the moment: CPSA 95, section 225(1).

⁷⁹ Section 24(1), (5) and (7).

⁸⁰ Section 24(1).

⁸¹ Section 24(1)(a) and (b).

⁸² Section 24(2).

⁸³ Section 24(4).

⁸⁴ Section 24(2)(a) to (c).

⁸⁵ Section 25(1).

suspect is informed of his rights, any request for intimation to a solicitor or other person is made and is complied with, and of the person's release and, as the case may, further detention or arrest.⁸⁶ Presumably the intention is that the record is made as these things happen. So one ought to check the record and complain of any errors as one goes along.

45. The person must be informed of his right to silence (although he has none as regards the usual personal details), both when detained and on arrival at the HMRC office to which he is taken.⁸⁷ He may thereafter be questioned about the offence.⁸⁸ He may also be searched,⁸⁹ and any relevant possessions taken.

VI. Arrest

46. The final power conferred under the amended provisions is that of arrest. Where there are reasonable grounds for suspecting that a person is guilty of an offence consisting of failure to give any personal details or fingerprints required under the detention and questioning powers, or of failing to remain with an officer in that context,⁹⁰ or indeed is guilty of a Revenue & Customs offence generally,⁹¹ an authorised officer is entitled to arrest that person without warrant. An authorised officer means an officer acting with the authority of the Commissioners for HMRC. Whether HMRC will in practice grant general authority to make arrests, or only authority to make specific arrests, is not clear. Administrative convenience would indicate the former.⁹²

47. The important point about arrest in contrast to detention is that it is thereafter for the accused to seek bail pending trial. This may be granted by HMRC itself, or it may be

⁸⁶ Section 24(5)(c) to (f).

⁸⁷ Section 24(8) and (8A).

⁸⁸ Section 24(6)(a).

⁸⁹ Section 24(6)(b).

⁹⁰ Section 23P(3).

⁹¹ Section 26A.

⁹² Section 26B(1).

granted by the court. Bail will be subject to conditions. The usual ones relate to residence at a specified address, not committing any offence while on bail, reporting at specified intervals to a police station, and appearing or being represented, as required, at any hearing in relation to the prosecution in question.

VII. Conclusion

48. The exercise in aligning HMRC's powers has succeeded in creating a single set of powers available across the board of HMRC's functions. It has not succeeded in aligning these powers throughout the United Kingdom. But more important than the powers as written in the legislation is the policies that HMRC will adopt in using these powers, and the consistency with which they will be applied by different officers. These may be expected to evolve in time, at least partly in reaction to court decisions. But any challenges to what HMRC is doing should be made as soon as possible, and wherever possible before any information is provided.