CITY OF LONDON LAW SOCIETY

COMPANY LAW COMMITTEE

Response to the Law Commission's Discussion Paper on Corporate Criminal Liability

9 June 2021

1. The views set out in this response have been prepared by a working party of the Company Law Committee of the City of London Law Society (the "**CLLS**"). The CLLS represents approximately 17,000 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, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The working party is made up of senior and specialist corporate lawyers from the CLLS who have a particular focus on issues relating to company law and corporate governance.

2. We have had the opportunity of reviewing in draft the response made to the Law Commission's Discussion Paper by the Corporate Crime and Corruption Committee of the CLLS. We support the conclusions made in that response.

3. Our focus has been on the company law aspects of the issues raised in the Discussion Paper which leads us to make the following additional points:

    a. Given the criminal liability that will attach to companies as a result of any reform, whatever approach is adopted, a company and its directors should have certainty as to what behaviour (including failures to act) will constitute an offence and who (i.e. the person or category of persons) may commit the offence. The required elements for imposing criminal liability should be clear and readily understandable to the average person and a company and its directors should be able to plan in advance to avoid the company committing an offence. For this reason, we support the approach taken in Serious Fraud Office v Barclays[1].

    b. We do not believe that new criminal offences should be created to compensate for a lack of prosecutorial resource. We particularly endorse the points made in paragraphs 9 and 10 of the response from the Corporate Crime and Corruption Committee of the CLLS.

    c. Rather than legislative reform that applies to all companies in all sectors, specific issues and concerns in what are perceived to be "higher risk" sectors may be best addressed by the relevant regulator or on a much more targeted basis, as is the case with the senior managers and certification regime (**SM&CR**) in the financial services sector and the criminal offences in the legislation relating to money laundering, terrorist financing and proceeds of crime etc.

    d. The Discussion Paper envisages, in particular, the prospect of focusing attention and reforms on economic crime and wrongdoing in the financial services sector, but it is arguable that the relatively recently introduced SM&CR regime needs to be given more time before an assessment can be made as to the need for further change.

    e. Reforms need to be proportionate, particularly where they create a significant compliance burden and cost for companies. The demands on smaller companies whose actions and defaults are less likely to have a serious effect on third parties and on those in low risk sectors should be subject to lesser requirements than those applying to larger companies and those in high risk sectors.

[1] [2018] EWHC 3055, [2020] 1 Cr App R 28

f. Disproportionate legislation will be at risk of making the UK a less attractive destination for corporates to set up and carry on business if the resulting compliance burden is considered to be too high and/or the liability regime too broad and uncertain.

g. If the identity principle were to be replaced by a version of the existing failure-to-prevent model, with the prosecution required to prove that the accused company had effective control over the offending activities and that it had failed to put in place reasonable procedures to prevent the offending activities, safeguards would be needed to prevent corporate liability arising as a result of the actions of an entirely rogue employee. This might be achieved by ensuring that corporate liability only arises where the commission of the offence by a relevant employee (for example, fraud) is with a view to benefitting the company in some way or, at the very least, not solely or mainly with a view to benefitting the individual in question. Alternatively, corporate liability might be based on a test of whether the company could reasonably have been expected to be aware of the employee's actions and could have reasonably been expected to intervene.

h. When considering the use of the term "senior officers" and drawing on the experience of both Canada and Australia, please be aware that in those jurisdictions it is typically the case that the Chief Financial Officer is not a board position and, as such, the extension of the liability regime to "senior officers" is in part to address the fact that the directors are generally all non-executive directors other than the CEO. In the UK, the CFO will invariably be a director, often with other senior executives also as board members.

i. The lack of clarity as to who might be within the scope of a definition of senior officer (or any other term) highlights the difficulty in developing an approach which can adequately address the myriad range of corporate and management structures that are adopted by companies of varying size, complexity and international reach and the difficulty for boards in adopting an approach to avoid the company committing an offence.

j. Questions of attribution may therefore depend on corporate group structure. Some large businesses are organised as a single corporate entity with separate operating divisions, while others will comprise a holding company at the top with separate subsidiary companies for each distinct business. Attributing liability from an employee to a corporate entity may have different results depending on the model used. It might be useful to consider the body of law on a parent company's civil liability for the acts of its subsidiary (see Vedanta Resources PLC v Lungowe[2] and Okpabi v Royal Dutch Shell Plc[3]).

k. We have serious reservations as to the suggestion that an assessment of corporate culture might be an element in deciding corporate guilt or innocence. Culture is an amorphous concept difficult to assess on an objective basis and it is hard to see how a required standard of proof could establish a "bad" culture. The culture within a particular business unit in a large and diverse group can be very different from the culture as espoused and encouraged by a parent company board. Would a proliferation of policies and mission statements be evidence of the culture? What steps, if any, would a board be expected to take to monitor the culture or would culture be determined by the behaviour of the individuals in question (which might differ significantly from the behaviour of other individuals)? If the latter, does that raise the same questions as the attribution approach or the failure to prevent approach?

l. We strongly support the proposal that companies should have a defence available to them based on their own due diligence or the prevention measures they have taken. The potential availability of such a defence would on its own have the effect of encouraging the adoption by companies of a stronger compliance and corporate governance structure. It would nonetheless be important to ensure that there is appropriate proportionality and to recognise that a due diligence defence may provide better protection for larger companies that have greater resources available to them when compared with smaller, less-well resourced companies. Where a material risk exists, some level of due diligence will always be

[2] [2019] UKSC 20
[3] [2021] UKSC 3

required, but that should be proportionate to the perceived risk and the resources reasonably available for the task.

m. We support the recommendations made by Professor Macrory in 2006 (referred to in paragraph 7.13 of the Discussion Paper). We believe that the introduction and use of such orders would go a long way to meet the public's desire to see companies held to account where an offence has been committed.

n. We support the response of the Corporate Crime and Corruption Committee of the CLLS in relation to the criminal liability of directors. We do not believe a director should be at risk of conviction based on neglect. Nor do we think offences based on consent or connivance are likely to add significantly to the existing offences of aiding and abetting, counselling or procuring.

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