



Her Majesty's Revenue and Customs disclosure compliance with criminal investigations

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Executive summary

1. Her Majesty's Inspectorate of Constabulary (HMIC) is empowered under the Commissioners for Revenue and Customs Act 2005 (CRCA) to inspect the actions and omissions of Her Majesty's Revenue and Customs (HMRC) in preventing, detecting, investigating or prosecuting criminal offences.
2. HMRC is a non-ministerial government department established by the Commissioners for Revenue and Customs Act 2005 (CRCA). It employs approximately 64,000 staff in 42 directorates nationwide. In 2011/12 HMRC collected £474.2 billion from the tax payer and distributed £42 billion in benefits and credits.¹
3. The Chairman and the Board are responsible for ensuring standards of corporate governance, while the Chief Executive and the Executive Committee are responsible for running the Department. HMRC as a law enforcement agency must satisfy all legal obligations when conducting criminal investigations.
4. Between October 2012 and January 2013, HMIC conducted an inspection of the way in which HMRC complied with legal disclosure obligations in accordance with the Criminal Procedure and Investigations Act 1996 (CPIA) as amended by the Criminal Justice Act 2003 (CJA). This included an assessment of the leadership, governance, systems and processes in place to ensure compliance with the legislation and of the training provided to staff.

Leadership and governance

5. The senior leadership team in the Criminal Investigation (CI) Directorate are united in their commitment to ensuring compliance with the rules of disclosure. The Crown Prosecution Service (CPS) Central Fraud Division (which is responsible for HMRC prosecutions in England and Wales)

¹ HM Revenue & Customs Annual Report and Accounts 2011-12, London, June 2012

stated during this inspection that there is now full judicial confidence in HMRC as a law enforcement agency.

6. HMRC has invested heavily in putting structures and processes in place to counter the reputational risk and loss of revenue associated with unsuccessful prosecutions directly linked to disclosure breaches. There are systems in place to ensure effective governance and these include the formation of a Disclosure Steering Group (DSG) which provides direction and control across the entire department. The operational support and guidance to criminal investigators is delivered by the Disclosure Coordination Unit (DCU). CI maintains an Enforcement Handbook, available to all staff through the HMRC intranet. The Handbook provides tactical guidance, legislation and policy relevant to all aspects of criminal investigations, with a chapter specifically dedicated to disclosure.
7. These governance systems are complemented by an internal inspectorate, the Criminal Justice Assurance Team (CJAT).
8. The inspection revealed some issues of concern around leadership and governance, including a lack of understanding among staff as to what the DCU are responsible for doing. This needs to be rectified and clear terms of reference created. Within the Enforcement Handbook there is an unambiguous mandatory instruction that staff must prepare disclosure plans at the outset of an investigation,² and submit disclosure consolidation reports (provide post prosecution feedback specific to disclosure) at the conclusion of a prosecution.³ However, there is evidence that investigators are not following the requirement of the Enforcement Handbook in some cases and are adopting their own different procedures for recording and revealing unused material, thereby jeopardising prosecutions and potentially wasting public funds.

² HMRC Enforcement Handbook "Prepare for disclosure" Handbook reference:026:006 and "Disclosure plan" – handbook reference 026:007

³ HMRC Enforcement Handbook "Consolidate disclosure" – handbook reference 026:032

Training

9. HMRC's Enforcement and Compliance (E&C) business area has a well established and resourced training structure and there is a designated portfolio holder for disclosure training in CI. There are three levels of disclosure training, which cater for the different degrees of knowledge required by staff across HMRC.⁴
10. CI policy states that staff will not perform the role of disclosure officer unless they have passed the highest level of training – level 3. The Disclosure Steering Group (DSG) identifies members of staff who require level 1 online disclosure training. Despite the significance and relevance of this training, level 1 training is not mandatory for all staff and is not always completed by those who are required to undertake it. Furthermore, it is difficult to identify who has completed the training, because this is not recorded consistently.
11. This inspection found that some of the staff interviewed had undergone level 3 training several years previously. The disclosure inspection conducted in 2006⁵ and the subsequent review in 2009⁶ recommended the implementation of refresher training for disclosure officers to ensure that their knowledge was up to date. However, no such refresher training has taken place.

Systems and Processes

12. HMRC was formed in 2005 through the amalgamation of Inland Revenue and Her Majesty's Customs and Excise. Both independent public bodies had their own bespoke systems. This legacy presents HMRC with the challenge of investing in systems which merge, rationalise and ensure compatibility of all information technology.

⁴ Level 1 comprises a 20-minute online package; Level 2 is a 90-minute online package; and Level 3 involves 2.5 days in a classroom as well as a guided learning unit which takes a further 3.5 days preparation and learning time and must be completed before the classroom learning.

⁵ *From Genesis to Revelation- A study on Disclosure*, Her Majesty's Inspectorate of Constabulary, London, August 2007 page 56.

⁶ *From Genesis to Revelation- A study on Disclosure- Revisited*, Her Majesty's Inspectorate of Constabulary, London, November 2009 page 12.

13. In recent years, failures in disclosure have resulted in the collapse of high profile prosecutions.⁷ These have centred on protracted Missing Trader Intra Community (MTIC) investigations.⁸ The Department has addressed this through lobbying for change in legislation (which has been enacted) and by rigorously challenging value added tax claims. This has led to a significant reduction in offending patterns.
14. The DCU was formed in early 2008 and has three areas of responsibility: policy; supporting and guiding disclosure officers; and acting as the single point of contact for third-party law enforcement requests specific to disclosure.
15. It is mandatory for all investigators to use HMRC's case handling system. An element of this system caters exclusively for disclosure and the completion of disclosure schedules. An online disclosure training package was introduced in July 2012 to assist staff with populating the case handling system. However at the time of the inspection fieldwork, only a minority of investigators had completed the training. Furthermore, the inspection revealed that investigators are not routinely using the case handling system for disclosure purposes and for the preparation of schedules as required.
16. Negativity towards the role of the disclosure officer was a recurring theme throughout this inspection, although its importance was fully accepted and understood. Investigators were open in saying that it was considered an undesirable role within the investigation because it was office based, protracted and could lead to tension in the team during case preparation and prosecution. It was also felt that the disclosure officer was not always supported by middle management and that the task was secondary to the investigation and not always recognised as critical.

⁷ *From Genesis to Revelation- A study on Disclosure*, Her Majesty's Inspectorate of Constabulary, London, August 2007 page 1.

⁸ The theft of value added tax.

Recommendations

17. HMIC's findings identified strengths, areas for improvement and areas of work in progress in governance, training and systems and processes, which are detailed in the main body of the report. Of higher priority are the following seven recommendations.

Recommendation 1: There needs to be more structure and guidance as to how learning about disclosure is captured and shared across Criminal Investigation and the wider department as appropriate. The Disclosure Coordination Unit needs to raise awareness levels within the Department of its function, its responsibilities, its capabilities and its role in disseminating organisational learning.

Recommendation 2: There needs to be greater management oversight and governance, particularly by the officer in charge, to ensure that disclosure plans and consolidation reports are completed in accordance with the Enforcement Handbook.

Recommendation 3: Where HMRC identify staff requiring level 1 disclosure training, the training should be mandatory.

Recommendation 4: Accurate records should be maintained of all staff, receiving levels 1, 2 and 3 disclosure training.

Recommendation 5: Disclosure refresher training as recommended by HMIC in 2006 and 2009 should commence by 31 May 2013.

Recommendation 6: The online training package for HMRC's case handling system should be completed by all investigators to ensure they are competent and that HMRC is able to enforce mandatory compliance with the system.

Recommendation 7: HMRC should enhance the status of the role of disclosure officer, which is currently insufficiently recognised and valued.

Introduction

- 1.1 Her Majesty's Inspectorate of Constabulary (HMIC) is empowered under the Commissioners for Revenue and Customs Act 2005 (CRCA) to inspect the actions and omissions of Her Majesty's Revenue and Customs (HMRC) in preventing, detecting, investigating or prosecuting criminal offences. This includes offences committed by HMRC staff themselves. HMIC's remit includes examination of how HMRC mitigates associated risks arising from actions or omissions.
- 1.2 Between October 2012 and January 2013 HMIC conducted an inspection of the extent to which HMRC complies with legal disclosure obligations in accordance with the Criminal Procedure and Investigations Act 1996 (CPIA) as amended by the Criminal Justice Act 2003 (CJA).
- 1.3 Because HMRC investigators have powers across the United Kingdom, the inspection team visited Scotland, having first liaised with Her Majesty's Inspectorate of Constabulary Scotland⁹. Interviews took place with investigators, managers and representatives from the Crown Office & Procurator Fiscal Service. Disclosure in Scotland is now governed by the Criminal Justice and Licensing (Scotland) Act 2010 (CJL(S) A).
- 1.4 HMRC's primary responsibility is the administration of tax and revenue systems in the United Kingdom. Ancillary to that role is its duty for the investigation of criminal offences committed against these systems.

Terms of reference

- 1.5 The agreed terms of reference for this Inspection can be summarised as follows.
 - To assess and report on HMRC's compliance with CPIA and CJA.
 - To identify good practice within the disclosure regime.

 - To make any necessary recommendations for improving HMRC compliance with CPIA and CJA.

⁹ Commissioners for Revenue and Customs Act 2005 section 27 (4).

- 1.6 HMIC and HMRC agreed that the Inspectors would therefore assess the Department's application of legislation by investigators, as well as conduct a review of staff training, internal and external guidance, the disclosure communication strategy and working relationships.
- 1.7 The full terms of reference can be found at Annex A.

Methodology

- 1.8 The inspection was conducted in four phases:
- scoping and agreeing terms of reference;
 - analysing relevant documentation supplied by HMRC;
 - conducting interviews and chairing focus groups with senior managers and staff at various grades across the HMRC Enforcement & Compliance business area at various locations and
 - evaluating the evidence, reporting and making recommendations.
- 1.9 HMRC provided HMIC with relevant key documentation before the inspection fieldwork phase. This was supplemented by additional correspondence as the inspection progressed.
- 1.10 The interview and focus group phase was conducted during October and November 2012. HMIC is grateful for the cooperation, support and flexibility that was offered by all HMRC employees throughout the process.
- 1.11 HMIC's findings have established strengths, areas for improvement and work in progress within governance, training and systems and processes. Recommendations supported by evidence have been made to improve HMRC's performance and raise public confidence.

Background and Context

- 2.1 The merger of Inland Revenue and Her Majesty's Customs and Excise led to the formation of HMRC on 18 April 2005. HMRC is structured around four operational groups: Personal Tax; Benefits and Credit; Business Tax and Enforcement and Compliance. Each group is led by a Director General.
- 2.2 This report examines the extent to which HMRC is meeting its statutory disclosure obligations under the Criminal Procedure and Investigations Act 1996 (CPIA), as amended by the Criminal Justice Act 2003 (CJA).
- 2.3 Annex B describes the developments surrounding the law of disclosure.
- 2.4 Historically, many of HMRC's disclosure difficulties were caused by the failure of officers in the investigative process to reveal all relevant material to the case disclosure officer, who in turn was unable to reveal it to the prosecution. The reputational risk, financial costs and potential damage to public confidence associated with such failures to comply with legislation are not restricted to HMRC, but affect all law enforcement agencies. Given the gravity of these risks HMIC has been commissioned previously to inspect¹⁰ and then review¹¹ HMRC's compliance with disclosure obligations. While the current inspection stands alone, it revisits the recommendations made in these earlier reports.
- 2.5 During the course of any investigation a large volume of material may be generated. Anything the prosecution proposes to rely upon is determined as evidence; the remaining material is known as unused material and is subject to the disclosure regime. For disclosure purposes it is important that all material is accurately recorded, retained, revealed and continuously reviewed.

¹⁰ *From Genesis to Revelation- A study on Disclosure*, Her Majesty's Inspectorate of Constabulary, London, August 2007.

¹¹ *From Genesis to Revelation- A study on Disclosure- Revisited*, Her Majesty's Inspectorate of Constabulary, London, November 2009

- 2.6 If unused material is relevant to an investigation it has to be revealed to the prosecutor. The test for relevance is defined as: “...if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.”¹²
- 2.7 The prosecutor will then decide whether that material should be disclosed to the defence. The disclosure test is defined as “...any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.”¹³
- 2.8 HMRC’s Criminal Investigation (CI) directorate within Enforcement and Compliance operational group is the only part of HMRC which undertakes criminal investigations. CI staff have at their disposal all recognised crime prevention and detection tactics, both reactive and proactive. They possess the skills to tackle national and international organised crime as well as volume crime.
- 2.9 Some investigations inevitably gather substantial quantities of unused material and so place a heavy burden on criminal investigation teams working to comply with their obligations under CPIA. HMRC in the past decade has experienced the collapse of a number of high-profile cases because of disclosure failings. The enormous expansion in digitally stored material, email traffic and other electronic communications, which CPIA predates, makes the management of disclosure appreciably more testing.

¹² Criminal Procedure and Investigations Act 1996 s 23(1) Code of Practice 2005 Para 2.1

¹³ Criminal Procedure and Investigations Act 1996 s3(1)(a)

2.10 HMRC's primary role is not that of an investigative body but to collect revenue on behalf of the exchequer. Contextually it is important to understand that the Department has national and wide-ranging responsibilities, with the investigation of criminal offences being only one aspect. Nevertheless, it is essential that HMRC keep compliance with disclosure requirements at the heart of every criminal investigation in order to ensure successful prosecutions. This will be achieved by effective governance, the provision of high quality training for staff and reinforcing compliance with systems and processes introduced to facilitate disclosure. HMIC therefore reviewed these elements of HMRC's practice.

Governance

3.1 HMIC conducted interviews with senior leaders within HMRC's Enforcement and Compliance (E&C) operational group. It is clear that there is a unified commitment from senior management to ensure compliance with the legislation governing disclosure. HMIC's 2007 disclosure report identified that there had been adverse historical judicial criticism of Her Majesty's Customs and Excise as an investigative body (before it was merged with the Inland Revenue in 2005).¹⁴ However, the CPS Central Fraud Division, which is responsible for HMRC prosecutions in England and Wales, stated during this inspection that there is now full judicial confidence in HMRC as a law enforcement agency.

3.2 Governance within disclosure is assured through the following groups, roles and processes:

- the Disclosure Steering Group (DSG);
- the Disclosure Co-ordination Unit (DCU);
- the Enforcement Handbook;
- the Criminal Justice Assurance Team (CJAT);
- the Operational Tasking and Performance Team (OTP);
- joint CPS seminars and workshops; and
- the senior investigating officers (SIO), case officers and the disclosure officer (DO) manage the disclosure process throughout operations.

These were reviewed to assess how far each was helping to ensure compliance with disclosure requirements.

¹⁴ *From Genesis to Revelation- A study on Disclosure*, Her Majesty's Inspectorate of Constabulary, London, August 2007 page 1.

Strengths

- 3.3 The inspection established the following strengths in relation to governance. These positively drive compliance with disclosure legislation, quality assure processes and safeguard the Department.
- 3.4 The Disclosure Steering Group (DSG) was formed in November 2005 to improve disclosure compliance. It is chaired by a Deputy Director from Criminal Investigation and meets every quarter. The meetings are attended by nominated senior stakeholders and external partners and action plans are created to address any issues identified. The DSG also maintains oversight of disclosure training. HMIC regard the DSG as a strength because it is a strategic body which looks across the department as a whole and seeks to improve and drive disclosure compliance. In order to ensure legal compliance and minimise reputational risk, the DSG implements changes in law reflecting this in policy and guidance.
- 3.5 The Disclosure Co-ordination Unit (DCU) was formed in early 2008 following a recommendation made by HMIC,¹⁵ and acts as the secretariat to the DSG. HMIC regard the DCU as a strength because it rationalises systems and disclosure processes. It also supports and guides disclosure officers and acts as the single point of contact for all criminal investigators and third-party law enforcement requests related to disclosure.
- 3.6 The Enforcement Handbook covers all aspects of HMRC law enforcement. HMIC regards the chapter dedicated to disclosure as a strength because it provides investigators with detailed and comprehensive information, policy, guidance, direction and legislation. It also explicitly highlights what is required from those involved in criminal investigations and prosecution.
- 3.7 The Criminal Justice Assurance Team is an internal inspectorate tasked with conducting reviews on areas of concern within HMRC law

¹⁵ *From Genesis to Revelation- A study on Disclosure*, Her Majesty's Inspectorate of Constabulary, London, August 2007 page 56.

enforcement. This is a strength because it reports findings and makes recommendations in order to ensure legal compliance, minimise the damage to the reputation of HMRC and maintain public confidence.

- 3.8 The Operational Tasking and Performance Team (OTP) have been in existence within Criminal Investigation (CI) since September 2011. They are responsible for visiting CI branches and reviewing processes, planning and management information and reporting their findings. As part of that process they consider, disclose and report issues and make recommendations promoting good operational practice. In addition the OTP assure investigations in order to ensure they are appropriate, efficient and effective. This is predominantly achieved by dip sampling live cases and providing branch managers with direction and feedback. Although the OTP assessments do not directly feature disclosure, it is a strength because it encourages the pursuance of focussed lines of enquiry, therefore unnecessary material is not gathered and the burden on the disclosure officer is reduced.
- 3.9 In April 2010 the responsibility of prosecuting HMRC cases moved from the Revenue and Customs Prosecuting Office (RCPO) to the Crown Prosecution Service (CPS). Lawyers from RCPO and the CPS joined together in a new Central Fraud Division. The inspection identified that a good working relationship exists between all parties and the prosecution team: this is a strength. Furthermore the relationship is enhanced by meetings held every two months between senior lawyers and senior HMRC officers, at which cases are discussed. The CPS has a recognised disclosure 'champion' who regularly reviews, monitors and updates HMRC on specific disclosure issues. In addition, during 2012 the CPS organised joint disclosure workshops, attended by representatives from HMRC, the Metropolitan Police Service and the City of London Police.
- 3.10 HMIC identified that the direction provided by the senior leadership team and outlined in the Enforcement Handbook is a strength because it

emphasises to officers in charge their responsibility for leading, managing and supporting disclosure officers.

- 3.11 These responsibilities include the appointment of a suitable disclosure officer and the formulation, approval and implementation of a disclosure plan.

Areas for Improvement

- 3.12 The inspection identified the following as areas for improvement because they reflect a lack of understanding and conformity among staff which will affect the overall compliance with disclosure policy.
- 3.13 During the HMIC inspection it became evident the role of the DCU was not universally understood or recognised. The DCU is an integral part of the disclosure process because it provides the information on which areas of business should be interrogated to ensure all relevant material has been researched. Some staff were uncertain whether it was the disclosure officer's or DCU's responsibility to check mandatory work areas¹⁶ for unused material.
- 3.14 The DCU has no documented terms of reference, however the role of the DCU is set out on CI's intranet.¹⁷ Although disclosure guidance bulletins are issued on changes to operational policy, the DCU doesn't currently gather and communicate messages about lessons learnt and good practice. HMIC research established that no clear communication strategy exists to do this. The opportunity for E&C to learn lessons and improve practice is further limited by the inconsistent submission of disclosure consolidation reports (DCRs) by investigators, which provide post prosecution feedback related to disclosure.
- 3.15 The Enforcement Handbook clearly states that "*on first appointment the DO [Disclosure Officer] must prepare a disclosure plan that is agreed by the OIC [Officer in Charge]*" (handbook reference 026:006). The

¹⁶ Namely the National Humint (Human Intelligence) Centre (NHC), National Source Unit (NSU) and National Coordination Unit (NCU).

¹⁷ <http://intranet.active.hmrci/ci/guidance/ci0016.htm>

inspection established that these plans are not always being prepared and that some investigators failed to understand what a disclosure plan is. This instruction needs to be better communicated by managers and checked to ensure compliance.

- 3.16 The Enforcement Handbook also states that “*the DO must complete a consolidation report for a number of reasons but primarily to identify methods of best practice and lessons learnt. It should also contain confirmation that the case material and disclosure schedules are up to date. This report should then be approved by the OIC and forwarded to the DCU*” (handbook reference 026:032). The inspection identified that these reports are not always submitted. The DCU sends a reminder to the disclosure officer and copies in the officer in charge, but there is no follow up process. With reference to disclosure the DCR as a document is a primary source of learning for E&C. Investigators stated that the reason for the non compliance is that issues tend to be dealt with along the way rather than left to the end. In any event there must be intrusive supervision around this process and the OIC needs to be accountable for ensuring the DCR is submitted.

Work in Progress

- 3.17 A senior manager within CI is the lead for the planning and change programme with a team of 37 staff. His portfolio covers organisational learning, including in relation to compliance with disclosure requirements. An organisational learning pilot began in December 2011 with three strands; firstly, how to encourage sharing best practice and learning lessons; secondly, acting as a moderator; and thirdly, managing discussions with policy holders. The pilot is due for evaluation in early 2013.

Recommendation 1: There needs to be more structure and guidance as to how learning about disclosure is captured and shared across Criminal Investigation and the wider department as appropriate. The Disclosure Coordination Unit needs to raise

awareness levels within the Department of its function, its responsibilities, its capabilities and its role in disseminating organisational learning.

Recommendation 2: There needs to be greater management oversight and governance, particularly by the officer in charge, to ensure that disclosure plans and consolidation reports are completed in accordance with the Enforcement Handbook.

Training

- 4.1 HMRC's Enforcement and Compliance (E&C) business area comprises around 20,000 staff, spread across five directorates: Risk and Intelligence Service; Criminal Investigation; Local Compliance; Debt Management and Banking; and Specialist Investigation. There are dedicated staff who are responsible for training for each directorate. The training delivered is bespoke to each directorate. The CI training team has an individual who holds the portfolio for disclosure training. The same training is delivered nationally, applying the same assessment criteria.
- 4.2 In relation to disclosure training strategic oversight is maintained by the Disclosure Steering Group (DSG) which also monitors staff compliance with the legislation. The Disclosure Co-ordination Unit (DCU) is actively involved in the development of disclosure training.
- 4.3 There are three levels of disclosure training:
- Level 1: a 20-minute online package.
 - Level 2: a 90-minute online package.
 - Level 3: a course lasting 2.5 days. It is classroom based and the student either passes or fails. Students are required to complete a guided learning unit before attendance on the course which takes approximately 3.5 days.

Strengths

- 4.4 The paragraphs below document areas that HMIC regard as strong points. They illustrate the training and support available to investigators performing the function of disclosure officer.
- 4.5 CI mandates that individuals cannot perform the role of disclosure officer until they have successfully completed the level 3 disclosure training. HMIC regards this as a strength, because it ensures statutory

compliance.¹⁸ The level 3 training is a comprehensive package specifically designed for disclosure officers. It is positive in that it assists in mitigating challenges at court. Moreover it safeguards the disclosure officer, the senior leadership and HMRC.

- 4.6 The Department has invested heavily in assets to help the disclosure officer comply with legislation. In particular the availability of and access to the DCU, the Enforcement Handbook and information systems are valuable, because these resources support the disclosure officer and raise awareness of disclosure issues before they manifest at the case prosecution stage.
- 4.7 The inspection established that knowledge of disclosure and the associated legislation was embedded within CI and sufficient in relation to E&C more widely. This is an advantage since it highlights the understanding and importance placed on disclosure. It also demonstrates the effort expended by the Department in order to progress on disclosure issues.
- 4.8 Multi-agency disclosure workshops took place in 2011 and 2012 and were co-ordinated by the CPS. These have assisted in developing mutual understanding. This is helpful as it breaks down barriers and develops relationships between HMRC and the CPS.

Areas for Improvement

- 4.9 HMIC found the following areas for improvement. If these are considered and the recommendations implemented, this would strengthen HMRC's professional approach to disclosure.
- 4.10 HMRC hold large volumes of personal and business data across numerous information management systems. This data could be relevant material in criminal and civil investigations. The failure to satisfy the court that the Department has fulfilled its disclosure obligations (by

¹⁸ Criminal Procedure and Investigations Act 1996 s 23(1) Code of Practice 2005 para 3.3
“...disclosure officers and deputy disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively.”

checking information management systems for relevant material) has resulted in the collapse of high profile cases. In order to obviate this risk, HMRC has developed disclosure training packages to cater for different roles performed by staff. Where the Department deem that staff should undertake level 1 training this should be mandatory.

- 4.11 The multi-agency disclosure workshops coordinated by the CPS are acknowledged by HMIC as good practice. Feedback provided to the inspection team by practitioners identified that they would benefit from participating in similar events. HMIC recognises how these workshops promote understanding and allow the sharing of experience and suggests more should be held.
- 4.12 The disclosure inspection conducted by HMIC in 2006 and the subsequent review in 2009 recommended refresher training for level 3. It is acknowledged that the training has now been developed and tested. However, it has yet to be introduced.

Recommendation 3: Where HMRC identify staff requiring level 1 disclosure training, the training should be mandatory.

Recommendation 4: Accurate records should be maintained of all staff, receiving levels 1, 2 and 3 disclosure training.

Recommendation 5: Disclosure refresher training as recommended by HMIC in 2006 and 2009 should commence by 31 May 2013.

Systems and Processes

- 5.1 HMRC employs 64,000 staff, who are spread nationally across four operational groups and undertake diverse roles to collect and administer direct and indirect taxation. At the end of the financial year 2011/12 HMRC gathered £474.2 billion in revenue and distributed £42 billion in benefits and credits.¹⁹
- 5.2 Because of the nature of its work, the Department holds a vast amount of personal, professional and business data. As technology developed over the latter part of the twentieth and early twenty-first century, data was transferred from hard copy paper systems to computerised records.
- 5.3 The Inland Revenue and Her Majesty's Customs and Excise merged in 2005 to form HMRC. Before this they were independent organisations with their own systems and processes. Given their autonomous existence for many years, a multitude of systems were in place to manage the information they retained. This coupled with the merger resulted in today's situation, in which the Department may have to search an extensive number of databases in order to comply with current legislation.
- 5.4 The increased use of digital storage methods has created new challenges for CI (along with other law enforcement bodies). The Supplementary Attorney General's Guidelines on Disclosure observe that it is not the duty of the prosecution "*to comb through all the material in its possession...on the look out for anything which might conceivably or speculatively assist the defence*"²⁰. Furthermore the 2011 Guidelines build on the 2005 Guidelines by stating: "*...Where there is enormous volume of material it is perfectly proper for the investigator/disclosure officer to search it by sample, key words, or other appropriate search*

¹⁹ HM Revenue & Customs Annual Report and Accounts 2011-12, London, June 2012

²⁰ *The Supplementary Attorney General's Guidelines on Disclosure, Digitally Stored Material* July 2011

tools or analytical techniques to locate relevant passages, phrases and identifiers.”²¹

- 5.5 Until recently, common law governed disclosure obligations in Scotland. The disclosure process in Scotland has now been codified following the introduction of the Criminal Justice and Licensing (Scotland) Act 2010 which came into effect in June 2011. At the time of writing (January 2013) there are some cases which are going through the prosecution process to which this legislation has been applied. HMRC investigators have received appropriate training to cater for the legislative change.
- 5.6 HMRC recognises the difficulty presented by the number of IT systems it holds. The Department has begun a process of rationalising the multitude of systems into what is defined as the ‘13 machine’ strategy. Each machine is described as a logical grouping of information technology capability underpinned by a supporting set of applications, data and technology. Disclosure capability is part of the Case Management Machine. Delivery of the functions is fragmented across several projects. Subject to approval of their business cases, two projects are scheduled to deliver in September 2013. If adopted this should streamline and make the interrogation of HMRC systems more accurate and straightforward.

Strengths

- 5.7 The inspection established the following strengths, where systems and processes have been adopted by HMRC to ensure a consistent, auditable approach by investigators managing disclosure. These are identified as strengths because each contributes to the corporate response to ensure compliance with the rules of disclosure.
- 5.8 Missing Trader Intra Community (MTIC) investigations are in essence the theft of Value Added Tax (VAT). They take the form of acquisition and carousel fraud (see Annex C for more detail). These investigations are complex, span several years and all have an international dimension.

²¹ Attorney General’s Guidelines on Disclosure 2005 paragraph 27.

Offenders include organised crime groups and investigations of this nature generate vast amounts of material. It is evident that challenges from defence teams focus on technical disclosure issues as opposed to the strength of evidence. Investigations of this type were the principle contributors to the failure by HMRC to fulfil its disclosure obligations. HMIC regard the response from HMRC in tackling MTIC fraud as a strength. The Department has influenced the amendment of European legislation so that duty is paid in advance. Furthermore, it has introduced internal checking mechanisms to test the veracity of the claim. Legislation and the preventative approach have led to a significant decrease in MTIC fraud and associated investigations. This led to more resource being available to tackle stretching volume crime targets.

- 5.9 The Departmental solicitor's office is available to advise HMRC staff on all pre-arrest powers and legislation. This provides investigators with direct access to legal advice when they are conducting an investigation and planning arrests. Access to such advice provides investigators with clarity on their powers and reduces the risk to the Department of litigation should investigators make mistakes.
- 5.10 In anticipation of the changing landscape in respect of technology and the increased use of information stored in digital format, HMRC have an established digital forensic group to review how the department handles digital material in the disclosure process. This is a strength because the digital forensic group advise on strategies to examine information technology systems proportionately and reasonably in line with disclosure guidance. The CPS is engaged at an early stage to ensure that the disclosure assessment remains focussed.
- 5.11 The Disclosure Coordination Unit (DCU) is vital in the process of disclosure compliance. Officers complete a DCU1 form (a request for disclosure checks to be undertaken across E&C) and submit this to the DCU. The DCU then circulates the information supplied to a mandatory list of business areas, which in turn research their systems and reply direct to the disclosure officer. Depending on the case, the DCU will point

the disclosure officer in the direction of any other relevant business area. This is a strength because the process provides the disclosure officers with a single point of contact, is auditable and ensures a corporate approach when seeking to identify all material the department holds. The DCU is actively involved in the development of disclosure training and collates the consolidation reports which should be completed by disclosure officers at the end of each prosecution (for the purposes of organisational learning and good practice).

- 5.12 The bespoke HMRC case handling system should be used for all criminal investigations. A section of this system caters exclusively for disclosure and the completion of schedules to assist the prosecution. An online training package exists to assist staff with populating the case handling system, to aid the disclosure process. The case handling system itself is a strength, because it provides investigators with a single system to record all elements of an investigation. The system is auditable and enables supervisors to access their staff's investigations.
- 5.13 The role of dedicated disclosure officer has been trialled in London. The individuals selected possess investigative skills but are not investigators. Initial observations indicate that this is a positive step, because it raises the profile of the individual and reduces the burden on investigative resources.

Areas for Improvement

- 5.14 In order to improve performance in the disclosure regime, HMIC's inspection identified the following systems and process issues. These would merit further consideration and action from HMRC.
- 5.15 The inspection team interviewed a large number of practitioners and managers, all of whom reported concerns with the functionality of HMRC's case handling system. It was described as "cumbersome" and not "user friendly". Use of the system is mandatory but feedback during the course of the inspection suggested that it can be difficult to prepare and print disclosure schedules. This has led to the use of Excel

spreadsheets instead, with the explicit approval of stakeholders (namely the CPS and prosecuting counsel). This creates potential future problems in that the Excel spreadsheet becomes the primary source of information, with changes recorded there rather than on the case handling system. This means that should there be a review or appeal there would be no accurate record of disclosure held within the system.

5.16 The inspection revealed reluctance on the part of staff to use HMRC's case handling system for disclosure purposes. Furthermore despite the online training package which has been available since July 2012, at the time of the inspection few investigators had completed the training. This will undoubtedly have contributed to the lack of understanding of the case handling system and the failure to comply with CI policy.

5.17 HMRC staff working in Scotland are required to produce disclosure schedules in all solemn cases (these are cases heard at High Court or Sheriff and Jury level). However, because HMRC's case handling system is not set up to produce Scottish style disclosure schedules, it is not used for this purpose and the schedules are completed manually. There needs to be dialogue between the Department and the Crown Office & Procurator Fiscal Service to ensure that the case handling system delivers and fulfils Scottish legislation obligations and meets the requirements of partners and HMRC.

5.18 In a high proportion of cases, the disclosure schedules did not describe the unused material to a degree that satisfied prosecutors. The OIC needs to intrusively manage the process before the schedule is submitted.

5.19 Following receipt of a DCU1 (request for disclosure checks across E&C), the DCU instigate mandatory enquiries. Interviewees including disclosure officers, investigators and managers suggested it would be beneficial for a non exhaustive reference document to be available. This would provide disclosure officers with a list of all business areas, over and above those

instigated by the DCU, where data may be held to assist decision making and compliance.

5.20 The inspection team ascertained that disclosure officers may not consider or even be aware of the international Fiscal Crime Liaison Officer (FCLO) network. This is a potential relevant source of material. However it is clear that the DCU does appreciate the FCLO connections. If the disclosure officer fails to detail within the DCU1 any overseas aspect of the investigation (which could be as simple as an international telephone number), the opportunity for FCLO checks would be missed.

5.21 Negativity towards the role of the Disclosure Officer was a recurring theme throughout this inspection. While the importance of the role was fully accepted and understood, investigators were candid in saying that it was considered an undesirable role within the investigation. They generally found the disclosure officer's responsibilities difficult, felt that they were not always supported by middle management and that the role was secondary to the investigation and not always recognised as critical. This belief is exacerbated because certain HMRC investigations are complex and lengthy, so disclosure officers can remain in post for several years. Consequently, staff are reluctant to take on the role and would not volunteer. The inspection team acknowledges that the role of disclosure officer is demanding and requires an eye for detail.

Recommendation 6: The online training package for HMRC's case handling system should be completed by all investigators to ensure they are competent and that HMRC is able to enforce mandatory compliance with the system.

Recommendation 7: HMRC should enhance the status of the role of disclosure officer, which is currently insufficiently recognised and valued.

Conclusion

- 6.1 HMIC found that standards and levels of knowledge on meeting disclosure obligations varied depending on the role of the interviewees. Given that HMRC is a national body with a wide range of business, this in itself was not surprising. For example, the Department employs staff in roles ranging from call handlers through to those investigating complex international criminality.
- 6.2 HMRC has invested heavily in structures and processes to counter the reputational risk and loss of revenue associated with unsuccessful prosecutions directly linked to disclosure breaches. CI staff are cognisant of their responsibilities and the implications. However, this is not consistently the case in other directorates within Enforcement and Compliance.
- 6.3 There is a healthy relationship with the CPS at a senior level. As it is evident that challenges from defence teams focus on technical disclosure issues as opposed to the strength of evidence, HMRC should place disclosure obligations as an integral part of all investigations.
- 6.4 As part of the 2010 Spending Review, HMRC was provided with additional funds to tackle volume crime. Consequently 200 volume crime investigators and 40 further intelligence officers have been recruited to help meet the stretching prosecution targets, which require a significant increase in prosecutions²² related to tax evasion (excluding those resulting from organised crime groups). The 2011/12 target was 365, of which 302 were achieved; the target for 2012/13 was 565, of which (as of November 2012) 349 had been achieved. The target for 2013/14 is set at 765 and for 2014/15 1165²³. It is acknowledged by HMIC that the targets are challenging, in particular those for 2014/15. Although the CPS has made a clear commitment to resource this casework, it is HMIC's view that HMRC, should continue to liaise with the CPS

²² For this purpose prosecutions are defined as individuals charged as a result of HMRC investigations.

²³ Information provided by HMRC Criminal Investigation Directorate

regarding the resource implications of the increasing caseload on the CPS.

- 6.5 HMRC must continue to ensure that all staff receive the appropriate training and maintain accurate records. Support from line management also needs to be more proactive. The mandatory case handling system must be utilised.
- 6.6 HMIC has identified key strengths, work in progress and areas for improvement, not all of which are prioritised as recommendations. Those areas for improvement that are detailed within the narrative of this report remain for consideration by managers.
- 6.7 HMIC would like again to place on record sincere thanks to all the HMRC staff who participated in the inspection process.

Annex A

Inspection terms of reference

An inspection of HMRC's compliance with disclosure obligations under the Criminal Procedure and Investigations Act 1996 (CPIA) as amended by the Criminal Justice Act 2003 (CJA) in relation to unused material within the criminal justice system.

Background

In July 2003, The Honourable Mr Justice Butterfield published a report entitled *Review of criminal investigations and prosecutions conducted by HM Customs & Excise*. His recommendations included the need for regular, independent external scrutiny of Her Majesty's Customs and Excise law enforcement work. Following the announcement of the merger of Her Majesty's Customs and Excise and the Inland Revenue, The Commissioners for Revenue & Customs Act 2005 introduced HMIC as the organisation to undertake that role for the newly formed HMRC.

HMIC undertook an inspection of HMRC preparedness for disclosure and compliance with disclosure obligations under CPIA and CJA legislation in 2006. A subsequent review was undertaken in 2009. The 2009 review was established to consider the practical operation of the CPIA disclosure regime and, if appropriate, the legislative framework with a particular focus on the proportionality of the time and costs involved in that disclosure process. The recommendations related to improving staff awareness and enabling better compliance with the disclosure regime throughout HMRC. There were also recommendations about specialised training and producing improved instructions to help staff meet HMRC's legal obligations.

In September 2011 the Lord Chief Justice published a review of *Disclosure in Criminal Proceedings* in England and Wales relating to the whole of law enforcement, prompted by concerns as to the operation of the disclosure regime contained in the Criminal Procedure and Investigations Act 1996, as amended ("the CPIA"). In the executive summary it is noted that "There is room for significant, if incremental, improvement on the part of all concerned with the

criminal justice system” and that “Improvements in disclosure must be prosecution led or driven...”

This inspection will review current HMRC compliance with the CPIA.

Terms of reference

- To assess and report on HMRC’s compliance with CPIA and CJA.
- To identify good practice within the disclosure regime.
- To make any necessary recommendations for improving HMRC compliance with CPIA and CJA.

The inspection will focus on:

1. HMRC’s application of the CPIA and CJA legislation by the investigator.
2. Whether staff receive sufficient, comprehensive, proportionate and regular training that equips them with the knowledge they require to fulfil their obligations. Whether the training supports the delivery of CPIA compliance for HMRC around disclosure.
3. The clarity of HMRC’s instructions and guidance pertaining to disclosure and undisclosed material.
4. The effectiveness of HMRC’s communication/dissemination of instructions/guidance in relation to CPIA and CJA legislation.
5. The identification and retrieval of information both from the investigation and from internal and external third parties.
6. The relationship between the case team and the prosecutor.
7. The effectiveness of any quality assurance and quality control procedures.
8. HMRC’s performance management process regarding CPIA disclosure issues.

Methodology

Research current legal framework relating to CPIA Disclosure.

1. Collect the relevant documents, file and detail HMRC’s policy, systems and procedures.

2. Collate, assess and evaluate findings from the document review; use these findings to influence field work and include relevant detail within the report.
3. Conduct fieldwork visits to relevant units: interview key staff either individually or in groups and key stakeholders.
4. View a random sample of current live cases to assess disclosure compliance.
5. Collate, assess and evaluate findings. Explore opportunities for benchmarking HMRC performance.
6. Draft the report to include recommendations and consult with HMRC for factual accuracy.
7. Finalise report.

Timescales

Fieldwork to commence in October 2012

Emerging findings 'hot debrief' December 2012

Completion of report by January 2013

Annex B

Developments concerning the law of disclosure

Before the introduction of formal safeguards, common law and the integrity of those acting on behalf of the Crown in criminal cases provided the reassurance that principles of fairness were not breached.

In *Dallison v Caffery*, Lord Denning MR²⁴ expressed the duty of the prosecution in these terms: “*The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.*”

Further developments in criminal procedure resulted in the production of the Attorney General’s disclosure guidelines of 1981, introducing the concept of unused material. In essence this unused material includes everything in the possession of the Crown not adduced as evidence and the discretion to disclose remained with the prosecutor. Unhappiness with this regime was evident by the end of the 1980’s, even before its inadequacies were highlighted by a number of high profile cases²⁵.

R v Ward was one of a number of terrorism related cases dating back to the 1970s, in which miscarriages of justice were shown to have resulted. In *R v Ward*, the Court of Appeal Criminal Division held it to be settled law that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed was an “*irregularity in the course of the trial*”. The Court went on to observe that “*timely disclosure*” by the prosecution was an “*incident of a defendant’s right to a fair trial*”

²⁴ *Dallison v Caffery* [1965] 1 QB 348 Lord Denning MR, at p.369.

²⁵ *R v Ward (Judith)* [1993] 1 WLR 619.

The difficulty with *R v Ward* was its apparent requirement that, subject only to considerations of Public Interest Immunity (PII), virtually everything else gathered and created by the investigators during their investigation had to be disclosed. This gave the defence something akin to a blank cheque and caused real difficulty in the fight against crime.

Against this background, the Runciman Commission²⁶ took the view that the law on disclosure imposed unnecessary burdens, requiring too much from the prosecution and too little from the defence.

Legislation followed in the shape of the Criminal Procedure and Investigations Act (CPIA) 1996, which, as amended by the Criminal Justice Act 2003 (CJA) contains the disclosure rules presently in force. Allied to this is Article 6 (the right to a fair trial) of the European Convention on Human Rights 1998.

The intention was to create a more balanced approach to disclosure, although some thought it swung too far in favour of the defence. The CPIA came into force to prevent a recurrence of the miscarriages of justice which were a legacy of an earlier and troubled period in the criminal justice system. The CPIA was the legislative response to such miscarriages and other concerns regarding potential malpractice.

In *R v H*,²⁷ Lord Bingham underlined the central importance of proper disclosure: *“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.”*

A recent review of disclosure was conducted by the Rt. Hon. Lord Justice Gross²⁸ at the request of the Lord Chief Justice. This review was prompted by concerns in relation to the operation of the disclosure regime contained in the

²⁶ *Report Of The Royal Commission On Criminal Justice*, Cmnd 2263 1993 HMSO.

²⁷ *R v H* [2004] UKHL 3; [2004] 2 AC 134,

²⁸ *Review of Disclosure in Criminal Proceedings* London September 2011.

CPIA as amended by the CJA 2003. The report by the Rt. Hon. Lord Justice Gross was published in September 2011. The key findings identified that there was no requirement for legislative change. However recommendations were made regarding the obligations of the prosecution, defence and the judiciary relating to disclosure.

The Rt. Hon. Lord Justice Gross and the Rt. Hon. Lord Justice Treacy undertook a further review of disclosure,²⁹ which was published in November 2012. This focused on sanctions for disclosure failure by both the prosecution and the defence. The review concludes that the creation of additional sanctions against either the prosecution or defence is not required.

²⁹ *Further review of disclosure in criminal proceedings; sanctions for disclosure failure*. London November 2012.

Annex C

Missing Trader Intra Community Investigations

Missing Trader Intra Community (MTIC) investigations are in essence the theft of Value Added Tax (VAT). This type of VAT fraud involves obtaining a VAT registration number in the UK for the purposes of purchasing goods free from VAT in another EU Member State, selling them at a VAT inclusive purchase price in the UK and then going missing or defaulting without paying the output tax due to HMRC. The organised criminal networks behind these frauds are well resourced, innovative and resilient.

It's the costliest form of VAT fraud facing the UK and is estimated to have deprived the Government between £0.5bn and £2bn in 2009/10.

There are two main variants of MTIC fraud:³⁰

- Acquisition fraud
- Carousel fraud

Acquisition fraud is defined as commodity-based fraud in which VAT standard-rated goods or services are purchased zero-rated for VAT purposes from a supplier based in another EU Member State and sold in the UK for domestic consumption. The importer, who is officially known as the "acquirer", subsequently fails to account for the VAT due on the standard rated taxable supply to its UK based customer(s), which then has an impact on HMRC's VAT receipts.

Carousel fraud is defined as financial fraud that is an abuse of the VAT system resulting in the fraudulent extraction of revenue from the UK Treasury. It may involve any type of standard-rated goods or services. As with acquisition fraud, goods or services are imported zero-rated from the EU, with the acquirer then going missing without accounting for the VAT due on the onward supply. However, the goods or services do not become available for consumption in the UK, but are sold through a series of companies in the UK and then exported,

³⁰ HMRC Law Enforcement Handbook definition.

prompting a repayment from HMRC to the exporter. This process can then be repeated over and over again.

Annex D

Acronyms and Abbreviations

CI	Criminal Investigation Directorate
CJA	Criminal Justice Act 2003
CJAT	Criminal Justice Assurance Team
CJL(S)A	Criminal Justice Licensing (Scotland) Act 2010
CPIA	Criminal Procedure and Investigations Act 1996
CPS	Crown Prosecution Service
CRCA	Commissioners for Revenue and Customs Act 2005
DCU	Disclosure Co-ordination Unit
DO	Disclosure Officer
DSG	Disclosure Steering Group
E&C	Enforcement and Compliance
ECHR	European Convention on Human Rights
FCLO	Fiscal Crime Liaison Officer
HMIC	Her Majesty's Inspectorate of Constabulary
HMRC	Her Majesty's Revenue and Customs
MTIC	Missing Trader Intra Community
NCU	National Co-ordination Unit
NHC	National Humint Centre
NSU	National Source Unit
OIC	Officer in Charge
OTP	Operational Tasking and Performance team
PII	Public Interest Immunity
RCPO	Revenue and Customs Prosecuting Office

SIO Senior Investigating Officer

UK United Kingdom

VAT Value Added Tax