
HM Revenue and Customs and the Taxpayer:

Modernising Powers, Deterrents and Safeguards

Criminal Investigation Powers A Technical Consultation Document



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1: Summary

1. In March 2006 Her Majesty's Revenue and Customs (HMRC) consulted on modernising powers, deterrents and safeguards. For criminal investigations, the objective is to provide modern, consistent and effective powers with safeguards to protect suspects' rights.
2. The consultation document asked for views on whether the adoption of existing provisions that are generally used for the investigation of other kinds of crime would be appropriate. That option was preferred by most of those who responded to the question. The present consultation document looks in more detail at how this could be implemented and invites comments. It is anticipated that, in the light of the responses, specific proposals will be worked up in detail on which there will be a further opportunity to comment.
3. For England, Wales and Northern Ireland the existing, generally used powers are those in the Police and Criminal Evidence Act 1984 (PACE). Certain of these powers are already available to HMRC for use when investigating suspected offences related to ex-HM Customs and Excise (HMCE) matters. Making these powers available for ex-Revenue matters as well would provide HMRC with the powers and safeguards that Parliament has already considered appropriate generally for the investigation of crime.
4. This document also seeks views on the possibility of modifying two of the PACE provisions when they are applied to HMRC to make them more suitable for the crimes HMRC investigates:
 - Modifying the search warrant powers to retain HMRC's current power to search persons on the premises where they are thought to be in possession of evidence.
 - Modifying search warrant and production order powers so judges or magistrates could issue warrants and orders where there are reasonable grounds to suspect an offence has been, or is about to be, committed.
5. Views are also invited on the appropriateness of giving officers of HMRC powers to take fingerprints and to charge or bail suspects.
6. PACE provides important safeguards for suspects which are incorporated into the provisions themselves and contained in the PACE Codes of Practice which provide clarity and set out suspects' rights. Views are also sought on whether the PACE Codes of Practice should apply directly to HMRC's investigations so providing greater clarity and certainty. At the moment HMRC must only "have regard to" the Codes.
7. PACE does not apply in Scotland. Instead provisions appropriate to the Scottish criminal justice system would need to be developed taking into account precedents and adopting suitable provisions where they exist. This document sets out in detail the matters that would have to be considered when developing these provisions.
8. If the broad approach set out in this document is adopted it would mean that a number of existing provisions would be superseded and could be

repealed, in total 20 pages of tax legislation. Replacing this legislation by a smaller number of provisions would improve clarity and consistency.

2: Background

9. HMCE and the Inland Revenue merged in April 2005 to form Her Majesty's Revenue and Customs (HMRC). The Commissioners for Revenue and Customs Act 2005 (CRCA) which established HMRC transferred the powers of the predecessor departments to HMRC and "ring-fenced" them so they could only be used for their original purpose. For example, powers introduced for HMCE to use when administering VAT can still only be used for VAT. They cannot be used for corporation tax or any of the other matters HMRC deals with.
10. During the Second Reading of the Commissioners for Revenue and Customs Bill the Paymaster General announced a major review, involving wide consultation, of the powers, deterrents and safeguards for HMRC. An important part of the review is considering the scope for aligning, rationalising and modernising existing powers and safeguards.
11. HMRC is responsible for investigating suspected criminal activity across the whole range of its responsibilities throughout the UK, including investigating tax fraud and tax credit fraud involving organised crime¹. HMRC must carry out investigations effectively if it is to protect the Exchequer, deter crime, reduce the social harm crime causes, and help deliver fairness. To do this successfully HMRC needs appropriate powers that allow it to detect criminal activity, investigate and obtain evidence effectively and efficiently. To balance the powers there must be appropriate safeguards for suspects.
12. The review is considering a range of issues, including the criminal investigation powers HMRC inherited from the predecessor departments. A consultation document was published on 30 March 2006 – "Modernising Powers, Deterrents and Safeguards: The developing programme of work". That document provides more information about the background and context to the review and sets out a range of options. Readers of this consultation may find it useful to consider that document to see the broader context for this work². Paragraphs 5.20 to 5.24 of the 30 March document concern HMRC's criminal investigation powers. They are reproduced at Annex A for convenience.
13. HMRC aspires to have criminal investigation powers that:
 - Are proportionate to the suspected offence and comply with the Human Rights Act.
 - Provide a fair balance between the powers HMRC needs and safeguards for citizens.
 - Are consistent across HMRC's responsibilities as far as possible (so giving greater certainty to both citizens and HMRC).

¹ The Serious Organised Crime Agency (SOCA) took over HMRC's work dealing with drug trafficking and associated criminal finance but not all work involving serious organised crime.

² Available at www.hmrc.gov.uk/about/powers-appeal.htm

- Are efficient, effective and modern.
 - Gather evidence that may be reliably used in court proceedings.
 - Are consistent with, and respect the principles underlying, the criminal justice systems.
14. Responses to consultation have generally supported the view that tax crime is a crime and should, where possible, be investigated in the same way as other crimes of a similar seriousness. In many cases this means HMRC should use the same provisions as other law enforcement agencies when investigating similar crimes. These would only be available for criminal investigations; they could not be used by HMRC during civil enquiries. In addition if it becomes apparent during a criminal investigation that there are no longer grounds to suspect that a crime has been committed the powers considered would no longer be available.
 15. Although the objectives and principles underlying HMRC's criminal investigation powers and safeguards should be consistent across the UK, the detailed provisions themselves have to reflect the different criminal justice systems. In Scotland powers and safeguards must be consistent with the Scottish criminal justice system.
 16. Chapters 3 to 6 below set out the existing provisions for criminal investigations and show that these are sometimes inconsistent and can be unwieldy to use. They also set out in more detail the responses to the March consultation. Chapters 7 to 9 below set out how the relevant PACE provisions could be adopted for England, Wales and Northern Ireland, and considers some possible modifications to these.
 17. PACE legislation does not apply in Scotland and provisions based on PACE would be inappropriate and incompatible with the Scottish criminal justice system. Chapters 10 to 17 below set out issues relating to the design of powers and safeguards in Scotland. The aim is to design provisions for Scotland that meet the objectives set out at paragraph 13 above and, in particular, are appropriate for Scotland's legal system. The Crown Office and Procurator Fiscal Service (COPFS) is responsible for the prosecution of crime in Scotland and HMRC works closely with COPFS. It is important that the powers in Scotland support this relationship and the role of the Procurator Fiscal.
 18. The provisions discussed in this document must be used in a way that is proportionate and respects the Human Rights Act. The options included generally concern either existing provisions or designing new ones based on existing precedents. This means the provisions already incorporate appropriate safeguards (for example, judicial authorisation before some can be used) and their track records shows they comply with the Human Rights Act. However, considering safeguards is an important part of this review and HMRC would welcome ideas for new safeguards for citizens in respect of the powers being considered in this consultation.
 19. HMRC's use of criminal investigation powers is subject to review by Her Majesty's Inspectorate of Constabulary. The Independent Police Complaints Commission can also investigate the most serious allegations of misconduct made against HMRC staff in England and Wales. These

arrangements provide important safeguards for citizens in relation to the powers considered in this document. HMRC is now subject to the same standards of independent, external scrutiny already established for the police and other law enforcement agencies.

20. More details about the review, including the previous consultation document, can be found at <http://www.hmrc.gov.uk/about/powers-appeal.htm>.

How to Comment

21. Comments on any aspect of this consultative document are welcome. Chapter 19 contains a summary of those areas on which views are particularly invited. Comments should be received by 1 November 2006.

Comments should be sent

by e-mail to: powers.review-of-hmrc@hmrc.gsi.gov.uk

or by post to: HMRC and Criminal Investigation Powers, Room 1C/03, 1st Floor, 100 Parliament Street, London SW1A 2BQ

or by fax to: 020 7147 2460

The Review team can be contacted by telephone on: 020 7147 2401

Confidentiality

22. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
23. If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. If you have any queries about the application of the FOIA please contact the review of powers (details at paragraph 21 above).
24. The Department will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Current Powers and Safeguards

25. This part of the document considers HMRC's current powers and safeguards and analyses the issues that arise with their use. It also summarises the responses on criminal investigations to the March consultation document.

3: UK Wide Provisions

26. In order to investigate tax crime, HMRC has powers to:

- Apply for production orders.
- Apply for search warrants.
- Make arrests.

It also has powers in relation to suspects. All of these are subject to safeguards.

27. These powers cover the whole of the UK and are included in a number of Acts of Parliament. Although the provisions are often similar there are a number of inconsistencies. These may be minor but sometimes lead to important differences in the way a power may be exercised. For example, there is a search warrant power in respect of offences related to VAT in the Value Added Tax Act 1994 and a very similar provision for insurance premium tax in the Finance Act 1994. However the direct tax power in Section 20C TMA 1970 requires a different level of internal and judicial authorisation
28. A list of the tax specific powers relevant to this consultation is at Annex B. Many of these provisions could be repealed if they were replaced by new consistent provisions for HMRC.
29. HMRC also has more specialised powers used to protect frontiers, powers under the Proceeds of Crime Act 2002 (POCA) and various surveillance powers. **Potential changes to these powers are not within the scope of this consultation document.** Surveillance powers are discussed at paragraphs 5.23 and 5.24 of the consultation document published on 30 March 2006 (see Annex A).
30. It is intended that future work will look at HMRC's powers under POCA and the provisions used to protect frontiers. Although changes to these are outside the scope of this current consultation they may provide useful precedents. For example, where this document discusses a new power or safeguard the approach taken by relatively recent legislation like POCA could provide a useful model.

Production and Access Orders

31. These provisions allow HMRC to apply to a magistrate, judge or sheriff for an order requiring a person to deliver or give access to information where there are reasonable grounds to suspect it may be required as evidence relating to a relevant criminal offence. They are generally used to obtain

information from a third party, for example a bank, rather than the suspect. As Annex B shows the practice of providing a specific power for a particular tax means that there are a number of similar production order powers at the moment.

32. The current provisions are inconsistent in a number of ways, such as:
- Whether the orders should be issued by a judge or a magistrate.
 - The time given to comply with an order.
 - Whether the hearings where HMRC applies for an order are “inter partes” (so the intended recipient of the order has the right to attend) or “ex parte” (so they do not have the right to attend).

Search Warrants

33. These powers allow HMRC to apply for a search warrant. Depending on which provision is being used the applications can be to a magistrate, judge or sheriff. The provisions relevant to this consultation are listed in Annex B. There are practical problems with the use of some of the existing search warrant powers. For example, the ex-Revenue powers require two Commissioners for HMRC to personally authorise an application before a judge can be asked to consider issuing a warrant. This is a cumbersome procedure that can put tax at risk. Fraudsters (and their assets) may move beyond HMRC’s jurisdiction before a warrant is obtained.

Powers across HMRC’s responsibilities

34. The existing search warrant and production order powers are generally linked to specific taxes³. Using the existing powers causes difficulties when the suspected criminal activity involves more than one tax. For example, where a fraud involves VAT and corporation tax two search warrants might be needed even though they are to be executed at the same time and at the same premises. Separate teams are also needed to execute each warrant to ensure there is no doubt about the warrant under which evidence is seized.
35. It is important to have statutory powers that are clear, consistent and unambiguous to citizens, the courts and HMRC. One way to achieve this would be to introduce a single power to apply across HMRC’s responsibilities. This would mean that in future where the relevant conditions were met HMRC could apply for a single warrant or order although a number of taxes were involved in the suspected offence.

Arrest and Detention

36. HMRC has various powers of arrest and detention in connection with offences related to ex-HMCE matters (the powers relevant to this consultation are listed in Annex B) and trained and experienced officers to carry out those arrests. HMRC has no powers of arrest or detention for ex-Revenue matters and relies on the police for support. Arranging the

³ For examples see paragraph 10(3) and (4) Schedule 11 VAT Act 1994 and section 20C(1) Taxes Management Act 1970 (TMA 1970).

necessary police support can be difficult, especially where more than one force is involved and arrests need to be co-ordinated. Delays have occurred in the past, which have led to increased financial losses and difficulties apprehending suspects. There can also be complications where the suspected offences include both ex-HMCE and ex-Revenue matters – HMRC can make arrests in respect of some of the offences but not others. One solution would be for HMRC to have consistent powers of arrest that applied to both ex-HMCE and ex-Revenue matters. Chapters 7 (for England, Wales and Northern Ireland) and 14 (Scotland) discuss the options.

“Cross Border” Issues

37. As a UK wide organisation HMRC inevitably investigates crimes that involve different countries within the UK. Investigating such crimes involves complex issues around jurisdiction and the use of appropriate powers. Advances in communications and the increasing complexity of crime such as fraud mean the issues that arise where crimes involve more than one part of the UK are likely to become more common and complex. It is important to have clarity as to which powers and safeguards apply in these cases. Chapter 16 below looks at options for improving the present position.
38. Where crimes involve two or more countries in the UK it may be possible for more than one jurisdiction to instigate a prosecution. In these cases the practice followed was set out in a letter of 26 October 2004 from the Paymaster General to the Chartered Institute of Taxation that is reproduced at Annex C. That practice is still followed by the Revenue and Customs Prosecution Office (RCPO) and COPFS.

4: Provisions Specific to England, Wales and Northern Ireland

39. In addition to the UK wide provisions described above, certain powers are only available to HMRC in England, Wales and Northern Ireland.
40. For England and Wales some PACE provisions are available to HMRC when investigating offences relating to ex-HMCE matters. The powers are applied to HMRC by section 114 of PACE and the regulations made under that section⁴. The PACE powers are modified to be suitable for HMRC in a number of ways. For example, where PACE specifies a certain rank of police officer an appropriate grade of officer in HMCE is substituted. Annex D details all the PACE provisions currently available for investigations by officers of HMRC and applying to persons detained by those officers where the investigation relates to an ex-HMCE matter. These are not available to HMRC for investigations concerning ex-Revenue matters.
41. The PACE provisions do not apply to Northern Ireland. However, in Northern Ireland The Police and Criminal Evidence (Northern Ireland) Order 1989 (SI1989/1341) provides powers and safeguards almost identical to those in PACE. These are also available for ex-HMCE functions by virtue of article 85 of the regulations and the Order made under that article⁵.

⁴ The Police and Criminal Evidence Act 1984 (Application to Customs and Excise) Order 1985 - SI 1985/1800

⁵ The Police and Criminal Evidence (Application to Customs and Excise) Order (Northern Ireland) 1989 – 1989 No. 465

5: Provisions Specific to Scotland

42. In addition to the provisions available across the UK, HMRC has some powers only relevant to Scotland.

Common Law Search Warrants

43. HMRC has access to common law search warrant powers in Scotland, either by being empowered directly or by asking the police to assist in investigations. There is no general statutory arrangement between COPFS and HMRC (unlike those between COPFS and the Scottish police forces and SOCA) but in practice the Procurator Fiscal plays a vital role, advising on and facilitating the obtaining of appropriate search warrants. COPFS also has a more direct role in investigations conducted in terms of the Proceeds of Crime Act 2002 (POCA).

Officer of Law Status

44. Officers of HMRC are “officers of law” when carrying out some criminal investigations in Scotland. Chapter 15 below looks at the scope for providing greater clarity about their status in this area.

Powers Relating To Suspects

45. Measures to modernise and increase the effectiveness of the rules followed by police when establishing a suspect’s identity have just been passed by the Scottish Parliament. Officers of HMRC face the same issues as the police when carrying out investigations and Chapter 17 below considers whether these measures would also be appropriate for HMRC.

6: Responses to Consultation

46. A complete summary of responses to the consultation document will be published in October. In the meantime the responses relevant to powers for criminal investigations in England, Wales and Northern Ireland are summarised below.
47. Some respondents felt that they were not qualified to speak on criminal matters. However, the majority of those who did comment supported harmonising criminal investigation powers by adopting the relevant PACE powers for England, Wales and Northern Ireland.
48. Some concerns were expressed around the training of HMRC officers and the undesirability of the same officers dealing with both criminal and non-criminal investigations. The new structure of HMRC, with a separate Criminal Investigations Directorate, addresses these issues. The officers responsible for criminal investigations will receive all the relevant training and will not have any other duties such as carrying out routine compliance work.
49. Of the respondents who opposed the wider adoption of the relevant PACE powers by HMRC, one advocated the establishment of a “tax police” force to completely take over HMRC’s role in investigating suspected crime. Another rejected it as designed purely to expand HMRC’s powers.

England, Wales and Northern Ireland

50. For England, Wales and Northern Ireland, Parliament has already determined what is appropriate generally for the investigation of crime and enshrined it largely in PACE, which is well understood and respected legislation. One option for HMRC is the adoption of the relevant parts of PACE for all HMRC's criminal investigations. This would enable HMRC to retain up to date powers for criminal investigations, powers that are regularly subject to Parliamentary scrutiny. It would also ensure that HMRC remained properly equipped across the range of its activity to investigate effectively, including tackling attacks by organised crime on the tax and tax credit systems. Adopting this legislation would provide modern and well-understood safeguards for suspects.

7: Applying Relevant PACE Provisions across All HMRC Responsibilities

51. Only the provisions relevant to its responsibilities are available to HMRC, and currently only for use in respect of ex-HMCE responsibilities. These powers are listed in Annex D. These could be made available for criminal investigations involving all HMRC's responsibilities including those inherited from the Inland Revenue. As now the powers would only be available where appropriate. Both the tests for their use set out in PACE would have to be passed and any use would have to be proportionate and compliant with the Human Rights Act.
52. Making the powers listed in Annex D available for all HMRC's investigations in England, Wales and Northern Ireland would deal with the issues detailed above in paragraphs 31 to 36:
- PACE provides a production order power that gives consistent rules for the time allowed to comply with an order. All orders would have to be issued by a judge and all applications for orders would be made *inter partes*.
 - For search warrants PACE provides powers which are practical to use, have safeguards regarding the application for and execution of warrants, and extra protection for certain sensitive material. For example, where sensitive material is thought to be on the premises concerned any warrant must be issued by a judge rather than a magistrate.
 - The PACE powers available to HMRC would apply to all the taxes HMRC administers so there would no longer be any need to use two search warrants or production orders where more than one tax is involved.
 - Adopting the relevant PACE powers would provide a power of arrest that applies to indictable offences, and would apply both to offences related to ex-HMCE and ex-Revenue matters. When applied to HMRC this power would only be available to authorised officers, that is those with the appropriate training who need to arrest suspected

criminals as part of their duties. The power of arrest would not be made available to tax inspectors or others engaged in more routine compliance work.

53. Annex E lists HMRC's current powers alongside the PACE ones that could then be replaced. It highlights the principal changes this would involve to existing powers. As the Annex shows many of the changes to current powers would see new safeguards introduced or existing ones clarified and made explicit. For example:
- For the first time the use of HMRC's search warrant and production order powers in respect of "excluded material"⁶ would be prohibited.
 - All applications for search warrants involving "special procedure" material (certain confidential business or journalistic material) would have to be considered by a judge; at the moment a magistrate can issue many of these warrants.
 - Material subject to legal professional privilege would be specifically excluded from all search warrant and production order powers; it is not at the moment.

HMRC would welcome views on the application of these PACE powers across all HMRC responsibilities

8: Additional Powers and Safeguards

54. As well as the PACE provisions currently available to HMRC for ex-HMCE matters, there would also be advantages in making the following additional powers available.

- The power to take fingerprints. Where HMRC arrests a suspect fingerprints are taken by a constable, or a civilian gaoler working under the direction of a constable, as officers of HMRC are not authorised to do this. Arranging for a constable to carry out these duties can cause delays and means a suspect may have to be moved from a HMRC custody suite to a police station for the purpose. This can raise logistical and security issues.

If appropriately trained officers of HMRC were allowed to take fingerprints this would help establish the identity of detainees and prints at crime scenes more quickly without using police resources. It would also help HMRC to take better advantage of new technology which allows fingerprints to be identified quickly. This would not mean more people being fingerprinted. It would be a procedural change for practical reasons. The strict rules that currently apply on the retention, use and destruction of prints and records would continue to apply as now.

- The power to charge or bail suspects. Officers of HMRC do not have these powers so detainees have to be taken to and from police stations. Transporting suspects has resource costs and can have

⁶ Section 11 of PACE - certain personal records, medical samples and journalistic material

security implications. Requiring this work to be done by the police increases the amount of police time spent on these cases.

55. It is also important to consider the corresponding safeguards provided by PACE. PACE codes of practice set out the standards to which the police service must conform. They provide clarity and set out suspects' rights. The codes are not currently applied directly to HMRC; instead officers of HMRC must have regard to any relevant provision of a code. If the option detailed in this document is adopted HMRC would be relying more on PACE so HMRC would apply the codes of practice directly to HMRC in the same way they are applied to the police.

HMRC would welcome views on the adoption of these additional PACE powers and safeguards by HMRC

9: Modifications to PACE Provisions

56. In two areas the powers provided by PACE are not entirely suitable for HMRC and would require modification to enable them to be used effectively for criminal investigations. This would not increase HMRC's current powers but would retain powers already available under tax specific legislation that have proved important in HMRC's investigations.

Search Warrants - Search of Persons

57. As well as allowing premises to be searched, the current tax-specific search warrant powers (both ex-HMCE and ex-Revenue) allow the officers of HMRC executing the warrants to search any person found on the premises whom they have reasonable cause to believe to be in possession of evidence relating to the investigation. This is important if evidence such as a document is concealed by an individual on their person or is otherwise in their possession.
58. The PACE powers allow persons found on the premises to be searched if they are arrested. However, for some of the crimes HMRC investigates (for example complex frauds) it might not be appropriate to arrest everybody found on the premises. Under certain circumstances the police can search people without arresting them, but under powers not available to HMRC.
59. Modifying the PACE search warrant powers as they apply to HMRC to allow any person found on the premises to be searched (without being arrested), where there is reasonable cause to believe him or her to be in possession of evidence relating to the investigation, would preserve the current position for both ex-HMCE and ex-Revenue tax-specific search warrants.

When Powers can be Exercised - Timing

60. The existing tax-specific search warrant and production order powers (both ex-HMCE and ex-Revenue) can be used where there are reasonable grounds for suspecting an offence "is being, has been or is about to be" committed. The PACE powers can only be used where there are reasonable grounds for believing an offence "has been" committed.

61. The ability for the judicial authority to issue an order or warrant when satisfied there are reasonable grounds for believing an offence is being, or is about to be, committed is important for tax cases. If HMRC had to wait until an offence had been committed this could, in certain circumstances, impede investigations and put revenue at risk. Tax frauds usually occur where an incorrect return is submitted. But the damage is often done before then at the point when the money due to the Exchequer is diverted into criminals' hands. For example, if there are grounds to suspect that a missing trader intra community fraud (MTIC) is being carried out substantial amounts of VAT could be put at risk if HMRC had to wait for a VAT return to be submitted.
62. For this reason if the PACE search warrant and production order powers were applied to HMRC they would need modifying to allow the judicial authority to issue an order or warrant when satisfied there are reasonable grounds for believing an offence is being, or is about to be, committed.

HMRC would welcome views on the adoption of these modifications to PACE powers and safeguards by HMRC

Scotland

10: Options for Modern Provisions

63. Scotland has a different criminal justice system to England, Wales and Northern Ireland and PACE does not apply there. Instead powers and safeguards would need to be developed that are consistent with the objectives for a modernised criminal investigations for the UK, but are appropriate for the Scottish criminal justice system, including the role of Procurators Fiscal. The following paragraphs look in detail at the issues that arise, and consider precedents, inconsistencies in current powers and how the issues with current powers could be addressed, and set out some options for change.
64. The design of separate modern powers and safeguards should take account of good practice and experience with other criminal investigation powers. For example, POCA may provide useful precedents as relatively recent legislation with specific provision for search warrants and production orders in Scotland. The existing powers HMRC inherited also provide tried and tested models that could be built upon and tailored for Scotland.

HMRC would welcome views on what the appropriate provisions for Scotland should be, whether by reference to the suitability of existing precedents or by putting forward wholly new ideas

11: Matters Affecting Both Search Warrants and Production Orders

65. There are some issues with current powers that affect both search warrants and production orders as detailed below. For the rest of the UK adopting the relevant PACE powers would deal with these issues.

Provisions Across Taxes

66. To match the approach for England, Wales, and Northern Ireland the new provisions would need to apply across taxes instead of being linked to specific taxes. This would deal with the difficulties explained in paragraph 34 above.

Legal professional privilege

67. Some of HMRC's existing search warrant and production order powers include provisions specifically excluding items subject to legal privilege from the scope of the powers (for an example see paragraph 5 of Schedule 1AA Taxes Management Act 1970 (TMA 1970)). Likewise the POCA powers for Scotland include specific exclusions (sections 383 and 389 POCA). Other powers do not include a specific exclusion although common law and European Convention on Human Rights (ECHR) principles would apply.
68. When designing new search warrant and production order provisions the options would be either to include explicit exclusions for items covered by

legal professional privilege or, alternatively, leave this issue to general principles.

HMRC would welcome comments on which would be the appropriate approach for these provisions

Copies of, and access to, evidence held by HMRC

69. Both ex-Revenue and ex-HMCE powers have specific rules about access to, and copies of, evidence, for example the ex-Revenue power at section 20CC(4) to (8) TMA 1970. These rules give the person who had control or custody over items before they were seized certain rights to access and/or copy those items while they are held by HMRC unless that would prejudice investigation or proceedings.
70. To provide clarity similar rules could be included in any new provisions although this is not a feature of common law warrants. HMRC would seek guidance from the Procurator Fiscal where the question arises of whether access to evidence could prejudice an investigation or proceedings.

Suspicion or belief

71. Some of the inherited powers such as a warrant or order can be issued by the sheriff or justice where he is satisfied there are reasonable grounds for “suspecting” that an offence is being, has been or is about to be committed. By contrast other powers require him to be satisfied there are reasonable grounds for “believing” this to be the case. The comparable test in PACE is “believing”.

HMRC would welcome views on whether reasonable grounds for “suspecting” or “believing” would be the appropriate test for new powers in Scotland

Internal authorisation

72. Some inherited powers specify who in HMRC must authorise an application for an order or a warrant by reference to a level of seniority and a particular role. Other powers say the application must be by an “authorised person” and internal guidance then sets out who is authorised to apply.
73. As discussed in paragraph 33, some of the procedures for internal authorisation within HMRC have become out of date. They are now cumbersome, time consuming and put revenue at risk. In designing modernised powers it is important to have powers that provide appropriate safeguards for citizens’ rights but are practicable and effective. Job titles, grade structures and internal organisation can change frequently, so specifying such details in legislation can cause problems.
74. It is unusual to specify in the legislation who internally must authorise an application for a search warrant or production order. HMRC’s powers could follow the approach generally taken and not set out in legislation details of who internally in HMRC should authorise an application. Instead that would be clearly set out in published guidance (as it already is for many of HMRC’s powers).

HMRC would welcome views on the adoption of this approach to internal authorisation

Electronic information

75. Some of HMRC's existing powers include specific provisions about electronic information to ensure it is obtained in a visible and legible form. For example paragraph 7(3) of Schedule 1AA TMA 1970:
- (3) Where an order under section 20BA applies to a document in electronic or magnetic form, the order shall be taken to require the person to deliver the information recorded in the document in a form in which it is visible and legible
76. Electronic storage of information is becoming more common so it will be important to include such a provision in modernised provisions.

“Serious” offences

77. Some of the warrants and orders currently used in HMRC's investigations can only be issued where the suspected offence is a “serious” one. Others are not restricted in this way. There is no “seriousness” test for common law search warrants.
78. HMRC's Criminal Investigation Policy⁷ recognises that sometimes HMRC needs to send a strong deterrent message, and on occasions this can involve investigating cases which involve comparatively modest amounts but which result in prison sentences. In some circumstances these crimes might not have been considered “serious” for the purposes of obtaining search warrants and production orders; this means HMRC would not have had access to those investigative powers even though the court considered the crime serious enough to warrant a custodial sentence. In addition the interpretation of “serious” may differ and lead to inconsistency.

HMRC would welcome views on the exclusion of a “seriousness” test from any new powers

12: Production Orders

Issue of orders

79. Under some inherited powers production orders must be issued by a sheriff. Under others they must be issued by a justice (“justice” as defined at section 307 of the Criminal Procedure (Scotland) Act 1995 to include the sheriff and any stipendiary magistrate or justice of the peace). In practice HMRC would apply to a sheriff for a production order and it is usual to specify in legislation that production orders must be issued by a sheriff (for example that is the approach taken in POCA).

HMRC would welcome views on whether to specify that a sheriff must issue the order

⁷ Available at <http://www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm>

Time to comply

80. Some inherited production order powers allow ten working days for the order to be complied with, or such shorter period as may be specified in the order. Others allow not more than seven days beginning on the date of the order, or such longer period as the order may specify. POCA (section 380(6)) says the information must be supplied within the period stated in the order, and:

The period stated in a production order must be a period of seven days beginning with the day on which the order is made, unless it appears to the sheriff that a longer or shorter period would be appropriate in the particular circumstances.

81. Any new power could take the same approach as the POCA power and generally allow seven days but with the sheriff having discretion to set a different time limit if that is appropriate in the circumstances.

HMRC would welcome views on the adoption of the POCA approach

Give access to or deliver information?

82. Some existing powers require the person in possession of the documents to deliver them to an officer. Others require the person to give access to the documents and to permit the officer to remove and take away any if he reasonably considers that necessary. POCA (section 380(5)) provides that the sheriff can issue an order requiring either of these things and a decision on which course is appropriate would depend on the circumstances of the particular case. With any new power the approach taken by POCA could be followed so that the sheriff can specify in the order what is appropriate for the particular circumstances.

HMRC would welcome views on the adoption of the POCA approach

Different sheriffdoms

83. Some of HMRC's current powers have a specific provision covering the situation where the person who is the subject of the order resides or has business premises in more than one sheriffdom. The provision allows all the premises to be covered by orders issued by one sheriff, for an example see section 20BA(3) TMA. Without this provision it would be necessary to make separate applications to two or more sheriffs.

HMRC would welcome views on whether this approach would be appropriate

Ex parte or inter partes

84. Some inherited production order powers give the intended recipient the right to appear and be heard at the hearing of the application (inter partes). Others do not give the intended recipient the right to attend the application (ex parte). Under POCA applications are made ex parte (see section 386(1) POCA). Ex parte applications are the traditional approach in Scotland.

HMRC would welcome views on whether applications in Scotland for production orders should be made inter partes or ex parte

Destruction, falsification of documents

85. Powers sometimes have special rules designed to prevent the unauthorised destruction, concealment, alteration or disposal of documents that have been the subject of a production order (for example, section 20BB(1) TMA 1970). Such action becomes a criminal offence. Such a rule makes it clear to recipients of notices what their obligations are and to ensure orders are effective.

HMRC would welcome views on the inclusion of such a rule

Sanction for Failure to Comply

86. A wilful failure to comply with a court order is contempt of court at common law. Some of the existing production order legislation also has specific provisions saying that a person who fails to comply with an order may be dealt with as if he had committed a contempt of the court and makes clear which court is involved (for an example see paragraph 9 of Schedule 1AA TMA 1970). There would be advantage in having this sanction set out explicitly in the legislation.

HMRC would welcome views on including this sanction in legislation

13: Search Warrants

Issue of warrants

87. Under existing powers some search warrants must be issued by a sheriff. Others can be issued by a “justice”. For this purpose “justice” is defined in accordance with section 307 of the Criminal Procedure (Scotland) Act 1995 and includes the sheriff and any stipendiary magistrate or justice of the peace. In practice warrants are usually issued by sheriffs. However warrants are sometimes required urgently at unsocial hours when it may be possible to reach a stipendiary magistrate or justice of the peace but difficult to contact a sheriff. For this reason it is important that the new search warrant power should refer to a “justice” although in practice, as now, applications would usually be made to a sheriff.

HMRC would welcome views on this approach

Conditions on exercise of a warrant

88. Existing powers often impose conditions on what can be done when a warrant is exercised. For example, section 20C(1B) TMA 1970:

The powers conferred by a warrant under this section shall not be exercisable—

- (a) by more than such number of officers of the Board as may be specified in the warrant;

- (b) outside such times of day as may be so specified;
 - (c) if the warrant so provides, otherwise than in the presence of a constable in uniform.
89. Whilst these conditions are important safeguards for the citizen they can sometimes cause practical problems that actually increase the inconvenience and intrusion suffered. In particular, they can sometimes prevent the officers executing a warrant responding dynamically to a situation and may mean the intrusion authorised by the warrant is prolonged. For example, if on entering a premises the number of officers specified on a warrant find there is much more evidence to gather than anticipated this could mean a delay while a new warrant is sought to authorise more officers to assist, leading to a much longer operation.
90. In certain cases these conditions have also been misinterpreted leading to confusion and legal problems. For example, the same legislation that includes these conditions also says that “an officer who enters the premises under the authority of a warrant under this section may ... take with him such other persons as appear to him to be necessary” (for examples see section 20C(3) TMA 1970 and paragraph 10(3) Schedule 11 VATA 1994). It may not always be clear to the officers how the number of officers specified on the warrant relates to this power to take with them such other persons as appears necessary to him.

HMRC would welcome comments on whether these conditions would be appropriate and, if so, whether they could be phrased in a way that makes their intentions clearer

Record of items seized

91. The powers HMRC inherited have some specific rules on providing records of items seized to the person who had custody or control of them, or who occupied the relevant premises, before their seizure. For an example see section 20CC(1) and (2) TMA 1970.

HMRC would welcome views on the adoption of such a rule

14: Arrest and Detention

92. HMRC inherited powers of arrest, detention and questioning for ex-HMCE offences but not for offences relating to ex-Revenue matters. This leads to a number of difficulties as outlined in paragraph 36 above.

Detention and questioning

93. Sections 24 and 25 of the Criminal Law (Consolidation) (Scotland) Act 1995 give Customs officers the power to detain suspects where there are reasonable grounds to suspect that they have committed, or are committing, a relevant offence punishable by imprisonment. The detention can last for up to six hours and is for the purpose of facilitating investigations into the offence and whether criminal proceedings should be instigated. The officer may exercise the same powers of search as are available following an arrest and put questions to the suspect relating to the suspected offence.

However, the suspect is not obliged to answer any questions except to give his name and address and must be informed of this (but see Chapter 17 below for some changes in this area). There are other provisions which ensure that the suspect is informed of the reason for his detention and that records are kept of when detention began and ended etc.

94. Under the CRCA the powers provided by sections 24 and 25 of the Criminal Law (Consolidation) (Scotland) Act 1995 are available to officers of Revenue and Customs where the suspected offence relates to an ex-HMCE matter but not where an ex-Revenue matter is involved. So, for example, an officer of Revenue and Customs may detain a person suspected of a VAT fraud, but not a person suspected of a corporation tax fraud. For a corporation tax fraud HMRC would brief the police who undertake any necessary detention and questioning (in practice the questions put to the suspect would be suggested to the police by an officer of Revenue and Customs who would be present but unable to ask questions directly).
95. If sections 24 and 25 of the Criminal Law (Consolidation) (Scotland) Act 1995 were applied to HMRC whether the suspected offence related to an ex-HMCE or ex-Revenue matter this would provide consistent powers for use in appropriate circumstances.

HMRC would welcome views on applying these sections in this way

Power of arrest

96. For ex-HMCE matters powers of arrest are provided by a number of Acts. The powers of arrest are related to specific offences for particular taxes or duties. For example, section 72(9) VATA 1994 says:
 - (9) Where an authorised person has reasonable grounds for suspecting that an offence has been committed under the preceding provisions of this section, he may arrest anyone whom he has reasonable grounds for suspecting to be guilty of the offence.
97. To provide HMRC with a consistent power of arrest for use in Scotland a similar provision could be designed that applies to offences in connection with, or relating to, any of HMRC's responsibilities. This would only be available to authorised officers of Revenue and Customs, that is officers with the appropriate training whose duty it is to undertake criminal investigations. It would not be available to officers undertaking more routine work. Whether this power of arrest would be used would be decided on a case-by-case basis.
98. Such a consistent power would address the issues detailed in paragraphs 36 above and allow the existing tax-specific ex-HMCE arrest powers listed in Annex B to be repealed as they would be superseded.

HMRC would welcome views on this approach to providing a consistent power of arrest

15: Officer of Law Status

99. Section 307 of the Criminal Procedure (Scotland) Act 1995 defines "officer of law" "in relation to the service and execution of any warrant, citation,

petition, indictment, complaint, list of witnesses, order, notice, or other proceeding or document. The definition includes any person commissioned by the Commissioners of Customs and Excise.

100. Following the CRCA an officer of Revenue and Customs carrying out an investigation relating to an ex-HMCE matter (for example, into a VAT fraud) is an officer of law and so could, for example, execute a common law search warrant obtained by a Procurator Fiscal. However, where an officer of Revenue and Customs is carrying out an investigation relating to an ex-Revenue matter (for example, into a corporation tax fraud) he is arguably not included in the definition of an officer of law (even if the same officer is involved). So during the corporation tax investigation the police would have to be briefed and then execute the warrant on HMRC's behalf. This situation has the potential to cause particular difficulties and confusion where it is appropriate to use a common law warrant in a case involving, for example, both VAT and corporation tax.
- 101 This inconsistency would be removed if officers of HMRC were explicitly "officers of law" for all the investigations they carry out.

HMRC would welcome views on making HMRC officers "officers of law"

16: "Cross Border" Issues

102. HMRC is a UK wide department responsible for criminal investigations that relate to its responsibilities throughout the UK. Inevitably there are criminal investigations that are not solely concerned with a single UK jurisdiction. A case to be tried in a Scottish court may involve evidence acquired in England and a suspect who is apprehended in Northern Ireland. UK wide cases like this can raise complex issues around jurisdiction and the correct procedures and powers to use when gathering evidence and apprehending suspects. Although police forces are not UK wide organisations there are a number of legal provisions designed to help them with investigations involving more than one UK jurisdiction by clarifying which are the appropriate powers and procedures. The provisions applying to the police are detailed below in paragraphs 103 to 107.

HMRC would welcome views on whether these, or similar, powers should also be applied to investigations by HMRC

Arrest under warrant

103. Section 136 of Criminal Justice and Public Order Act 1994 gives a reciprocal power to execute in any part of the UK a warrant for arrest granted in any other part of the UK. These powers sometimes apply to HMRC now for ex-HMCE matters but do not apply consistently.

Arrest/detention without warrant

104. Section 137 of Criminal Justice and Public Order Act 1994 extends domestic arrest and detention powers to any part of the UK where the suspect is. So, for example, any constable of a Scottish police force may arrest suspects in England, Wales or Northern Ireland using the same powers of arrest or

detention as he would be able to use were that suspect in Scotland. The ability to arrest the suspect using the Scottish power means the officer is using a familiar power so is less likely to make mistakes. It also means that if proceedings follow in a Scottish court the court will be familiar with the powers used and there will be no complications regarding procedural issues.

Procedures following upon arrest/detention

105. Under section 138 of Criminal Justice and Public Order Act 1994 the procedures following upon arrest/detention follow the rules of the jurisdiction of the offence. So where a person suspected of committing a crime in Scotland is arrested in England the Scottish rules apply following the arrest. In addition the Scottish six-hour limit upon detention is modified to take account of the travelling time – so that the detention must end four hours from arrival at the relevant Scottish police station rather than six hours from the time detention commences. The lack of a similar rule for HMRC to modify the six-hour limit upon detention to take account of travelling time can particularly affect detentions made at sea where travelling time is inevitably increased.

Search under warrant

106. At the moment police from Scotland can execute certain search warrants issued by Scottish courts (courts of summary jurisdiction) in England, Wales or Northern Ireland in the same way they would be executed in Scotland provided the warrant is endorsed by a relevant court in the country where it is to be executed. The same procedure can apply to warrants issued elsewhere in the UK and then endorsed by a relevant Scottish court and executed in Scotland. Officers of HMRC can use these rules but only in respect of ex-HMCE matters and only for certain search warrants.
107. The lack of a consistent power to execute throughout the UK (once suitably endorsed) warrants issued by a court in the jurisdiction where any prosecution will take place leads to uncertainty. Investigators can seek a warrant from a court in the country where the evidence is but may be unsure as to how that approach will be received in any subsequent prosecution in the other country. There would be advantages if it was clear that warrants obtained by HMRC in one country could be executed in any other part of the UK once endorsed by a court in that country.

General Issues with the current “cross border” position

108. Up until now the lack of rules similar to those applicable to the police has been mitigated to some extent for HMRC as there are often powers that can be used which extend UK wide. For example, the income tax search warrant provision at section 20C TMA applies right across the UK. However, in future it is possible that the relevant PACE power will be used in England and Wales, the similar power will be used in Northern Ireland and a different power will be used in Scotland. The UK wide powers detailed at Annex B would be superseded and repealed. As HMRC would no longer have UK wide powers the problems currently experienced with “cross border” issues are likely to increase unless changes are made.

109. The lack of provisions for HMRC similar to those detailed above for the police can cause uncertainty about the correct powers and procedures to use. HMRC believes that applying consistent rules to HMRC similar to those outlined above at paragraphs 103 to 107 could benefit suspects, the courts and HMRC by clarifying the powers, procedures and citizen's safeguards which are appropriate in these cases.

HMRC would welcome views on whether it would be appropriate to apply such rules to HMRC

17: Powers Relating to Suspects and Witnesses

110. In 2005 the Scottish Executive consulted on various proposals to support the police protecting communities⁸. The proposals were designed to give the police the tools they need to do the job by keeping the legislation fit for purpose. The proposals included a number to allow the police to identify suspects (and in one case witnesses) more quickly and efficiently. Their aim was to make the identification process easier and less laborious by using new technology, so freeing up police time, and to improve the efficiency, accuracy and use of criminal justice records.
111. The proposals were supported by the majority of respondents to the consultation and the following have now been included in the Police, Public Order and Criminal Justice (Scotland) Act recently passed by the Scottish Parliament.
- A power to require persons suspected of committing an offence to provide details of their date and place of birth and nationality as well as their name and address, where considered necessary or expedient for establishing the person's identity. Failure to provide the information without reasonable excuse is an offence.
 - At the moment a person who has been detained is under no obligation to provide any information, other than their name and address. A provision in the Bill will put a person under an obligation also to provide their date and place of birth and details of their nationality where considered necessary or expedient for establishing that person's identity. It will not be an offence if a person does not provide this information.
 - A power to take fingerprints to verify the identity of someone suspected of having committed an offence and to establish if that person has committed any other offences. This power will be available in any place and so will enable fingerprints to be taken other than in a police station. The power will be used to confirm the identity of a suspect by checking these fingerprints against records in existing databases. Fingerprints taken for these purposes must be destroyed as soon as they have been used. They cannot be retained. It will be an offence for a suspect to refuse to allow fingerprints to be taken. The power will be used to allow mobile digital fingerprint readers to

⁸ Supporting Police, Protecting Communities: Proposals for Legislation – February 2005, available at <http://www.scotland.gov.uk/consultations/justice/sppcpl.pdf>. A summary of the responses to the consultation is at <http://www.scotland.gov.uk/Publications/2005/06/0394432/44339>

check identities and whether the suspect is wanted in connection with any unsolved crimes. These checks are expected to take approximately 3 minutes, whereas current procedures to establish identities can take 30-45 minutes.

- A right to require a potential witness to a crime to provide their date and place of birth and nationality (in addition to the name and address which can be required at present). This power will allow relevant information on any potential witness (such as previous convictions they have which might, in theory, be used to challenge their reliability/credibility in court) to be established quickly so early disclosure of the Crown's case can be provided to the defence. Failure to provide the information without reasonable excuse is an offence.

112. Officers of HMRC investigating crimes often face the same difficulties as the police when trying to identify suspects and check whether they are wanted for other crimes. In addition it is not always clear how the current rules on obtaining fingerprints, palm prints and samples (for example a sample of hair)⁹ apply to suspects arrested or detained by HMRC. Forensic evidence is becoming increasingly important in criminal investigation. Disclosure of information to the defence is also an issue for HMRC as well as the police.

HMRC would welcome views on whether it would be appropriate to bring HMRC powers in Scotland into line with the police powers described above

⁹ Sections 18 and 19 Criminal Procedure (Scotland) Act 1995

Conclusions

18: Repeals

113. The options set out above would provide modern powers and safeguards for the whole of the UK. The existing powers that would be superseded would be repealed. A list of those powers is at Annex B.

19: Views Sought

114. HMRC would welcome comments on of the matters mentioned in this document and particularly on the following issues:

England, Wales and Northern Ireland

Chapter 7 – Applying Relevant PACE Provisions across all HMRC Responsibilities

- Making PACE powers currently available for ex-HMCE matters apply to all HMRC responsibilities (paragraphs 51 to 53)

Chapter 8 – Additional Powers and Safeguards

- Fingerprints (54)
- Charging and bailing suspects (54)
- PACE Codes of Practice (55)

Chapter 9 – Modifications to PACE Provisions

- Search warrants and search of persons on the premises (57 to 59)
- When powers can be exercised – timing (60 to 62)

Scotland

Chapter 11 – Matters Affecting both Search Warrants and Production Orders

- Legal professional privilege (67 to 68)
- Suspicion or belief (71)
- Internal authorisation (72 to 74)
- “Serious” offences (77 to 78)

Chapter 12 – Production Orders

- Issue of orders (79)
- Time to comply (80 to 81)
- Give access to or deliver information (82)
- Different sheriffdoms (83)
- Ex parte or inter partes (84)
- Destruction, falsification of documents (85)
- Sanction for failure to comply (86)

Chapter 13 – Search Warrants

- Issue of warrants (87)
- Conditions on exercise of a warrant (88 to 90)
- Record of items seized (91)

Chapter 14 – Arrest and Detention

- Detention and questioning (93 to 95)
- Power of arrest (96 to 98)

Chapter 15 – Officer of Law status

- Officers of HMRC as officers of law for all investigations (99 to 101)

Chapter 16 – “Cross Border” Issues

Whether it is appropriate for HMRC to have rules similar to those applying to the police concerning:

- Arrest under warrant (103)
- Arrest/detention without warrant (104)
- Procedures following arrest/detention (105)
- Search under warrant (106 to 107)

Chapter 17 – Powers Relating to Suspects and Witnesses

- Up-dating and clarifying the rules (110 to 112)

Next Steps

115. It is anticipated that, in the light of the responses to this consultation, specific proposals will be worked up in detail on which there will be a further opportunity to comment.

Annex A

Extract from 30 March 2006 Consultation Document

These are the paragraphs concerned with criminal investigations.

Criminal Investigation Powers

Aligning criminal investigation powers

- 5.20 The Review's work has questioned why tax crime should be investigated differently from other criminal behaviour. Compliant taxpayers need HMRC to have those powers that will allow it to remove the disadvantages they suffer from criminal non-compliance. Currently there are gaps in those powers and also different powers for ex-Customs and ex-Revenue matters which can create uncertainty for those under investigation and can hinder effective investigation by HMRC officers. Effective and proportionate powers with the right safeguards are needed that apply across HMRC.
- 5.21 For England, Wales and Northern Ireland, Parliament has already determined what is appropriate generally for the investigation of crime and enshrined it largely in the Police and Criminal Evidence Act (PACE). This legislation is well understood and respected. An option for HMRC would be to adopt the relevant parts of PACE for all HMRC's criminal investigations which would enable HMRC to retain up to date powers for criminal investigation, which are regularly subject to Parliamentary scrutiny. It would also ensure that HMRC remained properly equipped across the range of its activity to investigate tax crimes and related money laundering activity effectively, including attacks by organised crime on the tax and credit systems.
- 5.22 For Scotland, where PACE powers do not apply, the Review will be looking at how to proceed in respect of crimes investigated under the jurisdiction of the Scottish courts and will be consulting very shortly with interested parties.
- 5.23 HMRC also needs powers to combat **organised crime**. Customs and Excise already had access to certain surveillance powers under the Regulation of Investigatory Powers Act 2000, the Police Act 1997 and the Wireless Telegraphy Act 1949 that were not available to the Inland Revenue. Direct tax systems are as vulnerable to attack by organised crimes as indirect ones – or systems across the public and private sectors for that matter. HMRC is already aware of attempted attacks on the construction industry scheme, tax return repayment claims and tax credits, on occasion involving stolen identities. Those who devise, organise and profit from these crimes hide behind the actual perpetrators, whom they regard as dispensable. Some of the perpetrators can be caught using existing powers. But, if the criminals behind the scenes are to be caught and prosecuted, access is needed occasionally and under appropriate safeguards to more intrusive surveillance techniques.
- 5.24 The powers currently available for ex-Customs matters include inherent safeguards. Agreement has to be obtained for their use on a case by case

basis and use of the most intrusive powers is restricted to investigations of serious crime or to protect the UK's economic well-being. They are not therefore available for use in routine tax matters. For example, the power to intercept communications can only be used under cover of a warrant from the Home Secretary (or another competent Secretary of State) who must be satisfied that the interception is proportionate and necessary for national security, safeguarding the economic well being of the UK, or preventing or detecting serious crime, and that the information being sought could not reasonably be obtained in another way. The powers are also overseen by the independent Interception of Communications Commissioner and the Office of Surveillance Commissioners and in appropriate cases require their approval before they can be used. And citizens can take their case to the Investigatory Powers Tribunal if they believe that they have been subject to intrusive surveillance without good cause or proper authorisation.

Annex B

Provisions for Repeal

The provisions that could be repealed if the options discussed above are implemented are listed below.

Production and Access Orders

Legislation	Subject Matter
Section 20BA and Schedule 1AA TMA 1970, SI2000/2875	income tax, corporation tax, capital gains tax, development land tax
Section 36(1) TCA 2002	tax credits
Part 6 of Schedule 13 FA 2003 (and any regulations made)	stamp duty land tax
Paragraph 11 Schedule 11 VATA 1994	VAT
Paragraph 8 Schedule 7 FA 2001	aggregates levy
Paragraph 4A Schedule 7 FA 1994	insurance premium tax
Paragraph 7 Schedule 5 FA 1996	landfill tax
Paragraph 131 Schedule 6 FA 2000	climate change levy

Search Warrants

Legislation	Subject Matter
Sections 20C and 20CC TMA 1970	income tax, corporation tax, capital gains tax
Section 36(2) TCA 2002	tax credits
Part 7 of Schedule 13 FA 2003	stamp duty land tax
Paragraphs 10(3) to (6) Schedule 11 VATA 1994	VAT
Paragraph 7 Schedule 7 FA 2001	aggregates levy "believing"
Paragraph 4(2) to (5) Schedule 7 FA 1994	insurance premium tax
Paragraph 5 Schedule 5 FA 1996	landfill tax
Paragraph 130 Schedule 6 FA 2000	climate change levy "suspecting"
Paragraph 16 Schedule 1 BGDA ¹⁰ 1981	general betting duty
Paragraph 17 Schedule 3 BGDA 1981	Bingo duties

¹⁰ Betting and Gaming Duties Act 1981

Paragraph 17 Schedule 4 BGDA 1981	Amusement machine licence duty
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Powers of Arrest

Paragraph 4(6) Schedule 7 FA 1994	insurance premium tax
Paragraph 6 Schedule 5 FA 1996	landfill tax
Section 72(9) VATA 1994	VAT
Paragraph 6 Schedule 6 FA 2001	aggregates levy
Paragraph 97 Schedule 6 FA 2000	climate change levy

Annex C

Practice where offences involve more than one country in UK

Extract from letter from the Paymaster General to the Chartered Institute of Taxation setting out practice.

Prosecutions under Scottish Law

I refer to your letter and enclosures dated 2 March 2004 about English resident taxpayers being prosecuted by the Inland Revenue in Scotland. I understand that in July of this year the Institute also included this matter in its Finance Bill 2005 representations. I am very sorry that there has been a long delay in responding to you. But I hope that this response will nonetheless be a helpful one for you and for your members.

In the case under consideration, a document suspected to be false was sent to the individual's tax office in Scotland. Technically, an offence was committed in Scotland and so prosecution was considered there. But the taxpayer was not actually prosecuted under Scottish law and the case did not proceed to prosecution at all.

In Scotland the Crown Office has the right to prosecute cases where an offence has been committed in Scotland. I have been advised, however, that in cases such as these, even without any changes to legislation, there is normally jurisdiction in both England and Scotland. The Revenue (for cases in England and Wales) will usually decide the place of prosecution on the balance of convenience – that is where the taxpayer and the majority of the witnesses reside. I can therefore confirm that this is the practice of the Inland Revenue in these types of cases. It also ensures that the Inland Revenue maintains a common sense and reasonable approach to the taxpayer and any witnesses giving evidence in court.

You may well have seen the recent announcement that revenue prosecution cases will be handled by an independent office when HM Revenue and Customs is created. That office will be known as the Revenue and Customs Prosecution Office (RCPO) and it will be accountable to the Attorney General, rather than to Treasury Ministers. It is my understanding that RCPO will adopt a similar practice to the one I have outlined here.

I do not therefore see that there is a need for a legislative change. But I hope that this clarification of Revenue policy and practice satisfies the Institute's concerns in this area. Thank you for raising them.

Annex D

The Current PACE Powers Available To HMRC for ex-HMCE matters

This is a complete list of the PACE provisions available to HMRC by virtue of section 114 PACE and the Police and Criminal Evidence Act 1985 (Application to Customs and Excise) Order 1985 – SI 1985/1800. Following the creation of HMRC these powers are only available to HMRC for ex-Customs and Excise matters and cannot be used for ex-Revenue matters – sections 6 and 7 and paragraphs 7 and 9 of Schedule 2 CRCA.

Provision	Subject
Section 8	Power of justice of the peace to authorise entry and search of premises
Section 9 and Schedule 1	Special provisions as to access – special procedure for search warrants/production orders
Section 15	Search warrants – safeguards
Section 16	Execution of warrants
Section 17(1)(b), (2), (4)	Entry for purpose of arrest etc (provisions relating to arresting a person for an arrestable offence)
Section 18 (as modified by article 7 of SI1985/1800)	Entry and search after arrest
Section 19	General power of seizure etc
Section 20	Extension of powers of seizure to computerised information
Section 21 (but does not apply to items subject to forfeiture under the customs and excise Acts – article 5 SI1985/1800)	Access and copying
Section 22(1) to (4)	Retention of items seized
Section 24(6) (as modified by article 12 SI1985/1800).	Arrest without warrant where there are reasonable grounds for suspecting the person of being guilty of an arrestable offence
Section 28	Information to be given on arrest
Section 29	Voluntary attendance at police station etc
Section 30(1) to (4)(a) and (5) to (11)	Arrest elsewhere than at police station
Section 31	Arrest for further offence

Section 32(1) to (9) (subject to the modifications in article 5 SI1985/1800)	Search upon arrest
Section 34(1) to (5)	Limitations on police detention
Section 35	Designated police stations
Section 36	Custody officers at police stations
Section 37	Duties of custody officer before charge
Section 39	Responsibilities in relation to persons detained
Section 40	Review of police detention
Section 41	Limits on period of detention without charge
Section 42	Authorisation of continued detention
Section 43	Warrants of further detention
Section 44	Extension of warrants of further detention
Section 50	Records of detention
Section 51(d)	Savings (in respect of right of a person in police detention to apply for a writ of habeas corpus)
Section 54	Searches of detained persons
Section 55 (subject to the modifications in articles 5 and 9 SI1985/1800).	Intimate searches
Section 56(1) to (9)	Right to have someone informed when arrested
Section 57(1) to (9)	Additional rights of children and young persons
Section 58(1) to (11)	Access to legal advice
Section 62	Intimate samples
Section 63	Other samples
Section 64(1) to (6)	Destruction of fingerprints and samples
Section 107	Police officers performing duties of higher rank

Annex E

Changes to Current Powers if PACE Adopted

The current powers are split between ex-HMCE and ex-Revenue powers to make the possible changes clearer.

Abbreviations – please see the explanatory list at the end of the Annex.

A) Production Orders

Current Powers	Power Used if PACE Adopted	Changes to Current Powers
<p>Ex-Revenue Matters</p> <p>Section 20BA TMA 1970 (IT, CT, CGT) Part 6 of Schedule 13 FA 2003 (SDLT) Section 36 TCA 2002 (Tax Credits)</p>	<p>Paragraph 4 of Schedule 1 PACE, order by a circuit judge.</p> <p>The PACE production order power as it applies to HMRC would be modified to allow the judge to issue an order when satisfied there are reasonable grounds for believing an offence “is being, or is about to be,” committed. This would preserve the current position for ex-Revenue tax specific orders.</p>	<ul style="list-style-type: none"> • An application to a judge would no longer need internal authorisation by a member of the SCS in HMRC. Instead authorisation would be set at a level at least equivalent to that used by the police. • It would only be possible to obtain a production order if some of the material sought is “special procedure material” – certain confidential business or journalistic material. • Under PACE there must be reasonable grounds for “believing” an offence has been committed as opposed to the current lower test of “suspecting”. • Under PACE HMRC would be unable to obtain “excluded material” - certain “personal records”, medical samples and journalistic material. These restrictions do not currently apply. • All applications to the judge would be made inter partes – at the moment some can be made ex parte if the judge agrees.

<p>Ex-HMCE Matters</p> <p>Paragraph 11 of Schedule 11 VATA 1994, for VAT and similar provisions for all other indirect taxes e.g. Schedule 7 paragraph 8 FA 2001 (aggregates levy). Paragraph 4 of Schedule 1 PACE for evidence generally</p>	<p>Paragraph 4 of Schedule 1 PACE, order by a circuit judge.</p> <p>The PACE production order power as it applies to HMRC would be modified to allow the judge to issue an order when satisfied there are reasonable grounds for believing an offence “is being, or is about to be,” committed. This would preserve the current position for ex-HMCE tax specific orders.</p>	<ul style="list-style-type: none"> • It would only be possible to obtain a production order if some of the material sought is “special procedure material” – certain confidential business or journalistic material. • All orders would have to be made by a judge – currently a magistrate issues ex-HMCE tax specific powers. • Under PACE there must be reasonable grounds for “believing” an offence has been committed as opposed to the current lower test of “suspecting”. • Under PACE HMRC would be unable to obtain “excluded material” – certain “personal records”, medical samples and journalistic material. These restrictions do not currently apply. • Orders would only be available in respect of “indictable” offences – at the moment some of the powers can be used in respect of more minor offences • All applications to the judge would be made inter partes – at the moment applications are ex parte. • Material subject to legal professional privilege would be specifically excluded; it is not at the moment.
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B) Search Warrants

Current Powers	Power Used if PACE Adopted	Changes to Current Powers
<p>Ex-Revenue Matters</p> <p>Section 20C TMA (IT, CT, CGT) Schedule 13 Part 7 FA 2003 (SDLT) Section 36 TCA 2002 (TCs)</p>	<p>Section 8 (search warrant from a magistrate). Paragraph 12 Schedule 1 (warrant from a circuit judge) where “special procedure material” (certain confidential business or journalistic material) is involved.</p> <p>The PACE search warrant powers as they apply to HMRC would be modified to both:</p> <ul style="list-style-type: none"> • Allow any person found on the premises to be searched where there is reasonable cause to believe him to be in possession of evidence. This would preserve the current position for ex-Revenue tax specific search warrants. • Allow the judicial authority to issue a warrant when satisfied there are reasonable grounds for believing an offence “is being, or is about to be,” committed. This would preserve the current position for ex-Revenue tax specific warrants. 	<ul style="list-style-type: none"> • Unless “special procedure material” is involved warrants would be issued by a magistrate, not a judge. • Before an application can be made it would no longer need authorisation by 2 Commissioners of HMRC. Instead internal authorisation would be set at a level at least equivalent to that used by the police. • Under PACE there must be reasonable grounds for “believing” an offence has been committed as opposed to the current lower test of “suspecting”. • Under PACE HMRC would be unable to obtain “excluded material” – certain “personal records”, medical samples and journalistic material. These restrictions do not currently apply.

<p>Ex-HMCE Matters</p> <p>Paragraph 10(3) to (6) Schedule 11 VATA 1994, similar provisions for all other indirect taxes, e.g. Schedule 7 paragraph 7 FA 2001 (aggregates levy), Section 8/Schedule 1 PACE for evidence generally.</p>	<p>Section 8 (search warrant from a magistrate). Paragraph 12 Schedule 1 (warrant from a circuit judge) where “special procedure material” is involved.</p> <p>The PACE search warrant powers as they apply to HMRC would be modified to both:</p> <ul style="list-style-type: none"> • Allow any person found on the premises to be searched where there is reasonable cause to believe him to be in possession of evidence. This would preserve the current position for ex-HMCE tax specific search warrants. • Allow the judicial authority to issue a warrant when satisfied there are reasonable grounds for believing an offence “is being, or is about to be,” committed. This would preserve the current position for ex-HMCE tax specific warrants. 	<ul style="list-style-type: none"> • Under PACE there must be reasonable grounds for “believing” an offence has been committed as opposed to the current lower test of “suspecting”. • Under PACE HMRC would be unable to obtain “excluded material” – certain “personal records”, medical samples and journalistic material. These restrictions do not currently apply. • Material subject to legal professional privilege would be specifically excluded; it is not at the moment. • Under PACE if special procedure material is involved (certain confidential business or journalistic material) the warrant must be issued by a circuit judge (a magistrate issues these warrants at the moment).
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C) Powers of Arrest

Current Powers	Power Used if PACE Adopted	Changes to Current Powers
<p>Ex- Revenue Matters</p> <p>There is no HMRC power of arrest for ex-Revenue matters. HMRC relies on the police for this who use their powers under PACE.</p>	<p>Section 24 – arrest without warrant</p>	<ul style="list-style-type: none"> • Arrests would be made by HMRC, no longer the police at HMRC's request.
<p>Ex-HMCE Matters</p> <p>Section 138 CEMA, Section 24(6) PACE, Section 72(9) VATA and similar provisions for all other indirect taxes.</p>	<p>Section 24 – arrest without warrant</p>	<ul style="list-style-type: none"> • HMRC can currently arrest anyone reasonably suspected of being guilty of the offence. Under PACE HMRC would only be able to make an arrest where it is also thought necessary for one of certain specified reasons. For example, one of the reasons is where there are reasonable grounds for believing the arrest is necessary to allow the prompt and effective investigation of the offence (section 24(5) PACE).

D) Searching Suspects on Arrest, Entry to make Arrests and Search Premises Following Arrests

Current Powers	Power Used if PACE Adopted	Changes to Current Powers
<p>Ex- Revenue Matters</p> <p>There are no HMRC powers for ex-Revenue matters. Instead HMRC relies on the police for this who use their powers under PACE.</p>	<p>Section 32 Section 17 Section 18 Section 19</p>	<ul style="list-style-type: none"> • Searches would be made by HMRC, no longer the police at HMRC's request.
<p>Ex- HMCE Matters</p> <p>HMRC would use PACE; Section 32 Section 17 Section 18 Section 19</p>	<p>Section 32 Section 17 Section 18 Section 19</p>	<ul style="list-style-type: none"> • No change – HMRC already uses PACE powers to make searches.

E) Additional PACE Powers it Might Be Appropriate to Make Available to HMRC (see paragraph 54 above)

Current Powers (for both ex-HMCE and ex-Revenue matters)	Power Used if PACE Adopted	Changes to Current Powers
<p>Fingerprinting</p> <p>There are no HMRC powers for taking fingerprints. Instead HMRC relies on the police for this who use their powers under PACE.</p>	<p>Section 27 Section 61</p>	<ul style="list-style-type: none"> Fingerprints would be taken by HMRC, no longer the police or a civilian gaoler at HMRC's request.
<p>Charging and Bailing Suspects</p> <p>There are no HMRC powers for this. Instead HMRC relies on the police for this who use their powers under PACE.</p>	<p>Section 37 Section 38 Section 47</p>	<ul style="list-style-type: none"> In appropriate circumstances suspects would be charged or bailed by HMRC, no longer the police at HMRC's request.

Abbreviations

CEMA	Customs and Excise Management Act 1979	SCS	Senior Civil Service
CT	Corporation Tax	SDLT	Stamp Duty Land Tax
CGT	Capital Gains Tax	TCA	Tax Credit Act 2002
FA	Finance Act	TCs	Tax Credits
IT	Income Tax	TMA	Taxes Management Act 1970
PACE	Police and Criminal Evidence Act 1984	VATA	Value Added Tax Act 1994

Annex F

Partial Regulatory Impact Assessment

This annex is a Partial Regulatory Impact Assessment to accompany the consultation document.

Title

Criminal Investigation Powers

Purpose and intended effect

The policy objective is to develop modern, proportionate, efficient and effective powers, with commensurate safeguards for citizens, for HMRC to use during criminal investigations.

Background

HMRC inherited various powers from its predecessor departments. Changes are being proposed for the reasons given below and detailed in the consultation document. For England, Wales and Northern Ireland HMRC is proposing to adopt the relevant powers from PACE. PACE does not apply in Scotland so separate, appropriate powers for Scotland are being considered.

Rationale for Government intervention

Intervention is needed to bring criminals to justice and protect society and the Exchequer. For this to be done efficiently and effectively HMRC needs appropriate powers which provide commensurate safeguards for citizens.

Changes are needed to the current position as the criminal investigation powers HMRC inherited are inconsistent, often out of step with the wider law enforcement community and cause practical difficulties. The problems with the current powers are detailed in the consultation document.

Consultation

The 30 March 2006 consultation paper¹¹ mentioned the possibility of adopting the relevant PACE powers for HMRC to use in England, Wales and Northern Ireland and that there would be consultation on the powers needed for Scotland. A clear majority of responses to that document were in favour of harmonising criminal investigation powers for England, Wales and Northern Ireland by adopting the relevant parts of PACE. A summary of responses to the consultation document will be published in October 2006.

Following the March consultation this paper sets out in more detail the option to adopt the relevant PACE powers and consults on the appropriate powers for Scotland.

Options

Do Nothing

¹¹ Modernising Powers, Deterrents and Safeguards: The developing programme of work – available at <http://www.hmrc.gov.uk/about/powers-appeal.htm>.

Responses to consultation have generally supported the view that tax crime should not be investigated differently to other crime. Compliant taxpayers need HMRC to have those powers that will allow it to remove the disadvantages they suffer from criminal non compliance. Currently there are gaps in those powers and also different powers for ex-Customs and ex-Revenue matters which can create uncertainty for those under investigation and can hinder effective investigation by HMRC officers.

Apply appropriate criminal investigation powers across HMRC

Parliament has already determined what is appropriate generally for the investigation of crime for England, Wales and Northern Ireland and enshrined it largely in PACE. This legislation is well understood and respected. An option for HMRC is to adopt the relevant parts of PACE for all HMRC's criminal investigations and this would enable HMRC to retain up to date powers for criminal investigation, which would regularly be subject to Parliamentary scrutiny. It would also ensure that HMRC remained properly equipped across the range of its activity to investigate tax crimes and related money laundering activity effectively, including attacks by organised crime on the tax and tax credit systems. This paper sets out that option in more detail.

For Scotland, PACE powers do not apply so this paper sets out issues to be considered when developing powers for HMRC to use when investigating crimes under the jurisdiction of Scottish courts.

Costs and benefits

Sectors and groups affected

The measures consulted on in this document are designed to tackle crime. Legitimate businesses and citizens in general would benefit as HMRC's ability to tackle and deter criminal activity would be increased.

Benefits

Compliant taxpayers can be doubly disadvantaged by criminal activity relating to tax and tax credits. Not only do compliant taxpayers end up paying an unfair share of what is needed to fund government expenditure but compliant businesses can find themselves undercut in the market place by lower prices subsidised from unpaid taxes or over claimed tax credits. Representations from citizens and businesses consistently stress the need for HMRC to deliver a level playing field. That includes tackling suspected criminal activity efficiently and effectively to deliver justice, deter crime and the social harm it causes, and help deliver fairness.

Costs

The only increased costs for any legitimate sectors as a result of options explored in this consultation would be some training costs for the legal sector as they get to know and understand the new rules. However, training costs are not expected to be large as the new rules are largely based on widely understood precedents or the adoption of existing powers.

HMRC would need to train staff on the proposed changes and amend the relevant guidance. However, this can be covered by existing budgets as part of the usual on-going programmes of work.

Small firms impact test

There would be no impact on small firms.

Competition assessment

The Review aims to improve competition by reducing the unfair advantage gained by those taxpayers that deliberately do not comply with their tax obligations. This will benefit all compliant taxpayers.

Enforcement, sanctions and monitoring

The options consulted on in this document include proportionate enforcement provisions and sanctions. There are robust procedures in place to monitor the use of criminal investigation powers by HMRC including:

- Internal authorisation that must be sought before a power is used
- External authorisation where appropriate (for example production orders being issued by a sheriff or judge)
- HMRC's internal audit and professional standards units review the use of powers
- External reviews by Her Majesty's Inspectorate of Constabulary for England, Wales and Northern Ireland and Her Majesty's Inspectorate of Constabulary for Scotland.

Comments

We would welcome comments on any aspect of this Consultation Document, and also on this Partial Regulatory Impact Assessment. Comments should be received by 1 November 2006.

Comments should be sent:

- by e-mail to powers.review-of-hmrc@hmrc.gsi.gov.uk;
- by post to HMRC and the taxpayer, Room 1C/03, 1st Floor, 100 Parliament Street, London SW1A 2BQ; or
- by fax to 020 7147 2460.

The Review can be contacted by telephone on: 020 7147 2401.

Annex G

Cabinet Office Code of Practice on written consultations

This consultation is being conducted in accordance with the code, which sets down the following criteria:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your Department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

You can see the full Cabinet Office Code of Practice on consultation on the internet, at the following address:

www.cabinet-office.gov.uk/regulation/Consultation/Code.htm

Complaints

If you have any comments or complaints about the consultation process, please contact:

Duncan Calloway,
Room 3/37,
100 Parliament Street,
London SW1A 2BQ

Email: duncan.calloway1@hmrc.gsi.gov.uk

Tel. 020 7147 2389

Details of how to respond to the consultation itself can be found at paragraph 21 of the consultation document.