The City of London Law Society

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The Law Commission
Consultation: Criminal Liability in Regulatory Contexts
CLLS response

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of The Law Commission's Consultation on Criminal Liability in Regulatory Contexts has been prepared by the CLLS Company Law Committee (with input from members of the CLLS Litigation and Regulatory Law Committees). The Committee's purpose is to represent the interests of those members of the CLLS involved in company law and related regulation.

1. INTRODUCTION AND SUMMARY

The Company Law Committee supports most of the Law Commission's proposals in principle. However, this support depends upon the proposed approach for civil penalties being satisfactory and providing appropriate safeguards. We think more information on what would be proposed is needed before a final view can be reached. Although we agree that, in theory, it would be better to reduce the number of matters dealt with by way of criminal offences, we do not think there will be better regulation if matters currently dealt with by criminal law are instead subject to a number of different regulatory regimes which are inconsistent and dealt with by different regulatory bodies.

It is important that any regime for imposing civil penalties (i) requires the same burden of proof before liability is established where the civil penalty replaces an existing criminal offence (i.e. the burden of proof before a civil penalty is imposed should be the same as that applicable for the criminal offence) (ii) offers appropriate protections in relation to evidence (iii) ensures that the decision to seek a civil penalty is kept separate from other regulatory decisions (iv) requires a clear approach to determining any penalty to be imposed and (v) provides for full rights of appeal to the courts. We are also concerned about the speed with which action is taken and decisions are made and the inter relationship between any civil penalty proceedings and any criminal prosecution. We are also concerned that sufficient resources are available for such an approach to work in practice.

2. RESPONSES TO THE LAW COMMISSION PROPOSALS AND QUESTIONS

Responses to the Law Commission Proposals and Questions

A: GENERAL PRINCIPLES

(i) General Principles: The Limits of Criminalisation

PROPOSAL 1: *The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.*

We agree but we think there may be some difficulty in deciding, at least in some cases, whether conduct is seriously reprehensible or not. We agree criminal law should not be used as the primary means to promote regulatory objectives. We also believe that it is not always necessary to use criminal law as the sanction for failure to meet a requirement imposed by a European Directive or Regulation.

PROPOSAL 2: *Harm done or risked should be regarded as serious enough to warrant criminalisation only if:*

(a) in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or

(b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences.

We do not agree with this proposal. We do not think the way to judge whether harm done or risked is sufficiently serious to warrant criminalisation is to look at the penalties to be imposed. In part, we think this is to be judged by whether the person knew or intended the harm caused and, in part, by the seriousness of the harm for the person who suffers it. This is easier to determine in cases of physical harm to individuals. However, it is harder to find an appropriate test where it is society more generally that is harmed – for example by bribery or market abuse. In some cases which are currently criminal offences e.g. financial assistance by companies, insider dealing and market abuse, it can be very difficult to determine in advance whether a particular action will or will not be a criminal offence. We do not think it is generally desirable for criminal liability to be imposed unless it is clear what action does or does not constitute a criminal offence.

PROPOSAL 3: *Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure) is likely to do as much to secure appropriate levels of punishment and deterrence.*

We agree. However, we suggest that if this proposal is taken forward, there should be consultation on the list of criminal offences proposed to be repealed and the civil penalty (or equivalent measure) proposed to replace them.

(ii) General Principles: Avoiding pointless overlaps between offences

PROPOSAL 4: *The criminal law should not be used to deal with inchoate offending when it is covered by the existing law governing conspiracy, attempt, and assisting or encouraging crime.*

In principle we agree that pointless overlaps between offences should be avoided.

However, we can see the benefits of trying to clarify what actions amount to "attempt", "assisting" and "encouraging" in some cases particularly where offences may be committed by companies or bodies other than individuals. Where clarity is provided perhaps the more general law should be excluded.

PROPOSAL 5: *The criminal law should not be used to deal with fraud when the conduct in question is covered by the Fraud Act 2006.*

In principle we agree.

(iii) General Principles: Structure and Process

PROPOSAL 6: *Criminal offences should, along with the civil measures that accompany them, form a hierarchy of seriousness.*

We agree with this in principle but think that it may be quite difficult to apply in practice. As stated above, we think it is undesirable for the same actions to be subject to both a civil penalty and criminal prosecution and we think it is important that civil penalties should only be imposed where there is fault and knowledge, intent or recklessness.

PROPOSAL 7: *More use should be made of process fairness to increase confidence in the criminal justice system. Duties on regulators formally to warn potential offenders that they are subject to liability should be supplemented by granting the courts power to stay proceedings until non-criminal regulatory steps have been taken first, in appropriate cases.*

We think it is important that process fairness applies both to a civil penalty regime and criminal offences. If it is possible to avoid overlap between matters covered by civil penalties and matters covered by criminal offences this should help. However, where the same actions could give rise to both civil penalties and criminal prosecution, we are concerned about the interplay of the two and the effect on rules of evidence and the presumption of innocence if there is a requirement that non criminal regulatory steps must be taken before a criminal prosecution. We agree that regulators should have duties to warn potential offenders that they may be subject to prosecution, where that is the case. We also think that where a matter is more appropriately dealt with by way of a civil procedure, the courts should have power to stay proceedings – subject to what we say above about evidence and the presumption of innocence.

PROPOSAL 8: *Criminal offences should be created and (other than in relation to minor details) amended only through primary legislation.*

We agree criminal offences should be created and amended only through primary legislation. We think it may be difficult to determine what is a minor detail that can be amended in some other way and are dubious that this exception is appropriate. Many European Directives are implemented by statutory instruments under the European Communities Act. We do not believe it is always necessary to impose criminal offences to ensure Directives are properly implemented and we think a requirement that criminal offences can only be created by primary legislation would help to reduce the number of criminal offences created. We also think it would be worth considering something like the German and French approach to administrative offences.

PROPOSAL 9: *A regulatory scheme that makes provision for the imposition of any civil penalty, or equivalent measure, must also provide for unfettered recourse to the courts to challenge the imposition of that measure, by way of rehearing or appeal on a point of law.*

Yes. We think it is very important to provide for unfettered recourse to the courts. We do not think it would be enough for this to be limited to a judicial review of a decision or an appeal only on a point of law – it is important that it is possible to have a full re-hearing in all cases.

General Principles: fault in offences supporting a regulatory structure

PROPOSAL 10: *Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate. This means that the more remote the conduct criminalised from harm done, and the less grave that harm, the more compelling the case for higher-level fault requirements such as dishonesty, intention, knowledge or recklessness.*

We agree that the mere fact that conduct is to be deterred or punished in some way is not sufficient to warrant it being made a criminal offence. We also agree that criminal offences should be used where the conduct is morally wrong. We do not agree that a criminal conviction for a company does not have the same effect as for an individual and it is not always open to a company to re-form or re-brand its operations to diminish the impact of a conviction.

We think criminal liability should only be imposed where there is dishonesty, intention or knowledge. It should not be imposed where there is negligence. Imposing criminal liability for recklessness can make it very difficult for companies to know what action they must take or avoid in order to avoid committing an offence. In some cases involving criminal offences, including market abuse, it can be very difficult to know, or advise with certainty, whether a particular course of action will constitute a criminal offence or not. This means that applying the test of whether a company has taken a risk that is unjustified to take that has been appreciated but ignored is not a satisfactory test to determine recklessness. Of the approaches to recklessness set out in Appendix C we think the approach adopted in Canada (where it must be shown that either a director or senior officer in an organisation had the relevant knowledge or mental state) is preferable. We do not think the approach adopted in Australia (which provides that bodies corporate are liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of their employment or within their actual or apparent authority where the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence) is appropriate as we think that proving that a corporate culture existed that tolerated the relevant provision or having a corporate culture that led to non-compliance should not be enough to show that the body corporate authorised or permitted the offence.

We think it is important that directors of companies should be clear about the actions they are expected to take or avoid to avoid committing a criminal offence.

PROPOSAL 11: *In relation to wrongdoing bearing on the simple provision of (or failure to provide) information, individuals should not be subject to criminal proceedings – even if they may still face civil penalties – unless their wrongdoing was knowing or reckless.*

We agree.

PROPOSAL 12: *The Ministry of Justice, in collaboration with other departments and agencies, should seek to ensure not only that proportionate fault elements are an essential part of criminal offences created to support regulatory aims, but also that there is consistency*

and clarity in the use of such elements when the offence in question is to be used by departments and agencies for a similar purpose.

We agree.

B. DOCTRINES OF CRIMINAL LIABILITY APPLICABLE TO BUSINESSES

(i) The Doctrine of identification

PROPOSAL 13: *Legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable, but in the absence of such provisions, the courts should treat the question of how corporate criminal liability may be established as a matter of statutory interpretation. The Law Commission encourages the courts not to presume that the identification doctrine applies when interpreting the scope of criminal offences applicable to companies.*

We feel strongly that legislation should include specific provisions to indicate the basis on which companies may be found liable. It would be helpful if there were a broad consensus on this so that a different approach is not taken from one statute to another. Leaving this to the courts as a matter of statutory interpretation is undesirable as it means companies cannot know in advance what action to take or avoid in order to avoid committing an offence. We agree that there are difficulties with the identification doctrine.

(ii) A general defence of due diligence

PROPOSAL 14: *The courts should be given a power to apply a due diligence defence to any statutory offence that does not require proof that the defendant was at fault in engaging in the wrongful conduct. The burden of proof should be on the defendant to establish the defence.*

We agree except that we think a due diligence defence should apply in all cases, rather than it being left to the court to decide whether or not it applies. We strongly agree that a general defence to a criminal offence should not counsel perfection. We also agree that the form should be most generous to the defendant. As explained above, in many cases it is hard to be sure whether a particular course of action will involve an offence and this makes it important that a due diligence defence applies as widely as possible. Judicial decisions about whether a due diligence defence applies in a particular case are likely to be very important to companies in determining the action they must take or avoid.

PROPOSAL 15: *If Proposal 14 is accepted, the defence of due diligence should take the form of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence.*

We strongly agree.

However, the Law Commission says that consultees may prefer this defence to have the same wording and to impose the same standards as the most commonly encountered form of the defence. Accordingly, the Law Commission asks the following questions:

QUESTION 1: *Were it to be introduced, should the due diligence defence take the stricter form already found in some statutes, namely, did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence?*

No. We think this formulation risks a "counsel of perfection" approach. We do not think a company should incur criminal liability just because it made a negligent slip in taking

precautions or because it can be shown that there was another precaution it could have taken but did not.

QUESTION 2: *If the power to apply a due diligence defence is introduced, should Parliament prevent or restrict its application to certain statutes, and if so which statutes?*

We believe the due diligence defence should apply in all cases unless Parliament decides it should not. For the reasons set out above, we would expect such cases to be very infrequent.

(iii) The consent and connivance doctrine

PROPOSAL 16: *When it is appropriate to provide that individual directors (or equivalent officers) can themselves be liable for an offence committed by their company, on the basis that they consented or connived at the company's commission of that offence, the provision in question should not be extended to include instances in which the company's offence is attributable to neglect on the part of an individual director or equivalent person.*

We agree. One of the difficulties here is what knowledge of the facts, action or inaction by a director amounts to consent or connivance. If it were clear that an individual must know that wrongdoing is taking place or will do so to be shown to be consenting or conniving, that would be very helpful. However, that may not go far enough, as there will be cases when a director will be aware of what is proposed but will not be able to stop the proposed action or failure taking place. It would be helpful to make it clear that consent or connivance is not shown merely because a director participated in a board meeting where a decision is taken. Directors will be concerned to understand whether, to show they did not consent or connive at an offence, it is sufficient for them to show that they voiced their opposition, even if this is not recorded in the minutes (typically minutes only record the decision, which is usually taken on a majority basis, and not anyone who dissented and a director may not be able to insist on how the minutes are recorded). Directors may also wish to understand whether they must resign in order to show they did not consent or connive. A director may feel that it would be better not to do this to try to protect the shareholders' interests. Another grey area is the extent to which directors (particularly non-executive directors) can rely on information provided to them.

QUESTION 3: *When a company is proved to have committed an offence, might it be appropriate in some circumstances to provide that an individual director (or equivalent officer) can be liable for the separate offence of 'negligently failing to prevent' that offence?*

We feel strongly that a director should not be liable for negligently failing to prevent the commission of an offence by the company. Liability should only be imposed if there is assent to wrongdoing. We do not think mere awareness should be a ground for liability as a single director may not be able to prevent the conduct.

(iv) The delegation doctrine

QUESTION 4: *Should the doctrine of delegation be abolished, and replaced by an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated?*

We are not entirely clear how the delegation principle applies and how it applies to companies. We do not think criminal liability should be imposed for failing to prevent an offence being committed by someone to whom the running of the business has been delegated. If someone has delegated to a person who appears to be suitable and has appropriate procedures in place to check if the delegation is working appropriately, liability

should not be imposed merely because the person to whom the delegation was made committed an offence. We do not think the argument that the stigma attaching to such an offence would be less is a good one.

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

William Underhill (Slaughter and May) (Chairman)
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