



HOUSE OF LORDS

Select Committee on the Constitution

5th Report of Session 2008–09

**Part 1 of the
Borders,
Citizenship and
Immigration Bill**

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Part 1 of the Borders, Citizenship and Immigration Bill

1. The Constitution Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution. This report draws to the attention of the House constitutional issues arising in Part 1 of the Borders, Citizenship and Immigration Bill. The Committee is engaged in ongoing correspondence on Part 3 of the Bill and may therefore publish a further report in due course.
2. The constitutional convention, or principle, at stake is that the revenue affairs of individuals should be kept at arm’s length from ministers. It is clear to us from our correspondence with Lord West of Spithead (set out in the Appendix, below) that the Government accept both the existence and importance of this convention. The question is whether the proposals in Part 1 of the bill, as they currently stand, risk undermining this principle.
3. The principle of insulating the revenue affairs of individuals from ministerial influence was debated during the passage of the bill that became the Revenue and Customs Act 2005. That legislation, enacted in order to bring about a merger between the Her Majesty’s Customs and Excise and Her Majesty’s Inland Revenue to create Her Majesty’s Revenue and Customs (HMRC), was careful to put in place institutional arrangements to buttress this principle. First, core functions of HMRC are expressly excluded from the operation of the Ministers of the Crown Act 1975 so that these functions cannot be transferred to ministers by order. Secondly, the HMRC is a non-ministerial department and as such enjoys a degree of autonomy from detailed ministerial direction. Thirdly, Commissioners of HMRC are Crown appointments under Letters Patent on the recommendation of the Civil Service Commission. Fourthly, under the 2005 Act, the Commissioners appoint staff—officers of Revenue and Customs—who work under their direction rather than that of a minister.
4. The policy of the bill is to transfer some functions currently carried out by HMRC to immigration officers and other Home Office officials working within the UK Border Agency (UKBA), a non-statutory executive agency. In an attempt to respect the principle of keeping individuals’ revenue affairs at arm’s length from ministers, Part 1 of the bill develops a scheme in which a ‘Director of Border Revenue’ is created, who will exercise ‘customs revenue functions’ concurrently with HMRC. The bill provides for two categories of Home Office official: ‘a general customs official’, designated as such by the Home Secretary (clause 3); and ‘a customs revenue official’, designated as such by the Director of Border Security (clause 11). Responsibility for customs revenue policy will remain with HMRC.
5. The following table sets out significant points of comparison that need to be made in order to assess to extent to which the principle that the administration of revenues is, and is seen to be, held at arm’s length from ministers will be maintained.

	Commissioners of Revenue and Customs Act 2005	Borders, Citizenship and Immigration Bill, Part 1
Leadership appointments	Commissioners appointed by Her Majesty by Letters Patent on recommendation of the Civil Service Commission (s 1); ministers consulted but do not decide.	Director of Border Revenue to be ‘designated’ by Home Secretary, with the consent of the Treasury (cl 6).
Institutional personality	HMRC is a non-ministerial department	UKBA is a non-statutory executive agency of the Home Office
Staff	Commissioners appoint staff, known as officers of Revenue and Customs (s 2)	Director of Border Revenue may designate immigration officers and other Home Office officials as ‘customs revenue officials’. An official may also be designated as a ‘general customs official’ by the Home Secretary (cl 3)
Transfer of functions	Core functions of HMRC are expressly excluded from operation of Ministers of the Crown Act 1975, so transfer must be made by primary legislation rather than order (s 8)	Director of Border Revenue’s functions may be modified by the Treasury (cl 8)

6. As well as these formal differences, day-to-day working practices also need to be taken into account in assessing the extent to which the administration of individual revenue matters will be kept at arm’s length from ministers. In his letter, Lord West told us that the Chief Executive of the UK Border Agency and the Director of Border Revenue will be the same individual and that “the role of the Director of Border Revenue needs to be closely integrated with the rest of the Agency’s senior management structure” and that “we also intend to ensure there is a clear single unified structure achieving the main objective of the Cabinet Office Review of providing an integrated customs and immigration service at the Border”. Wearing his or her hat as Chief Executive, the head will be answerable to the Home Secretary. Wearing the hat of Director of Border Revenue, “the Chief Executive [sic] will act independently subject, like the HMRC, to the general oversight of Treasury ministers”, Lord West told us. Lord West also made clear that, at official level, the same person may act concurrently as an immigration officer, a ‘general customs official’ and a ‘customs revenue official’.
7. **Our correspondence with Lord West has not allayed our initial concerns about the Government’s proposals. The formal structure envisaged by Part 1 of the bill is significantly different from that**

designed for the Commissioners of Revenue and Customs Act as recently as 2005. Lord West acknowledges as much, telling us that that the bill's approach "does not deliver the same model of constitutional independence as that which HMRC enjoys..." In our judgement the model put forward in the bill is not only different from that of the Commissioners of Revenue and Customs Act 2005 but offers significantly weaker guarantees that individual revenue affairs will be ring-fenced from ministerial involvement, actual or perceived.

8. Our concerns have been exacerbated by what we know of the practical implementation of Part 1 of the bill. The Commissioners of Revenue and Customs Act 2005 created a simple, easily understood model for preserving the principle of no intrusion by ministers into the revenue affairs of individuals. The bill proposes to replace that with something that is—from a constitutional perspective—complex and opaque. A system in which the head wears two hats (as Chief Executive and Director of Border Revenue), and the staff may wear three (immigration officer, general customs official, customs revenue official) risks undermining the limited formal guarantees of separation between ministers and individuals' revenue affairs that appear on the face of the bill.

APPENDIX: CORRESPONDENCE ON THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL

Letter from Lord Goodlad to the Lord West of Spithead, 5 February 2009

The Constitution Committee is scrutinising the Borders, Citizenship and Immigration Bill. The purpose of this letter is to seek clarification about aspects of Part 1 of the bill, which proposes a scheme under which the Director of Border Revenue will share ‘customs revenue functions’ with the current holder of those functions, namely the Commissioners for Her Majesty’s Revenue and Customs (HMRC).

It is a principle of the British constitution that the administration of revenue-related affairs of individuals should be held at arm’s length from ministers. In relation to the HMRC, this principle is given practical effect in several ways. First, core functions of HMRC are expressly excluded from the operation of the Ministers of the Crown Act 1975 so that these functions cannot be transferred to ministers by order. Secondly, the HMRC is a non-ministerial department and as such enjoys a degree of autonomy from detailed ministerial direction. Thirdly, Commissioners of the HMRC are Crown appointments under Letters Patent on the recommendation of the Civil Service Commission. Fourthly, under the Commissioners of Revenue and Customs Act 2005, the Commissioners appoint staff, known as officers of Revenue and Customs who work under their direction rather than that of a minister.

If the bill is enacted in its current form, it is not clear to us how the current degree of independence from ministers enjoyed by the HMRC will be replicated in relation to the ‘customs revenue functions’ that will be exercised by the Director of Border Revenue, and in the day-to-day work designated ‘customs revenue officials’ within the UK Borders Agency (UKBA) of the Home Office. In our course of our scrutiny of the bill, the following points of possible concern have been identified.

- (a) Whereas the Commissioners for HMRC are appointed by the Civil Service Commission and Letters Patent by the Queen, the proposed office of Director of Border Revenue is merely ‘designated’ by the Home Secretary.
 - Do you accept that the process of appointment of the Director is an important way in which the bar on ministerial interference in the revenue-related affairs of individuals can be put into practice?
 - Why has appointment through ‘designation’ rather than involvement of the Civil Service Commissioner been chosen?
 - Have any other ways of enhancing perceptions of independence of the Director been considered?
- (b) Although the Explanatory Notes accompanying the bill state that ‘The Director, like HMRC, will act on behalf of the Crown in revenue matters independently of the Home Secretary’ there does not appear to be any express provision to this effect on the face of the bill.
 - We would be grateful if you could explain why this was not thought to be necessary or desirable.
- (c) It will be important for the principle of insulating the administration of individual revenue-related matters from ministerial influence (actual or

perceived) to be implemented in the day-to-day practices of the UK Border Agency. If we understood the practicalities correctly, officials in the Agency will broadly speaking have three types of function. In relation to some activities they will be (i) acting generally as a Home Office civil servant (answerable ultimately to carry out the directions of the Home Secretary), (ii) acting as a ‘general customs official’ if so designated by the Home Secretary (clause 3), and (iii) in other aspects of their work, if so designated by the Director, be acting as a designated ‘customs revenue official’ answerable to the Director (clause 11).

- Is it envisaged that an officer may be designated as a ‘general customs official’ and a ‘customs revenue official’, or will the two sets of functions be kept distinct?
- Is there a risk that, in day-to-day management of the Agency’s work, chains of command may become confused, so that officials dealing with individual revenue-related matters are answerable to instructions of the Home Secretary or other ministers rather than the Director?

Response from the Lord West of Spithead, 11 February 2009

Thank you for your letter of 5 February about Part 1 of the Borders, Citizenship and Immigration Bill in which you seek clarification about aspects of this Part of the Bill. Specifically, the Committee raises concerns about the process of appointment of the Director of Border Revenue, the absence of express provisions for the exercise of the Director’s functions independently from the Secretary of State and the practicalities of insulating the day to day exercise of revenue-related functions by UK Border Agency officials from perceived or actual Ministerial influence.

Before turning to the specific questions in your letter, I would first like to assure the Committee that preserving the long-standing convention that the administration of revenue-related affairs of individuals is kept at arm’s length from Ministers has been a fundamental objective throughout the development of these provisions. This objective builds on the commitment given by the Government during the passage through Parliament of the Commissioners of Revenue and Customs Act 2005 to protect the “vital principle” that Ministers should not have a role in individual revenue decisions.

I will now address each of the points you raise in turn.

a) i) Do you accept that the process of appointment of the Director is an important way in which the bar on ministerial interference in the revenue-related affairs of individuals can be put into practice?

The Government accepts that the appointment process may play an important role in keeping the administration of revenue matters out of the ambit of Ministers. However, the concept of a Secretary of State appointing an official to an independent role is not without precedent. In accordance with section 48 of the UK Borders Act 2007, the Home Secretary has appointed a Chief Inspector to monitor and report on the efficiency and effectiveness of the agency.

We agree that it is important to maintain the convention that revenue matters remain outside of the ambit of ministers and that is why we have expressly created an independent post of the Director of Border Revenue whose appointment is to be subject to the consent of the Treasury. This recognises the continued

accountability of the Treasury and the Chancellor for the effective administration of taxes and provides a mechanism by which they can ensure that the Parliamentary commitments given by Treasury Ministers in relation to the Commissioners of Revenue and Customs Act 2005 are met.

a) ii) Why has appointment through ‘designation’ rather than involvement of the Civil Service Commissioner been chosen?

The Cabinet Office Review, “Security in a Global Hub”, published in November 2007, which set out how the Government would establish the UK Border Agency, recommended that the new border agency should report to both the Home Secretary and the Chancellor.

We also intend to ensure there is a clear single unified command structure achieving the main objective of the Cabinet Office Review of providing an integrated customs and immigration service at the Border. The role of Director of Border Revenue needs to be closely integrated with the rest of the Agency’s senior management structure. Designation of an existing member of the senior management team - who have of course all been appointed under normal civil service procedures - is therefore preferable to a separate, free-standing recruitment exercise.

We believe that these twin objectives can be met by allowing the Chief Executive of the UK Border Agency and the Director of Border Revenue to be the same individual. Such an appointment can be achieved by means of a ‘designation’ process. Of course, if in future the post of Chief Executive of the border agency were to become vacant, it would be possible to fill the post by open competition under Civil Service rules explicitly on the basis that the post holder would also be the Director of Border Revenue.

a) iii) Have any other ways of enhancing perceptions of independence of the Director been considered?

In creating the policy model based on a Director of Border Revenue, we looked to strike the right balance between maintaining constitutional convention on revenue matters on the one hand and ensuring that accountability for the exercise of revenue functions transferred from the Commissioners of HM Revenue and Customs to the person responsible for controlling the exercise of those functions at the border by UK Border Agency officials.

The UK Border Agency will be a non-statutory executive agency of the Home Office. It was decided not to create a statutory body because it would not be appropriate to remove responsibility for immigration and border security generally from the Home Secretary, who is directly accountable to Parliament for these matters.

This approach emphasises the separation of customs revenue functions from the rest of the functions of the agency and enhances the insulation of those revenue functions from direct Ministerial involvement.

In revenue matters, decisions will be taken by the Director of Border Revenue and officials designated by the Director. The functions conferred on the Home Secretary by virtue of the Bill explicitly exclude the exercise of customs revenue functions (clause 1(2)). Therefore the Home Secretary has no vires in exercising any functions relating to a customs revenue matter.

Policy in relation to customs revenue matters will remain with HM Revenue and Customs and the Director of Border Revenue will be required to act in accordance with the policies of the Commissioners of HM Revenue and Customs. This will ensure consistency in the application of tax policy and decision making.

Whilst this approach does not deliver the same model of constitutional independence as that which HM Revenue and Customs enjoys, we do not think such a model would be appropriate for most border functions. The revenue functions that will be exercised by the Director of Border Revenue are directly related to border control. In broad terms, the revenue functions will consist of the prevention of smuggling, the collection of duties and taxes from passengers in the red channel and on postal packets. The collection of duties on freight will remain with HMRC (this is centralised and not carried out at the ports).

In contrast, the revenue functions of HM Revenue and Customs extend across the full tax administration system and impact much more directly on individuals' financial affairs.

We are satisfied that the model we have adopted for the UK Border Agency, coupled with the Bill provisions specifically excluding the Secretary of State from exercising revenue functions and the obligations requiring the Director to act in accordance with the policies of the Commissioners, together provide sufficient means to ensure that the Director of Border Revenue will exercise revenue functions independently of the Home Secretary.

Other measures in Part 1 of this Bill will widen the remit of the Chief Inspector of the UK Border Agency to cover the agency's new revenue and customs function. Specifically, the Chief Inspector will monitor and report on the efficiency and effectiveness of the UK Border Agency; this will include monitoring and reporting on the performance of the Director of Border Revenue and the Secretary of State, and their officials who exercise customs functions.

The Chief Inspector provides an external review independent of the UK Border Agency. The expansion of the Chief Inspector's role will ensure that this independent scrutiny applies to all of the UK Border Agency's functions including the exercise of customs revenue functions.

b) We would be grateful if you could explain why [express provision for the Director to act on behalf of the Crown in revenue matters independently of the Home Secretary] was not thought to be necessary or desirable.

Our clear intention is that, in exercising customs revenue functions, the Director of Border Revenue will act independently of the Home Secretary. As we have noted above, the Bill creates the office of Director of Border Revenue and expressly precludes the Secretary of State from exercising customs revenue functions.

I have mentioned previously that, in exercising customs revenue functions, the Director of Border Revenue must act in accordance with the policies of the Commissioners of HM Revenue and Customs. This includes the application of any concession published by the Commissioners and any interpretation of the law issued by the Commissioners.

In addition, the Director will be subject to the general directions of the Treasury. This is wholly consistent with the role of the Treasury in respect of HM Revenue and Customs and does not impact upon the insulation of revenue matters. This will ensure the Treasury's continued oversight of the administration of taxes.

Whilst it enables the Treasury to make directions relating to the Director's strategies, critically, it does not permit Treasury directions to be issued in relation to day to day or operational decisions.

These obligations are included on the face of the Bill (clause 10).

c) i) Is it envisaged that an officer may be designated as a 'general customs official' and a 'customs revenue official', or will the two sets of functions be kept distinct?

It is intended that UK Border Agency officers may be designated as a 'general customs official' and a 'customs revenue official' and as an immigration officer. This means that the border will be better protected because UK Border Agency officers will be able to tackle a broader range of threats, for example, drug smuggling, tobacco smuggling and illegal immigration, with all officers appropriately trained and designated.

c) ii) Is there a risk that, in day-to-day management of the Agency's work, chains of command may become confused, so that officials dealing with individual revenue-related matters are answerable to instructions of the Home Secretary or other ministers rather than the Director?

In practice the officers of the UK Border Agency will be under the day to day command of the agency's Chief Executive. The Chief Executive will be accountable to the Home Secretary in relation to all non-revenue matters. As stated above, it is our intention that the Chief Executive should be appointed as Director of Border Revenue. In relation to revenue matters, the Chief Executive will act independently subject, like HMRC, to the general oversight of Treasury ministers.

On balance we feel that these arrangements will enable us to build a single unified multi-functional agency better able to protect our borders while preserving the essential principle of keeping revenue matters at arm's length from Ministers.

Whilst we intend that the Chief Executive should be appointed to the post of Director of Border Revenue, we have not provided for this expressly on the face of the statute. This is because that would require us to establish the UK Border Agency as a statutory body which, as previously mentioned, would not be appropriate.

The Cabinet Office Review, "Security in a Global Hub" recognised that the threat to our borders is an evolving picture. The Government needs to have flexibility to respond to those threats. Under this model the most appropriate official, who has operational and managerial command of the UK's border forces, can be appointed as Director of Border Revenue, whatever the organisational structures put in place to deliver our frontier security.