

## CORPORATE CRIMINAL LIABILITY

Issued: 20 August 2021

The Fraud Advisory Panel welcomes the opportunity to comment on the Law Commission's discussion paper on corporate criminal liability, published on 09 June 2021, a copy of which is available from this [link](#).

We are very happy to discuss any aspect of our comments and to take part in all further inquiries on the issues we've highlighted to the Law Commission.

© Fraud Advisory Panel 2021

All rights reserved.

This document may be reproduced without specific permission, in whole or in part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and Fraud Advisory Panel reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder. For more information email: [info@fraudadvisorypanel.org](mailto:info@fraudadvisorypanel.org)

## GENERAL COMMENTS

1. The Fraud Advisory Panel welcomes the opportunity to respond to the Law Commission discussion paper on *Corporate Criminal Liability*, published on 09 June 2021.
2. The Fraud Advisory Panel (the 'Panel') is the UK's leading counter fraud charity. We act as the collective voice of the counter fraud profession and provide practical support to more than 260 corporate and individual members. Our members come from a wide range of professions and sectors who are united in their determination to stop fraud.
3. There is widespread agreement that the current approach to attributing corporate criminal liability in the UK, through the identification principle, is outdated, complicated and ineffective in holding companies to account for the criminality of their employees, senior management or board members.
4. However there appears to be no clear consensus on what measures, if any, should be implemented to ensure the law deals adequately with offences committed in the context of corporate organisations. Opinions vary from introducing strict or vicarious liability offences to widen the net to capture more corporate criminality, to leaving the law as is, and using regulatory bodies and not the criminal law to regulate the conduct of companies.
5. What is clear is that the statutory 'failure to prevent' offences, brought in via the Bribery Act 2010, and the Criminal Finances Act 2017, with defences of adequate or reasonable procedures, have had a significant impact upon corporate behaviours. These offences have led to the creation of corporate policies and procedures, designed to prevent the offences in question. They have also led to a significant corporate focus on compliance, and a significant uptick in enforcement. In the case of the Bribery Act, sizeable penalties have been imposed, which have also led to corporates increasing their focus on compliance.
6. Pending consensus being achieved around the issue of changes to the identification principle, the Panel recommends that, in the short term, new statutory offences are created following the failure to prevent model. Such offences should also include defences of adequate or reasonable procedures.
7. In particular, the Panel recommends that a corporate failure to prevent economic crime offence is introduced in order to improve corporate behaviours regarding fraud and other financial crimes<sup>1</sup>. A statutory defence of adequate or reasonable procedures should be available, as should the possibility of a Deferred Prosecution Agreement ('DPA') as a penalty.
8. While it is accepted that there would be some cost implications for companies of an offence of failure to prevent economic crime, such measures should ensure that the implementation costs associated with compliance with such laws would not be

---

<sup>1</sup> 'Economic crime' is not a term defined in statute. The Fraud Advisory Panel propose as a starting point it should include any offence contained within schedule 17 part 2 of the Crime and Courts Act 2013, although there may be a case to exclude some offences (see paragraph 28).

significantly more than those already being incurred due to the Bribery Act and Criminal Finances Act. Companies are already familiar with the defence being based on the six principles of proportionate procedures, top level commitment, risk assessment, due diligence, communication and monitoring and training.

## RESPONSES TO SPECIFIC QUESTIONS

### Question 1

What principles should govern the attribution of criminal liability to non-natural persons?

9. The law needs to be clear. It also needs to be easy to understand who is being held liable and for what.
10. If changes are to be introduced, they need be fair and ensure that corporates are held criminally liable only for matters within their control or held criminally liable only for the actions of individuals over whom they can exercise some form of control.

### Question 2

Does the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?

11. As mentioned above the identification principle is neither clear nor easy to understand in advance who will make the company liable.
12. This principle tends to be applied disproportionately to smaller companies. Such companies have a smaller and more limited number of directors, which makes them more likely to be held criminally liable than larger companies with more complex management structures.
13. There is clearly merit in considering a broader basis for imposing liability, However, due to the wide range of opinions, consensus may not be achieved as to what this should look like.
14. If changes are to be introduced, they need be fair and need to ensure that corporates are held criminally liable only for matters within their control or held criminally liable only for the actions of individuals over whom they can exercise some form of control.

### Question 3

In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?

15. Subject to it being clear and certain what level of senior management can attribute criminal liability to a company, and what degree of fault is required, then such a change may be merited. Those who would make the company liable need to be of sufficient seniority that their actions can fairly be attributable to the company and they need to be readily identifiable.
16. However, as can be seen from the Financial Conduct Authority's Senior Managers and Certification Regime, it is not straightforward to enforce and can have knock on impacts.

#### **Question 4**

In Australia, Commonwealth statute modifies the common law identification principle so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?

17. Subject to it being clear and certain what is meant by 'corporate culture' and 'directed, encouraged, tolerated or led', then such a change may be merited as it would seek to encourage good corporate behaviours whilst criminalising bad behaviours.
18. Practically however this may be difficult to define and difficult to prove.

#### **Question 5**

In the United States, through the principle of respondeat superior, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England and Wales? If so, in what circumstances would it be appropriate to hold a company responsible for its employee's conduct?

19. Respondeat Superior has the advantage of being very clear and certain. However, it is often viewed as being very unfair for companies and likely to lead to significant opposition.
20. If it were to be introduced, it should be limited to more serious offences, such as economic crimes, or those which result in significant harms to others or benefits to the company. Needless-to-say the actions of the employee, representative or agent, need to be ones which the company would have been able to influence in advance of the offence being committed.

#### **Question 6**

If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

21. Yes. Criminal law should punish transgressions, but at the same time the harshness of the law need be mitigated in circumstances where the corporate has taken precautions to prevent the behaviour.
22. This would incentivise companies to create and monitor appropriate policies and procedures to prevent crime and has worked well with the Bribery Act and the Criminal Finances Act failure to prevent offences, as well as offences under the Money Laundering Regulations.

### **Question 7**

What would be the economic and other consequences for companies extending the identification doctrine to cover the conduct along the lines discussed in questions 3, 4 and 5, above?

23. Any change in the law will necessitate corporates to introduce compliance measures (for example, the six principles set down in the Bribery Act 2010 guidance) and will therefore result in a cost to business.
24. Changes analogous to those already in place with the failure to prevent offences under the Bribery Act or the Criminal Finances Act, are likely to be less costly to implement as the infrastructure for risk assessment, due diligence, policies and procedures and training should already be in place. However more significant changes, as those with respondeat superior, are likely to be significantly more costly.
25. Any discussion as to economic and other consequences must also consider the impact of not extending the identification doctrine. There are economic and other consequences for not taking action to prevent economic crime, such as harm to companies, individuals and investors and the undermining of the financial system.

### **Question 8**

Should there be 'failure to prevent' offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic crimes? If so, which offences should be covered and what defences should be available to companies?

26. Yes. These offences have been successfully introduced and enforced in relation to bribery and tax evasion. They have led to corporates having to focus on compliance, and they have led to improved corporate behaviours. Furthermore, enforcement has resulted in sizeable penalties being imposed.
27. As a starting point, the offence should cover the economic crimes for which DPAs are available under schedule 17 part 2 of the Crime & Courts Act 2013. There may be arguments for excluding some offences, for example, 19 (it is not practical to have procedures to prevent forgery), 22 (an area which is really the domain of the FCA), and 26 (bribery, which already has an FTP offence).

### Question 9

What would be the economic and other consequences for companies of introducing new 'failure to prevent' offences along the lines discussed in question 8, above?

28. As mentioned above under Question 7, changes analogous to those already in place with the failure to prevent offences under the Bribery Act or the Criminal Finances Act, are likely to be less costly to implement as the infrastructure for risk assessment, due diligence, policies and procedures and training should already be in place.
29. There are also economic and other consequences for not taking action to prevent economic crime, such as harm to companies, individuals and investors and the undermining of the financial system.

### Question 10

In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

30. Overlapping criminal, civil, administrative or regulatory liability tends to make the system in England and Wales appear confusing, disorganised, and unclear to companies what they should be focussing on. Multiple overlapping systems also risks confusion over which organisation should take the lead in enforcement.
31. Furthermore, resolutions such as DPAs or civil recovery under the Proceeds of Crime Act, mean that there are already alternatives to commencing criminal cases. As such it is unclear what additional alternatives are being suggested or whether any such alternatives are in fact needed.

### Question 11

What principles should govern the sentencing of non-natural persons?

32. Sentencing principles for non-natural persons need not be any different from those used for sentencing individuals. The principles of culpability of the person and the level of harm resulting from their acts are equally applicable to companies as they are to individuals.
33. A number of sentencing guides already exist for corporate offending – such as those for bribery, fraud and money laundering, which could easily be adapted or applied if additional failure to prevent offences such as economic crime, were created.

### **Question 12**

What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory 'consent and connivance' or 'consent, connivance or neglect' provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body's criminal conduct?

34. It is unclear how many criminal prosecutions – if any – have been brought against directors for consenting or conniving to a corporate criminal offence. As such their merit is questionable.
35. Substantive criminal offences and accessory liability would enable prosecutors to take action against relevant individual employees or responsible directors.

### **Question 13**

Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?

36. As mentioned above, the law needs to be clear and certain. It also needs to be enforced and enforced fairly against all sizes of companies. As such the prosecution agencies need to have sufficient training and sufficient resources to be able to do so effectively.
37. Companies also need to have clear and detailed guidance on how to ensure compliance with any legislative changes. The cost of such compliance should also be manageable and proportionate to the risks faced and the size of the company in question.
38. Furthermore, companies need to be incentivised to comply by being able to avoid prosecution by showing that they have taken reasonable steps to prevent offending. Appropriate non-criminal disposals, such as DPAs, also need to be available in order to incentivise early self-reporting, cooperation, and speedy resolutions.