

# EXECUTIVE COUNCIL

## CONFIDENTIAL

**Title of Report:** Complaints Commissioner's Report  
Mr G Clement and others v Customs & Immigration Service

**Paper No:** 290/12

**Date:** 21<sup>st</sup> November 2012

**Report of:** Director of Emergency Services

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### 1. Purpose

- 1.1 To seek approval from Executive Council of the response to be forwarded to the Complaints Commissioner regarding her recent investigation into the way the Customs & Immigration Service handled the importation of satellite receivers from Chile in 2011
- 1.2 To seek approval from Executive Council of a process whereby the Governor may make a response to the Complaints Commissioner without recourse to ExCo unless there is some significant policy issue requiring members' involvement.

### 2. Recommendation

- (i) It is recommended that Executive Council accept all five recommendations made by the Complaints Commissioner.
- (ii) It is recommended that Executive Council accept how it is intended that each recommendation is taken forward.
- (iii) It is recommended that Executive Council agree the future proposed process for enabling the Governor to make a response to the Complaint Commissioner under certain circumstances.

### 3. Summary of Financial Implications

None.

### 4. Background

- 4.1 On 1<sup>st</sup> October 2010 the Complaints Commissioners Ordinance was enacted which prescribes the functions, powers and jurisdiction of Complaints Commissioners who are appointed by the Governor under section 95(1) of the Constitution to investigate complaints of maladministration in the government of the Falkland Islands or such other matters as are prescribed by Ordinance. In addition to complaints of maladministration, this Ordinance applies to complaints of conduct in respect of which a member of the public would reasonably feel a sense of injustice despite the fact that it does not constitute maladministration.

4.2 A complaint was received by the Principal Complaints Commissioner from MLA Sawle on behalf of a Mr G Clement and others on 12 July 2012 and stated;

“In accordance with the Complaints Commissioners Ordinance of 2010, I wish to make a complaint on my own and on behalf of a number of members of the community in respect of the way Customs has dealt with the importation of satellite receivers from Chile.”

And goes on to say:

“It is not intended that this is a complaint about the contents of legislation, conduct of the judiciary or the Attorney General’s department and any reference to them is by way of background to the matter. It is submitted that I and other people aggrieved do not have the option to pursue matters through the court as it is accepted that the receivers purchased in good faith appear to be unauthorised decoders and as such are not lawful. As such the complaint relates to maladministration on the part of Customs as to the way in which the matter was dealt with and the fairness of the way we have been treated.”

4.3 The Complaints Commissioner conducted an investigation into the complaint and on the 17<sup>th</sup> September 2012 published her findings (see attached report) to the Governor and also to the Collector of Customs. This date is relevant as the Complaints Commissioners Ordinance requires a response to be made by the Governor within three months of that date.

4.4 In her findings the Complaints Commissioner does not believe that the Customs and Immigration Department caused the complainants injustice though maladministration but finds three areas in which the conduct of the department caused the aggrieved to suffer injustices. The three areas are;

- (i) The Collector of Customs took no formal action during the week of 10<sup>th</sup> October to inform the community of his concerns, knowing that people, having sought his advice, planned to import decoders. As a result the individuals suffered an injustice.
- (ii) It was an injustice not to inform the individual that it was the role of Customs Officers to seize imported items and there was an intention to retain any decoders imported from Chile that were considered illegal for testing.
- (iii) In spite of the pressures that C&I were working under, it was an injustice not to keep the complainants fully informed about the procedures for testing the retained equipment in order to prevent misunderstandings arising.

4.5 The Complaints Commissioner made five recommendations to prevent a recurrence of the injustice;

- (i) The Customs and Immigration Department are recommended to write a letter of apology to the complainants’ lawyer, apologising for the unhelpful actions taken during the seizure of satellite TV equipment as set out above.
- (ii) The Customs and Immigration Department are recommended to consider what procedures will be used for the testing of satellite TV decoders in any future retention of equipment in order to demonstrate transparency and independence.

- (iii) It is not recommended that the complainants are compensated financially for the seized decoders or for legal fees incurred, due to the fact that the decoders were found to be illegal and the responsibility for the importation of legal equipment rests with importers.
- (iv) That the Royal Falkland Islands Police proceed at the earliest opportunity to address the issue of individuals in possession of satellite TV decoders that were unknowingly illegally imported under the Broadcasting Ordinance.
- (v) It has become apparent during this investigation that the Broadcasting Ordinance 2004 creates considerable enforcement difficulties for both Customs and Immigration and the Royal Falkland Islands Police. It is therefore recommended that the Ordinance is reviewed

4.6 It is proposed that Executive Council accept all five recommendations made by the Complaints Commissioner. The Complaints Commissioners Ordinance also requires the Governor to inform the Complaints Commissioner that if a recommendation to take a course of action is accepted, how it is intended to take that course of action and the following details the proposed action;

4.7 **Recommendation (i):** The Customs and Immigration Department are recommended to write a letter of apology to the complainants' lawyer, apologising for the unhelpful actions taken during the seizure of satellite TV equipment as set out above.

To avoid delay and further aggravate the matter the Director of Emergency Services has written a letter of apology which has been forwarded to the complainants' lawyer.

4.8 **Recommendation (ii):** The Customs and Immigration Department are recommended to consider what procedures will be used for the testing of satellite TV decoders in any future retention of equipment in order to demonstrate transparency and independence.

The Complaints Commissioner's report mentions that the Customs & Immigration Service had no choice but to use KTV's antenna if a speedy test was to be achieved and the manager of SSVC from MPA conducted the test using a KTV antenna as he did not have one that was compatible with the receiver. This was due to the Prohibited Goods Ordinance 1992 requiring prohibited items to be seized within 14 days and the fact that there is a limited source of technical equipment on the Falkland Islands such as an antenna and associated accessories. There is also a degree of technical knowledge required to operate the receiver and adjust the antenna to the relevant satellite to ensure its correct orientation.

Whilst this situation wasn't ideal it was perhaps the most practical solution in the Falkland Islands at the time as it would be unrealistic and hardly an efficient use of public funds to purchase a myriad of different types of antennae and associated accessories or to train officers in the use of such equipment as it may never be used and with advances in technology may become obsolete very quickly.

The matter was aggravated on this occasion in that members of the public were unaware of what was happening due to a lack of information being provided to them and that they were not permitted to view the testing of the equipment on the advice of the Attorney Generals Chambers.

To remedy the situation research will be conducted on the realistic options available for testing which will result in guidelines being drawn up by the Collector of Customs in conjunction with the Attorney Generals Chambers. These guidelines will explain to members of the public how such testing will take place in the future and what their rights will be including the provision of information and under what circumstances they will be able to view the testing of seized items.

- 4.9 **Recommendation (iii):** It is not recommended that the complainants are compensated financially for the seized decoders or for legal fees incurred, due to the fact that the decoders were found to be illegal and the responsibility for the importation of legal equipment rests with importers.

No further action is required by the FIG.

- 4.10 **Recommendation (iv):** That the Royal Falkland Islands Police proceed at the earliest opportunity to address the issue of individuals in possession of satellite TV decoders that were unknowingly illegally imported under the Broadcasting Ordinance.

The RFIP in conjunction with the Attorney General's Chambers have considered what action can be taken in relation to individuals in possession of 'unauthorised' satellite TV decoders which are capable of receiving encrypted transmissions without payment of the relevant fee.

Section 5 of the Broadcasting Ordinance makes it an offence to import an unauthorised decoder. It is a defence to prove that the individual concerned did not know, and had no reasonable ground for believing, that the decoder was an unauthorised decoder.

Importation records held by Customs indicate that several decoders of the same make as those which were seized on 15 October 2011 were imported into the Falkland Islands prior to that date. It is probable that these decoders are unauthorised decoders. However, based on the information provided by the supplier, the importers would have no grounds for believing that the decoders were unauthorised. Accordingly no criminal offence has been committed by the importation of the equipment.

Section 5 of the Broadcasting Ordinance also creates a number of other offences, which are not relevant in this instance, including making, selling or advertising for sale an unauthorised decoder or having an unauthorised decoder in one's possession for commercial purposes.

Section 8 of the Broadcasting Ordinance makes it an offence to dishonestly receive a programme with intent to avoid any charge for the reception of the programme. If the police receive intelligence that such an offence is being committed, they will investigate, but there are significant evidential problems in proving the commission of the offence which involves a number of elements including receipt of the programme, intent to avoid a relevant charge, and dishonesty.

It should be noted that it is not an offence to possess an unauthorised decoder. Search warrants can be issued under section 6 of the Broadcasting Ordinance only where an offence is suspected under section 5, and an order for forfeiture can be sought under section 7 of the Ordinance only where an offence is committed under section 5 or 8.

- 4.11 **Recommendation (v):** It has become apparent during this investigation that the Broadcasting Ordinance 2004 creates considerable enforcement difficulties for both

Customs and Immigration and the Royal Falkland Islands Police. It is therefore recommended that the Ordinance is reviewed.

FIG agree that the Broadcasting Ordinance should be reviewed given the difficulties highlighted above, but this work will need to be prioritised appropriately given the other demands on officers' time.

- 4.12 It is proposed that Executive Council accept all intended courses of action in relation to the Complaints Commissioner's recommendations.
- 4.13 This complaint is the first to be investigated and reported by the Complaints Commissioner and the subsequent process has identified where improvements could be made to ensure early progression of any recommendations. The Complaints Commissioners Ordinance states that where a report from a Complaints Commissioner involves a Government Department, section 28 of the Ordinance requires the Government to issue a written response to the Complaints Commissioner within three months of receipt by the department of their report. Under section 66 of the Constitution this means the Governor acting on the advice of Executive Council. To avoid unnecessary delay, it is recommended that in future a written response agreed between the Governor, the Chief Executive and the relevant Director be issued direct to the Complaints Commissioner and copied to Executive Council unless, in the opinion of the Governor, the Chief Executive or the Director, the report from the Complaints Commissioner raises issues of policy which require consideration by Executive Council.
- 4.14 It is proposed that Executive Council accept the suggested process for enabling the Governor to make a response to the Complaints Commissioner under such circumstances.

## **5. Financial Implications**

None

## **6. Legal Implications**

- 6.1 The Complaints Commissioners Ordinance 2010 prescribes the functions, powers and jurisdiction of Complaints Commissioners who are appointed by the Governor under section 95(1) of the Constitution to investigate complaints of maladministration in the government of the Falkland Islands or such other matters as are prescribed by Ordinance. In addition to complaints of maladministration, this Ordinance applies to complaints of conduct in respect of which a member of the public would reasonably feel a sense of injustice despite the fact that it does not constitute maladministration.

## **7. Human Resources Implications**

None

**Report of the Falkland Islands Principal  
Complaints Commissioner**

**To the Governor**

**Complaint submitted by MLA Sawle**

**On behalf of Mr G Clement and Others v The  
Customs and Immigration Service**

**Compiled by Mrs P Rendell  
Date: 17 September 2012**

The Complaints Commissioners Ordinance 2010 makes provision for an aggrieved person to submit a complaint through a Member of the Legislature where there are grounds for investigation into maladministration in the government of the Falkland Islands. In addition to complaints of maladministration, this Ordinance applies to complaints of conduct in respect of which a member of the public would reasonably feel a sense of injustice despite the fact that it does not constitute maladministration. (Details can be found in Part 1, Section 3 (3) of the Ordinance).

A complaint was received by the Principal Complaints Commissioner from MLA Sawle on behalf of Mr G Clement and others on 12 July 2012.

### **The Complaint:**

The complaint set out in a letter dated 17 May 2012 from Mr Clement and others states that:

*“In accordance with the Complaints Commissioners Ordinance of 2010, I wish to make a complaint on my own and on behalf of a number of members of the community in respect of the way Customs has dealt with the importation of Satellite Receivers from Chile.”*

And goes on to say:

*“It is **not** intended that this is a complaint about the contents of legislation, conduct of the judiciary or the Attorney General’s department and any reference to them is by way of background to the matter. It is submitted that I and other people aggrieved do not have the option to pursue matters through the court as it is accepted that the Receivers purchased in good faith appear to be unauthorised decoders and as such are not lawful. As such the complaint relates to maladministration on the part of Customs as to the way in which the matter was dealt with and the fairness of the way we have been treated.”*

(The letter of complaint of 17 May 2012 is attached in full).

### **Clarification concerning the identity of complainants.**

The complaint has been submitted by Mr Gary Clement and others. MLA Sawle’s covering letter to the Complaints Commissioner names five of the complainants. The Collector of Customs (C of C) requested that the Complaints Commissioner seeks the identification of all the complainants in order for him to address individual alleged grievances. The complainants’ lawyer advised that bearing in mind the nature of the complaint is the general way the matter was dealt with, he is not instructed to disclose the names of the group. However, he confirmed that the names quoted by MLA Sawle are part of the group. The complainants’ lawyer also stated that he is aware that there were issues of all names being disclosed due to concerns of victimisation.

The Commissioner has concluded that the disclosed names were sufficient for the C of C to respond to the complaint because of its general nature, and that other individuals could remain unnamed. She agreed to note the C of C's concern about the suggestion of victimisation.

## **Complaints Commissioners Ordinance**

### **Section 24 (1) Determining the complaint**

#### **(a) Commissioner's findings of fact**

1. The Broadcasting Ordinance 2004 came into effect on 11 July 2005. The Ordinance addresses the award of re-broadcasting licences and states that anyone who provides a re-broadcasting service without a licence commits an offence. Interpretation of the Ordinance provided for individuals to continue to legally use satellite TV equipment imported before 11 July 2005.
2. Before the Ordinance came into effect, individuals had imported Sky TV satellite TV decoders and antennas from Chile. A "dummy" subscriber resident in Chile was needed to continue paying the subscription in order to receive programmes in the Falkland Islands.
3. Sky TV was bought by DirecTV in late 2005. The new provider proceeded to change the decoders required to receive Sky TV programmes thus requiring a change of boxes if individuals in the Falkland Islands were to continue to access these programmes. On seeking advice from the Attorney General's Department, individuals were advised that it would be illegal to import decoders other than Free To Air (FTA) boxes under the terms of the Broadcasting Ordinance. Individuals who could previously watch Sky TV programmes using their own decoders felt aggrieved that they could no longer do so legally.
4. Penguin News published an article on 16 December 2005 where it was reported that a Stanley resident had had two satellite TV decoders seized by the Customs and Immigration (C&I) Department.
5. The Royal Falkland Islands Police (RFIP) conducted enquiries in November 2007 regarding a number of individuals suspected of having imported unauthorised DirecTV satellite TV equipment.
6. In September/ October 2011 adverts appeared in Chile stating that FTA Receivers were available for purchase.
7. A number of residents contacted C&I to seek advice regarding importing FTA equipment. The advice given by the C of C was that it was legal to import FTA (standard encryption) satellite TV equipment into the Falkland Islands (provided that it is genuine FTA and does not compromise devices that have been modified or adapted in order to be capable of receiving non-FTA satellite TV transmissions).

8. In the week of 12 September 2011 a member of the public visited C&I and sought advice about importing three FTA receivers from a supplier in Chile. He stated to the C of C that he did not want to do anything illegal. The C of C explained that the importation of FTA satellite TV receiver equipment was legal in regard to the Broadcasting Ordinance but if he wished to provide him with details of the supplier he would look at the equipment being offered for sale in order to check whether it was actually genuine.
9. The C of C had difficulty finding the website the person had provided but the following week he returned to C&I with the correct website address and a check on the website was made by the C of C. In his evidence the C of C states that he thought, at face value, the equipment appeared legal. However, he noted that several channels listed were ones he presumed to be subscription (encoded) channels. He offered to contact the supplier to ask about the receivers but the member of the public stated that he would do this himself.
10. A few days later the prospective importer telephoned the C of C and said that the supplier had assured him that the equipment was legal. Meanwhile the C of C had done some research on the internet with regard to FTA equipment offered for sale in South America. In his evidence he stated to the prospective importer that he had not come across anything particularly concerning or anything to suggest that the equipment being offered for sale was illegal.
11. The prospective importer advised the C of C that he would therefore proceed to import three units and they arrived on 1 November 2011.
12. The C of C decided to further investigate the status of the equipment available in South America and finally hit on information that raised his concerns about the legality of the FTA equipment available.
13. Another prospective importer contacted the C of C in the week of 26 September 2011 about importing a receiver. That person was advised by the C of C that provided that it was genuinely FTA, the equipment was lawful, but he states in his evidence that he had concerns that the equipment described as FTA satellite TV receivers could actually be capable of also receiving protected encrypted TV channels, which is illegal. He recommended that the prospective importer should properly ascertain that the equipment was genuine before importing it.
14. In the week of 3 October 2011 the owner of the satellite TV station, KTV, (the company holds a re-broadcasting licence under the terms of the Broadcasting Ordinance 2004) having returned to the Islands that week, visited the C of C to report seeing the installation of satellite TV antennas at a number of properties. On several occasions over the next few days, the owner of KTV explained to the C of C some of the technical details of FTA TV transmissions and the extent of the problem of TV piracy in South America.
15. The owner of KTV also informed the C of C that a person had alleged that KTV was providing TV programmes by subscription when they were actually

FTA TV channels. This, it was thought, was because of the range of premium TV channels that importers of decoders were able to view. The C of C advised the owner of KTV that he could make a complaint in writing to himself and the Chief Police Officer.

16. Two other prospective importers contacted the C of C about importing FTA receivers between 1 and 10 October. They were both advised that FTA receivers were legal and in one case the C of C advised that he had some concerns about the legality of some equipment available for purchase in South America but had no convincing evidence at the time. The individual said they would therefore go ahead and import a decoder. In the second case the C of C strongly advised the person to ensure that the supplier ascertained that the equipment was FTA before importing it.
17. On 12 October 2011 the C of C received an email from BBC Worldwide Channels Latin America and US Hispanic, who are based in Florida, stating that they had been informed of possible signal piracy in the Falkland Islands. KTV were copied into the e-mails.
18. The C of C states that he contacted the BBC representative later that day for more information. The BBC representative and a technical colleague explained that manufacturers in China were supplying illegal decoders to South American countries that could download programmes through a satellite named 'Amazonas' without the programme providers' permission.
19. By mid-week of 10 October 2011 the C of C states in his evidence that there was sufficient reason to believe that the FTA receivers that had been imported recently might be unlawful under the definition set out in the Broadcasting Ordinance.
20. A meeting of Government officers was convened on 14 October 2011 to discuss the matter. A plan of action was agreed at this meeting. It was agreed that if any satellite TV decoders were to arrive on the LAN flight the following day, 15 October, they would be retained by C&I for examination to establish whether they were genuine FTA receivers or not.
21. Soon after the meeting concluded, a member of the public telephoned the C of C and asked if it was correct that the RFIP were going to seize any decoders arriving on the LAN flight of the following day. The C of C states in his evidence that he told the person that he did not know of such an intention on the part of the police.
22. Also on 14 October 2011 the owner of KTV submitted a letter of complaint which included his reasons for believing that unauthorised decoders were being imported into the Falkland Islands.
23. Customs officers retained six consignments comprising 30 satellite TV decoders that arrived on the LAN flight on 15 October. Freight arriving on LAN flights is collected by the bus company FITT, and is delivered to Stanley the same afternoon. C&I staff were instructed to notify the FITT delivery van

24. On 17 October a number of individuals requested to see the C of C. They were not necessarily the persons who had imported receivers on 15 October. A meeting was convened at the C&I office and it was explained that the goods had been retained for examination and had not been formally seized. The group requested that the decoders would not be tested by KTV and they were assured by the C of C that this would not occur. They also asked if they could be present at a demonstration of the testing of the equipment and this request, the C of C stated, could be considered. The C of C asked for any paperwork from the supplier to assist in the examination.
25. Later on 17 October 2011 The C of C contacted the Technical Manager at Services Sound and Vision Corporation (SSVC) based at Mount Pleasant Airport (MPA). The Manager agreed to run some tests on one of the retained receivers.
26. On 18 October 2011 one of the importers provided the C of C with a manual and associated documents for the decoder he had purchased that had been retained for examination. The C of C travelled to MPA to deliver the receiver equipment to SSVC together with a copy of the manual provided by the importer. The SSVC Manager explained that he would also require a suitable antenna as he did not have one that was combatable with the receiver.
27. The C of C contacted the owner of KTV to ask to borrow a suitable antenna, as there were in his view a limited source of antennas in the Islands. The owner of KTV was going to MPA the next day and he agreed to deliver the antenna to SSVC.
28. Also on 18 October C&I issued a notice for publication by the media regarding importation of satellite decoders.
29. The SSVC Manager contacted the C of C on 20 October 2011 to say that he had been able to activate the receiver by following the set up procedures in the manual and could receive a wide range of TV channels in intelligible form.
30. The C of C received an email from the Acting Chief Police Officer (ACPO). Attached were copies of a number of letters from major TV Channel providers that he had received from the owner of KTV.
31. The C of C proceeded over the next few days to contact a number of TV channel providers who had provided KTV with letters, asking for specific information to assist with the investigation.
32. A meeting of Government officials was convened on 27 October 2011 to discuss the next steps to be taken. Although the ACPO had initially advised the C of C that it would be appropriate to have representation from the consignees present at any demonstration of the retained equipment, the

Attorney General's representative advised against it. The C of C therefore decided to proceed without the consignees present. It was also decided that all the decoders should be tested before issuing seizure notices to the consignees.

33. On 28 October the C of C contacted the SSVV Manager and asked if he could come to Stanley to carry out the test. He was coming to Stanley later that day so it was agreed to hold the demonstration then. However, an antenna and equipment was needed to facilitate the test so the C of C contacted the owner of KTV in order to borrow the equipment. The owner of the company agreed to have the equipment delivered to C&I by one of his employees, immediately. This was achieved just before the SSVV Manager arrived at the offices. At this time, KTV were regularly visiting the building to carry out work for Byron Marine on the upper floor.
34. That day two individuals had an altercation with a KTV employee, wrongly assuming that KTV were involved in the testing of the decoders. The matter was dealt with through the court where, on 8<sup>th</sup> February 2012, not guilty verdicts were entered in relation to all matters, with agreement to be bound over to keep the peace for 12 months. The Senior Magistrate states that consequently no evidence was heard and no adjudication was made as to what, if anything, had taken place during the incident. He clarified that a Bind Over in these circumstances does not rank or count as any form of conviction.
35. The remaining 29 receivers were tested and all proved to be able to pick up TV signals, not FTA.
36. During the late afternoon and evening of 28 October seizure notices were served by C&I Officers on the six persons whose equipment had been held for examination. While in the process of preparing the notices the C of C met with eight people at the C&I offices and explained his reasons for the seizure notices. He advised those who had had their equipment seized, that they had the right of appeal. The C of C states that these individuals tended to act "in a mob handed fashion", making allegations against C&I. He further stated that this behaviour added to the pressure under which he had to operate. Some of the notices contained errors and revised notices had to be served but all seizure notices were served by 7:30pm.
37. Mr Clement and others then proceeded to apply to the court for the release of the satellite TV receivers seized by C&I. The case was first heard on 21 November 2011, and continued before the Senior Magistrate on 3 February 2012. The Senior Magistrate stated his concern over the evidence presented by the prosecution saying that "emails had been sent to providers telling them what to write." The case was adjourned until 13 March but was subsequently dropped by the appellants on 29 March after they had received legal advice.
38. On 22 March 2012 a letter of complaint was hand delivered to C&I by a complainant.
39. As there was no acknowledgement to the letter a subsequent letter from the complainants' lawyer was sent to C&I on 4 April 2012 reminding the C&I

department of its obligations to respond to the public under the Falkland Islands Government Corporate Complaints Procedure, within 5 working days, and to provide an outcome within ten working days. A letter was also sent to the Chief Executive bringing the matter to his attention.

40. The Chief Executive responded to the letter of complaint dated 21 March, by way of a letter on 2 May 2012.
41. Not being satisfied with the Chief Executive's response, the complainants submitted a letter to MLA Sawle, which was forwarded to the Complaint's Commissioner on 12 July 2012.

### **Complaints Commissioners Ordinance Section 24 (1)**

- (b) the Commissioner's opinion as to whether the aggrieved person has suffered injustice in consequence of maladministration or other conduct to which the Ordinance applies; and**
- (c) the Commissioner's reasons for that opinion.**

**The Commissioner does not believe that the Customs and Immigration Department caused the complainants injustice through maladministration but finds three areas in which the conduct of the department caused the aggrieved to suffer injustices.**

1. In September and October 2011 individuals sought advice from the C of C with regard the importation of satellite TV receivers. They did this because they did not, at any time, want to import illegal equipment. The C of C advised them that it was their responsibility for ensuring that anything they imported was legal. However, he offered to check on the equipment for one individual to ascertain its legal status (details are set out above in sections 8-11) and reported that, at face value, the equipment appeared legal and he added later that he had no evidence to the contrary.

The C of C's evidence states that he commented to another individual that he was starting to have concerns about the equipment available in Chile being legal and another person was advise that although he had growing concerns about the equipment he had not thus far come up with fully convincing evidence at that point. Then, during the week of 10 October the C of C stated that there was sufficient reason to believe that the FTA receivers that had been imported recently might be unlawful.

**The C of C took no formal action during that week of 10 October to inform the community of his concerns, knowing that people, having sought his**

**advice, planned to import decoders. As a result the individuals suffered an injustice.**

### **The Commissioner's reasons for that opinion**

Being a senior member of the Falkland Islands Government, The C of C's advice carries weight with the general public. His communications with a single individual would have been shared with other members of the public so it is not surprising that not all the complainants approached C&I separately for information about importing satellite TV decoders.

It is not thought that the officer set out in any way to mislead members of the public, but once he became engaged in a dialogue with individuals about the legality of equipment available for purchase in Chile he had established a relationship of trust with them and therefore had a duty to keep these individuals informed of any change in his opinion. As soon as the C of C had doubts about the equipment during the week of 10 October, he should have formally notified potential importers of his concerns so that they could decide whether to proceed with importing the decoders. The notice that was distributed to the media by C&I on 18 October came too late to assist the importers who had arranged for equipment to arrive on the LAN flight on 15 October in making a decision as to whether to continue with their orders. They therefore suffered an injustice.

**Complaints Commissioners Ordinance Section (3) (e) and (f) apply: a refusal to rectify a mistake, and unhelpfulness.**

2. After a meeting of officials on 14 October, where it was agreed that Customs officers would retain any satellite TV equipment arriving on the LAN flight of 15 October in order to test it, the C of C received a call from a person who asked if the *police* were going to seize the goods. The Collector of Customs advised that the *police* were not going to do this. (See section 21 above). Although the C of C was correct to say that the RFIP were not planning to seize equipment coming in on the LAN flight, his answer was misleading.

**It was an injustice not to inform the individual that it was the role of Customs officers to seize imported items and there was an intension to retain any decoders imported from Chile that were considered illegal for testing.**

### **The Commissioner's reasons for that opinion**

The C of C states that he found himself in a difficult position on receiving a call so soon after the meeting where the decision had been taken for Customs officers to retain incoming satellite TV decoding equipment. I believe it was misleading and disingenuous not to let the person know that it was **not** the *police* **but** *customs officers* who were planning to retain any imported decoders in order to test them. Having entered into a dialogue with potential importers in previous weeks, and knowing that they did not want to do anything illegal, I believe it was an injustice

not to clarify the situation to the individual. The individual would have had time to alert others that day, who could have cancelled their orders if they wished. The action of the authorities appears to have been set on seizing equipment in order to retain it for testing to prove a point. This should not have been done at the expense of members of the public who sought advice in order to avoid importing illegal equipment.

**Section (3) (f) applies: unhelpfulness.**

3. KTV's knowledge related to encrypted TV signals was shared with C&I and contacts with programme providers supplied by KTV was also used by C&I. C&I proceeded to use antennas belonging to KTV to carry out tests on retained decoders, as KTV were the only known source for this equipment. (See sections 26-34 above).

Although C&I had little choice other than to refer to KTV for technical advice, the company had a vested interest in the case and C&I had a responsibility to ensure that the public were informed that KTV had no direct involvement in C&I's actions.

At a meeting of officials, the Attorney General's department advised against any of the importers of the retained TV equipment being present during any tests. Previously the ACPO considered that a representative being present would be appropriate. The C of C accepted the legal advice and the tests therefore went ahead without any representation from the importers being present.

**In spite of the pressures that C&I were working under, it was an injustice not to keep the complainants fully informed about the procedures for testing the retained equipment in order to prevent misunderstandings arising.**

**The Commissioner's reasons for that opinion**

Customs officers were aware of the strength of opposition to the introduction of the Broadcasting Ordinance and subsequent unrest when individuals could no longer import satellite TV decoders of the type they had in use before the legislation came into force. This experience should have alerted them to the sensitivity of the issue that arose in October 2011 regarding satellite TV decoders being imported from Chile.

It is evident that KTV were not involved in the testing of the retained decoders. However, advice was provided to C&I on what was a highly technical matter by KTV, and an antenna was lent by KTV on two occasions to allow the tests to go ahead. Also the fact that KTV were actively working in the building that accommodates C&I at the time of the testing should have alerted the department to explain the situation to the importers. Tension was so charged that two individuals had an altercation with a KTV employee, believing wrongly that he was involved in the testing of the decoders, which resulted in charges being brought against them.

It was critical that the importers were made aware that C&I had no choice but to use KTV's antennas if a speedy test result was to be achieved, and to demonstrate that the company had no direct input in proceedings. The outcomes show that the importers had not been made aware of the facts.

When the decision was made that no importers of the retained equipment would be present during the testing of the decoders, again the importers should have been fully briefed as to who was to conduct the tests, and that KTV staff would not be involved in any way. One of the complainants had cooperated with C&I by supplying the handbook for the decoders to assist in the tests and the importers had, after all, asked to be present at the test when they met the C of C on 17 October and they were not advised at that meeting that they could not be present.

**Section (3) (f) applies: unhelpfulness.**

### **Concluding comments**

Having carefully considered all the evidence provided by the complainants and the department of Customs and Immigration it is evident that Customs officers were dealing with highly technical issues without access to independent advice. Furthermore the depth of feeling in the community after the introduction of the Broadcasting Ordinance added to the pressure under which the Collector of Customs had to work and make judgements. None of the complainants wanted to break the law and the matter escalated to a point where a great deal of stress was suffered by both the complainants and Customs officers. It is regrettable that no apologies were offered when the complainants first wrote to the department, as this would have defused issues in a more timely way. It is not a weakness to accept that an error of judgement has been made and to apologise to a complainant. A willingness to apologise promptly strengthens relations with public. This regrettable chain of events highlights the need for the Falkland Islands Government to address customer care provision across all services in order to respond to a growing demand from the public to be treated fairly.

### **Recommendations for prevention of a recurrence of the injustice**

1. The Customs and Immigration Department are recommended to write a letter of apology to the complainants' lawyer, apologising for the unhelpful actions taken during the seizure of satellite TV equipment as set out above.
2. The Customs and Immigration Department are recommended to consider what procedures will be used for the testing of satellite TV decoders in any future retention of equipment in order to demonstrate transparency and independence.
3. It is not recommended that the complainants are compensated financially for the seized decoders or for legal fees incurred, due to the fact that the decoders

were found to be illegal and the responsibility for the importation of legal equipment rests with importers.

4. That the Royal Falkland Islands Police proceed at the earliest opportunity to address the issue of individuals in possession of satellite TV decoders that were unknowingly illegally imported under the Broadcasting Ordinance.
5. It has become apparent during this investigation that the Broadcasting Ordinance 2004 creates considerable enforcement difficulties for both Customs and Immigration and the Royal Falkland Islands Police. It is therefore recommended that the Ordinance is reviewed.

**Attachments:**

Complainants' letter to the Commissioner dated 17 May 2012

Covering letter from MLA Sawle dated 12 July 2012

Complainants' letter to C&I dated 21 March 2012