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Submitted to Law Commission consultation on corporate criminal liability
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About you

What is your name?

Name:
Susan Hawley

What is the name of your organisation?

Organisation:
Spotlight on Corruption

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state::

What is your email address?

Email:
[redacted]

What is your telephone number?

Telephone number:
[redacted]

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Questions for discussion

Question 1: What principles should govern the attribution of criminal liability to non-natural persons?

Please share your views below:

The principles that should govern how criminal liability is attributed to corporate bodies and other non-natural persons should include:
A. Fairness and equality before the law – all corporate bodies should be held to account equally before the law regardless of size or corporate structure.
B. Prevention – the law should encourage the introduction of robust compliance and monitoring regimes in order to prevent criminality.
C. Deterrence – the ability of the state to stigmatise certain egregious behaviour through the criminal law is important to provide a genuine and credible deterrence and to provide recognition of the serious harm that corporate behaviour can cause society.
D. Certainty and clarity – so that the rules are applied and interpreted consistently by prosecutors, courts and corporates themselves.
E. Reality - current modes of decision-making and responsibility within modern corporate structures are reflected in the law.
F. Extra-territoriality – to capture the global nature of much corporate activity and avoids a competitive disadvantage for UK-based companies.
G. Equivalence – ensuring the UK does not fall behind international standards.

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?

Please share your views below:

The identification principle does not provide a satisfactory basis for attributing criminal responsibility to non-natural persons. This was supported by the Ministry of Justice's Call for Evidence – where 75.9% of those responding thought the identification doctrine inhibits holding companies to account – and by the submissions of law enforcement agencies, including the Serious Fraud Office and Crown Prosecution Service.

Parliament's Treasury Select Committee has noted that without much-needed law reform in the area of economic crime: "multi-national firms appear beyond the scope of legislation designed to counter economic crime. That is wrong, potentially dangerous and weakens the deterrent effect a more stringent corporate liability regime may bring."

In our view a broader basis for attributing corporate criminal liability is essential to ensure that the UK's laws can adequately hold corporate bodies to account for egregious criminality where appropriate, and that large, complex corporate bodies can be held to account in the same way as smaller, owner-managed corporate bodies.

As the Law Commission's consultation document makes clear, the UK currently has one of the narrowest versions of the identification principle among comparable common law jurisdictions. This has been further narrowed by the 2019 Barclays ruling, which in our experience of monitoring court cases now imposes further burdens on prosecutors to investigate and prove the relevant relationship with and authorisation from the Board. This imposes additional costs on the public purse in terms of additional investigative costs by public prosecutors, and also more complex trials leading potentially to longer court hearings and greater risk of failed prosecutions. Without Parliamentary intervention, this extremely narrow judicial interpretation of the corporate liability rules will determine the future viability of corporate fraud investigations and prosecutions.

In our view it is essential that the operation of the identification principle in England and Wales is reformed in line with global trends on corporate criminal liability. The Law Reform Commissions of both Ireland and Australia have both recently completed reviews of corporate criminal liability, making strong recommendations for the expansion of the identification principle to reflect modern corporate decision-making.
Within the EU, which includes several major trading partners of the UK such as Germany, the Netherlands and Ireland, the trend is also towards stronger corporate criminal liability with EU law itself specifying in multiple directives that corporates must be held criminally liable for wrongdoing where there is lack of supervision or control. An example of this in the economic crime sphere, is the EU's recent introduction of the 6th Anti-Money Laundering Directive on combating money laundering by criminal law (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.284.01.0022.01.ENG) in which this standard of criminal liability for corporate wrongdoing is specified.

Article 7 of the 6th AML Directive requires Member States to ensure that legal persons can be held liable where an offence has occurred as a result of lack of supervision or control by a person in a leading position. At the time of its review by the European Scrutiny Committee in February 2017, then Minister for Security, Ben Wallace, noted that if the UK had opted into the Directive, it would have had to amend domestic law with regard to corporate criminal liability for money laundering or negotiate the provision on corporate liability out.

Furthermore, we think there are strong arguments in favour of ensuring that attribution of criminal responsibility to corporates reflects the reality of modern corporate decision-making. As the Law Reform Commission of Ireland review highlights, best practice in corporate governance and regulatory trends in corporate governance globally have emphasised decentralised decision-making in large companies as a means for providing better oversight and corporate efficiency (Regulatory Powers and Corporate Offences, 2018, para 8.57-9,
https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%202.pd
As a result of this trend towards decentralisation, corporate culpability where it occurs, is likely to be "dispersed" throughout the organisation. It is essential that the means of attributing criminal responsibility reflects this dispersed culpability.

In its 2017 consultation on a failure to prevent facilitation of criminal tax evasion, the UK government recognised that in its current form, the identification doctrine creates incentives for senior management to turn a blind eye to wrongdoing, and disincentivises internal reporting (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf).

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?

Please share your views below:

Neither Canada or Australia have successful corporate prosecution rates. In fact, in both countries corporate prosecutions are extremely rare. We are therefore not convinced that this modification provides a suitable or adequate model on which to base attribution. It has not been tested sufficiently to warrant its adoption, nor has it proven itself as a model that allows corporates to be prosecuted successfully where this is necessary.

As we note below, the Australian Law Reform Commission has recently recommended reform to how corporate bodies are held liable for criminality in Australia. This proposed reform goes wider than just senior management and includes anyone who acts with "actual or apparent authority."

We think it would be a mistake to adopt a model which is not considered successful by the Law Reform Commission of the country in which it is used. Furthermore, we believe there is a considerable risk that adopting this modification could lead to similar perverse incentives for bad corporate governance as the current model used in England and Wales has.

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?

Please share your views below:

We do not believe that the 'corporate culture' model in Australia has proven effective, despite its academic appeal and despite the obvious attraction of having a law that recognises that criminality can be the product of organisational culture rather than just individual behaviour.

The notion of 'corporate culture' has been criticised, as the Australian Law Reform Commission's report itself notes, for being too ambiguous. It is possible that proving a culture exists may also impose an additional and almost impossible burden on prosecutors.

Furthermore, the Australian Law Reform Commission has recommended the Australian government legislate away from this approach, and amend the country's Criminal Code so that corporate bodies can be held criminally liable where appropriate, where: "one or more officers, employees, or agents of the body corporate, acting within actual or apparent authority, engaged in the relevant conduct, and had the relevant state of mind."

We believe it would be a mistake to replicate a model which has few proven results in its application and which Australia itself is in the process of reforming.

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?

Please share your views below:

We strongly believe that a form of vicarious liability modified in line with the model in the Netherlands, and with recommendations by the Law Reform Commissions of Australia and Ireland, would be most appropriate for attributing corporate liability to substantive offending for serious corporate crime in England and Wales.
There is little doubt that the United States' vicarious liability regime has allowed one of the strongest records on corporate prosecutions across the board globally. The only other country that achieves similar corporate prosecution rates globally is the Netherlands which has a similar legislative model to the US.
In the Netherlands, a company is liable:
i) Where the act is committed by an employee or someone contracted by the company
ii) Where the act is in the normal course of business of the company
iii) Where the act leads to benefit for the company
iv) Where the company failed to take reasonable care to prevent the behaviour occurring

As noted above, the Law Reform Commission of Australia has recommended that the Australian government adopt a form of vicarious liability where an employee or agent acting with "actual or apparent authority" commits the criminality.

This recommendation for an expansion of the identification doctrine beyond senior managerial agents has also been made by the Law Reform Commission of Ireland, which has recommended that corporate bodies be held criminally liable where a criminal act is committed by "a director, manager, officer, employee or agent of the corporate body (or any other natural person who purports to act in that capacity) who exercises a delegated policy-related operational authority in relation to the offence in question, and that such a natural person has such authority where he or she has, expressly or impliedly, been given delegated control, to a significant extent, over an element of corporate policy relevant to the offence in question."

This formulation is potentially more convoluted and lacks the clarity of the version recommended by the Law Reform Commission of Australia, and may miss circumstances where an employee or agents has been given operational authority without a specific policy-related function. However, it illustrates that the general trend by Law Commissions in other comparable jurisdictions which have the identification doctrine as the basis for attributing corporate liability has been to recommend a form of wording that recognises that responsibility and authority may be delegated below senior management within large modern corporations.

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?

Please share your views below:

This would be reasonable as long as the defence is not too broad. While the current failure to prevent offence has a statutory defence where a company has adequate procedures to prevent offences being committed on its behalf, for statutory offending it is arguable that companies should have to show more proactively what steps it took to prevent the offending. The burden of any defence must be constructed in such a way so that it falls on the company to prove what steps it took to prevent the crime rather than on the prosecutor to prove it did not do so.

The public interest stage of the Code for Crown Prosecutors also provides companies with further protection against being unfairly prosecuted so it would be undesirable to make this defence too broad.

Question 7: What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions 3, 4 and 5, above?

Please share your views below:

In our view, it is essential to ensure that consideration of economic and other consequences includes the benefits of crime prevention that are likely to be achieved by the adoption of robust corporate governance procedures in response to stronger rules on corporate liability. This economic benefit, as well as the economic cost that corporate criminality imposes on society, must be counter-balanced against any potential additional short-term compliance cost to companies of new rules.

Improved crime prevention, and a more level playing field for how corporate criminality is addressed, is likely to provide an improved business environment for companies themselves. It is noteworthy that 66.7% of those who replied to the government's Call for Evidence on corporate liability for economic crime thought that corporate liability reform for economic crime would result in improved corporate conduct, with only 13.3% thinking it would not.

There is no evidence that we have come across that suggests that strong corporate liability rules in the US or the Netherlands has impacted upon economic competitiveness in these jurisdictions. Indeed, the US has had a robust framework for corporate criminal liability for 100 years and a proactive enforcement regime, along with a steadily increasing GDP.

As the UK potentially opens itself up to business from countries outside of the EU, improved corporate liability rules will also create a level playing field between UK companies and companies from key trading partners such as the US, the Netherlands, and other countries that are in the process of strengthening corporate liability rules such as Germany and Australia. As many UK companies need to adopt corporate governance procedures to operate in these trading partner countries, the cost of adopting similar procedures to operate within the UK is arguably likely to be minimal.

A broader basis for attributing corporate liability is likely to lead to a) greater self-reporting by companies and co-operation with investigating authorities; b) reduced costs to the public purse of failed prosecutions or investigations. In order to enter into negotiations for a DPA, companies are likely to need a reasonable prospect of being found guilty of an offence, but the restricted nature of the current regime significantly undermines that prospect. These are important benefits that should also be weighed against potential costs to companies of compliance costs.

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?

Please share your views below:

We strongly support the introduction of a failure to prevent offence for certain serious crimes alongside reform of the identification doctrine.

Failure to prevent offences are tried and tested and have reaped significant corporate governance benefits in relation to fighting bribery and tax evasion, with the SFO entering into DPAs that secured income of £1.3 billion for the Treasury under Section 7 of the Bribery Act. The House of Lords Bribery Act Committee described the failure to prevent offence, “as particularly effective, enabling those in a position to influence a company’s manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not.” The offence requires a company to focus on the way that business is conducted on its behalf and thereby seeks to tackle corporate environments that permit bribery.

When HMRC consulted on the failure to prevent tax evasion corporate offence, it found that stakeholders generally understand this model and its requirements well, and it therefore ensured consistency and minimised the burden on business.

Given that bribery and tax evasion usually involve an element of money laundering and often fraud, it is inconsistent to have different models of corporate liability operating for different economic crimes. Fraud, false accounting and money laundering impose serious costs to society, just like bribery and tax evasion. The lack of consistency between the offences has been highlighted by prosecutors as hindering their work on economic crime. The lack of consistency between offences also undermines the DPA regime, which applies to all economic crimes, as listed in Schedule 17 of the Crime and Courts Act 2013. Accordingly, we believe that a failure to prevent economic crimes such as fraud, money laundering and false accounting – offences laid out in Schedule 17 of the Crime and Courts Act – would be essential to ensure that the DPA regime has a similar model of attribution for all corporate criminality covered by the regime.

Broadly speaking we favour consistency in the type of defences available across different offences. We also support the legislative requirement for offence-specific guidance to be produced through extensive public consultation.

The introduction of a failure to prevent offence must however in our view be accompanied by reform of the identification doctrine and is not sufficient on its own to ensure full equality before the law. This is because in our experience from monitoring implementation of the Bribery Act:

a) a failure to prevent offence is regarded by the courts as a lesser offence, incurring lower fine levels than substantive offending. While large companies can largely only be held to account for a failure to prevent offence, smaller companies can be held to account for both failure to prevent and substantive offending, resulting in unfairness. As a consequence, larger, operationally complex companies, which are likely to cause more significant and widespread harm, are less likely to be found criminally liable than smaller companies.
b) a failure to prevent offence does not incur mandatory exclusion from public procurement (under Regulation 57 of the Public Contract Regulations 2015) whereas a conviction for a substantive offence does, resulting in further unfairness: smaller companies are likely to face increased prospect of exclusion from public procurement than larger companies. This appears to be directly at odds with the government’s stated objective of levelling the playing field for SMEs in government procurement.

Question 9: What would be the economic and other consequences for companies of introducing new “failure to prevent” offences along the lines discussed in the question 8, above?

Please share your views below:

Please see our answer to question 7 which we believe would be largely the same.

Additionally, in our view, because of the strong focus that a ‘failure to prevent’ offence has on preventative corporate governance procedures, this would have significant potential economic benefits in the fraud sphere and for SMEs. An example of this would be the significant beneficial effects of large tech companies having stronger preventative measures against fraud in place, which the introduction of a failure to prevent offence in relation to the Fraud Act would necessitate, which would lead to a reduction in online fraud and greater protection of SMEs.

Failure to prevent is a well-established model for companies, and complying with an extended model of that offence is, in our view, unlikely to be unnecessarily onerous. In a 2015 survey of 500 SMEs by the MoJ and BIS, 89% of the SMEs who were aware of the Bribery Act said it had not impacted on their plans or ability to export. Of those who had taken professional advice, the median cost was £1,000. Many companies will have implemented compliance policies when the Bribery Act took effect – and FCA-regulated companies already have a duty to prevent financial crime – so could extend those policies and programmes.

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?

Please share your views below:

In our view, the use of administrative penalties for serious criminality by corporations can never be an effective substitute for criminal penalties. 73.6% of those responding to the government's Call for Evidence on corporate criminal liability thought that solely regulatory responses are not appropriate where companies commit serious crime. The deterrent value of administrative or civil penalties is significantly less than for criminal ones, with less reputational costs and less potential additional consequences for corporates.
It is crucial to note that the global trend is away from OECD jurisdictions only using civil or administrative penalties to address corporate criminality. Germany, which has been the main outlier in this regard, is in the process of introducing a Corporate Sanctions Act, precisely because of sustained criticism of its lack of criminal penalties for corporates from the OECD.
Increased use of civil penalties is appropriate and would be desirable where criminal prosecutions cannot be pursued owing to the standard of evidence, or where it is not in the public interest to prosecute, among other reasons. However, they will rarely be appropriate where wrongdoing is egregious, sustained, causes significant harm, forms a system of conduct by a corporate, or is repeated.
Furthermore, there is little evidence that the UK regulatory system currently offers sufficiently robust application of current regulatory standards to provide real deterrence for corporate criminality or an effective substitute for criminal enforcement. There have been repeated regulatory failures in cases of major corporate wrongdoing in recent years which have been severely criticised by Parliamentary Committees. There are strong arguments to suggest meanwhile that introducing an effective 'criminal law' backstop for economic crime, which is currently absent, could help strengthen the UK's regulatory regime, and provide greater incentive for corporates to engage proactively with regulators.
We note that the Law Reform Commission of Australia has recommended the introduction of a criminal offence where contraventions of civil penalty provisions are part of a pattern of behaviour by companies. This is in our view important to ensure that regulatory or civil fines as not viewed as a cost of doing business and we would strongly encourage a similar approach in the UK.

Question 11: What principles should govern the sentencing of non-natural persons?

Please share your views below:

We strongly support an amendment of the Sentencing Code to ensure that it accurately reflects corporate offending.

In particular, we think that the principles governing corporate sentencing should include:
a) Rehabilitation or reform of the corporate body, through the introduction of corporate probation or rehabilitation orders at sentencing stage which would allow courts to impose an independent monitor on the corporate. This would help ensure far greater parity between criminal sentencing and the DPA regime. It would reduce costs on the prosecutor and the courts of holding additional hearings to impose a Serious Crime Prevention Order. And it would resolve the issue identified by the Law Commission's consultation document, that a SCPO potentially imposes a higher threshold of evidence that is required by a 'failure to prevent' offence. In addition, courts should be given the power to order pre-sentence reports in relation to corporations to enable them to assess whether a probation or rehabilitation order is necessary.
b) Compensation that reflects the complexity of, and extent of harm caused by, corporate crime. Currently case law establishes that compensation orders cannot be given in 'complex' cases. In our experience, compensation has been rejected in corporate bribery cases, and even under the DPA regime, compensation is rare and limited owing to the case law. Corporate crime is often by its very nature complex. The consequence of this case law is that the more complex and more egregious the offending, the less likely compensation is to be ordered. This is an injustice which undermines the ability of victims of corporate crime to get remedy in criminal cases. Furthermore, compensation rarely reflects the full range of harm caused, and is often excessively narrowly defined. We would recommend a full review of whether concepts of 'social harm' could be introduced which reflect the full impact of corporate offending.
c) Publicity orders that ensure appropriate publication of convictions and allow accurate statistics on corporate prosecutions to be kept. Currently, as sentencing remarks in criminal cases are rarely published, there is little information beyond basic detail and press reporting in the public domain about a corporate conviction. A publicity order would help correct this as well as address the imbalance that currently exists whereby more information is put in the public domain under a DPA with a corporate than where there is a corporate conviction. Additionally, it would significantly help with the collection of data on companies that have been convicted, which would ensure that the government's proposed debarment register will be more effectively implemented.
d) Consistency – we support the proposal of the Law Commission to amend the Sentencing Code to reflect corporate offending, in particular to remedy the situation where penalties have only been set in statute with natural persons in mind.

We think Courts should also be given the power, as recommended by the Australian Law Reform Commission, to dissolve a company in very egregious circumstances, and to be disqualified from undertaking certain activities.

We also strongly recommend the 'ticketing' of judges for economic crime, to ensure that judges that there is greater consistency of sentencing by the judiciary in corporate economic crime cases. In our view, the new economic crime court's success will be in part dependent upon whether there is sufficient specialisation and training of the judiciary in this field of law.

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?

Please share your views below:

Where corporate criminal liability cannot be established it may only be possible to prosecute individuals. However, the current level of liability for directors for the actions of corporate bodies in our view falls short of what is required to drive good corporate governance. The acquittal of directors in a significant number of recent high profile economic crime cases raises real questions about the adequacy of the law as well as enforcement.

We strongly support the creation of an individual failure to prevent offence for directors. Alternatively, the introduction of a 'consent, connivance or neglect' provision to a failure to prevent offence may create a similar liability. Currently Section 14 of the Bribery Act enables senior officers of a company to be found guilty of an offence where a crime has been committed by a corporate and there has been consent or connivance by the officer. Our understanding is that there has however never been a prosecution under this Section. If the offence were extended to include neglect and applied to a Section 7 offence and not just substantive offending, this could be a powerful addition to ensure individuals at a senior executive level are held to account.

The Irish Law Reform Commission has recommended the introduction of a statutory scheme of derivative criminal liability for senior managers where there is 'culpable contribution' to substantive offending by corporate bodies. This would include negligence and failure to prevent substantive offending. The Australian Law Reform Commission has meanwhile expressed concern at the potential 'accountability gap' relating to senior officers in corporate offending, and proposed a full review of the individual accountability mechanisms under Australian law within five years of Australia's Financial Accountability Regime (broadly equivalent to the UK's Senior Managers regime) coming into force.

We note that within England and Wales there has been a particular issue with achieving successful individual director level prosecutions where a DPA has been agreed with a corporate. Guidance issued by the SFO and CPS indicates that individuals should be investigated and prosecuted where appropriate in cases where a DPA has been entered into with a corporate offender, but there has yet to be a conviction in this instance. Since the DPA regime took effect in 2014, no individuals have been convicted of the underlying offence, and ten individuals have so far been acquitted.

When responding to a criminal investigation or prosecution, directors are operating in an uncertain legal framework as a result of the identification doctrine, and may not accept that they are liable for a company's conduct. This uncertainty in the regime for corporate liability risks complicating and burdening the investigative and prosecutorial processes when considering the evidence of a director's criminal liability, and may increase the costs and uncertainty for the individual and company. In our view, certainty and consistency are essential for corporations and their directors to be held accountable where appropriate.

Given that DPAs are often agreed on a lower standard of proof than a criminal conviction, this creates an inherent tension for prosecutors. We therefore recommend serious consideration be given to civil penalties that could be imposed where a criminal standard cannot be met. This could include allowing prosecutorial bodies to seek a Disqualification Order of a Director, where the Director was in charge of a company that is subject to a DPA. This would be broadly similar to the Competition and Market Authorities' power to seek a Competition Disqualification Order (CDO) where an individual has been director of a company that breached competition law and their conduct makes them unfit to manage a company. The CMA's power includes the ability to seek such orders where a director has left or been removed from the company committing the offence or where a director refuses to cooperate with its investigation including any leniency procedure.

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?

Please share your views below: