Bar Council response to the Law Commission Discussion Paper on Corporate Criminal Liability

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission's Discussion Paper on Corporate Criminal Liability.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

The Bar Council welcomes the opportunity to respond to the Law Commission's thoughtful Discussion Paper. In advance of the preparation of this response we have met with representatives from the Law Commission and participated in round table meetings with other key stakeholders. This is plainly an area of the law that merits

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[1] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/06/Corporate-Criminal-Liability-Discussion-Paper.pdf

serious consideration, and one in which significant policy decisions are required. Those decisions will of course be for others, weighing up a variety of competing interests and taking into account the varying perspectives of individuals, companies, law enforcement agencies and others. We confine ourselves below to the legal merits of the various potential reforms under discussion.

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

There needs to be a policy choice made between, on the one hand, widening the scope for prosecution of non-natural persons[2], and, on the other, diverting such entities away from the criminal justice system and towards a system of civil / regulatory penalties. That choice is ultimately for others to make, and the Law Commission's consideration of this issue will no doubt be informed by the evidence received during the process of consultation.

However, that there is a need to take action and make such a choice is not, in our view, really in doubt. Such a need is clearly mandated by the current failure of the law on corporate criminal liability properly to deal with crimes allegedly committed by larger corporations (see §1.8 of the Discussion Paper, and our observations on the weaknesses apparent when the identification principle is applied to larger corporations set out below in our response to Question 2). Whether it is possible to devise a regime that is capable of ascribing criminal liability to companies for crimes requiring a positive intention is very much an open question. But whatever the basis for ascribing criminal liability to corporations, it should be no more difficult - legally - to apply to complicated organisations than to sole traders.

Accordingly, the aim of any reform of the law in this area should be to produce legislation that meets the following three tests:

(i) clarity;

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[2] The Discussion Paper uses, seemingly interchangeably, the terms "company", "corporation" and "corporate", as if these were synonymous expressions. While "corporate" has no particular legal meaning (on its own, at least without some qualifier, eg "body corporate"), "companies" and "corporations" are not synonymous at least in their technical usage. We point this out only to ensure consistency and clarity in any proposals that might be forthcoming. As part of that exercise, consideration will need to be given to an appropriate description of those entities that are intended to be within the scope of the proposals. We highlight that regard should be had to the variety of legal forms that might be used in business other than companies or corporations (eg partnerships and LLPs), to basic economic reality (eg the fact that some private companies can be of substantial size and bigger than some public companies) and to policy questions (such as whether the proposals should catch foreign or unregistered companies trading, to some degree, in this jurisdiction).

(ii) accessibility – in the form of a statutory test;

(iii) scalability, *i.e.* equality of application across the range of corporations from the smallest to the largest.

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?

We approach the utility of the identification principle from the presumption that continued (and enhanced) criminal prosecution is an accepted policy objective to meet the culpability of, and harm caused by, companies as a result of wrongful conduct committed in their name. That policy is itself a contentious one.

It is worth noting that in the criminal courts, the directing mind and will ('DMW') of a company is often simply identified as the (or rather 'a') director, without further discussion. In 'run of the mill' cases – usually not involving fraud or economic crime – the issue often does not receive detailed attention; the companies are frequently relatively small organisations and their management structure, in terms of the active decision-makers, is not complicated.

Also our anecdotal experience (it may be that the Law Commission has requested the relevant data from prosecution agencies such as the Crown Prosecution Service's Serious Fraud Division, the Serious Fraud Office ('SFO') and the Financial Conduct Authority) is that it is still relatively rare for companies, as opposed to the individuals who may represent the companies' DMW, to be indicted for fraud offences. Companies may more frequently be prosecuted in the magistrates' court, where there may be even less scrutiny of the DMW issue. High profile corporate prosecutions often receive significant media attention, disproportionate to their incidence.

As set out in the Discussion Paper, and as consistently rehearsed in academic literature, the identification principle has significant flaws, both in its legal justification and practical application. In summary form the Bar Council points to the following:

(i) The identification principle is itself not clear. The House of Lords' decision in *Tesco v Nattrass* does not speak with one voice as to how the DMW is to be determined, as analysed in the Paper at §2.23 et seq.. The DMW cannot always be identified by reference to the job title of a company officer, as opposed to the function carried out by that person.

(ii) That uncertainty has a practical effect on prosecutions. If the company as a legal person with a separate identity can cause harm and be held criminally liable for the harm, that liability should not depend on the lottery of the prosecuting agency being able to find the appropriate decision-taker. In particular, if the interpretation of the identification principle espoused by Davies LJ in *SFO v Barclays* is correct, liability may depend on there being a clause in a company's constitution or a board minute giving the decision-taker sufficient autonomy over what is alleged to be the conduct element of the offence.

(iii) The current iteration of the identification principle is uncertain as to whether one rogue director can act as the company with the relevant *mens rea*, regardless of the state of mind of any other directors, assuming they are both/all the DMW for the conduct element. This issue has become more acute following Davies LJ's judgment in *SFO v Barclays* (see Paper §2.41 and §2.59). The proposition that the prosecution has to prove that every director on the board shared the same *mens rea* before the fault element can be established could present a significant (and often insurmountable) hurdle and not reflect the reality in many small and medium sized firms, where often one director controls its operation and others have little day-to-day involvement, regardless of the terms of their appointment. In criminal practice, our experience is that issue is not commonly, if ever, addressed, and prosecutions are regularly presented on the basis of a single director's culpability. The Supreme Court in a recent civil case, *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2020] AC 1189 (at §34), held that: "the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant"; on the facts of that case the actions of one dishonest director, to the ignorance of the six other directors, did not bind the company so as to deprive it of an action against a third party which negligently acted on the instructions of that single director.

(iv) Indeed, following *Singularis,* it would appear that the identification of a director as the DMW (and potentially any person acting as the DMW) will itself always require a further analysis of the 'context and purpose' of the offence creating provisions before attribution can be made. Whilst the Supreme Court made no observation as to the impact of its judgment in the criminal jurisdiction, it is of note that Lord Thomas of Cwmgiedd, the former Lord Chief Justice, was a member of the Court and in agreement with the sole judgment.

(v) The result of (i)-(iii) above is that the application of the identification principle makes it easier to prosecute small and medium sized companies, rather than large companies with complex domestic and international management structures. Given that, as a generality, it can be said that the larger the company the greater the potential impact of any wrongdoing, that is a paradox which no doubt confounds the policy rationale which justifies the criminalisation of corporate wrongdoing.

(vi) The special rule of attribution developed in *Meridian* (see Paper at §2.45 et seq.) as a route to identify the natural individual who can act as the company in respect of the fault element, by means of a purposive interpretation of the relevant statutory provisions which create the offence, has not proved to be the answer. Whilst the judgment of Davis LJ (sitting as a High Court Judge, not in the Court of Appeal (Criminal Division)) in *SFO v Barclays*, may be seen to have significantly restricted the scope of the rule, it is our experience that the rule has been rarely deployed by prosecutors in any event. As far as we are aware there has not been a substantive appellate case in the criminal jurisdiction (prior to *Barclays*) which deals with the application of the rule in *Meridian* (before or since *Singularis)* to a statutory offence since *R v St Regis Paper Company Ltd* [2012] 1 Cr. App. R. 14[3], a case turning on the construction of the Pollution Prevention and Control (England and Wales) Regulations 2000. That may reflect the fact that prosecutors have failed to give criminal trial courts the opportunity "not to presume that the identification doctrine applies when interpreting the scope of statutory criminal offences applicable to companies"[4]. It is though not clear which of the principal economic or fraud offence-creating statutes, for example, would easily allow for such a purposive interpretation.

(vii) Dr Robin Lööf (Crim. L.R. 2020, 4, 275-290, cited for other reasons in the Law Commission's Paper) categorises as 'systemic incohesion' the anomaly of a company being convicted, or effectively accepting guilt in the terms of a Deferred Prosecution Agreement[5] ('DPA'), of an offence predicated on the *mens rea* of an individual as the DMW, where that individual is subsequently acquitted of the same offence in his/her individual capacity. That is certainly a theoretical possibility and is intriguing in terms of the

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[3] The fact (and limitation) of the rule is acknowledged but not further discussed in *R v A Ltd* [2017] 1 Cr App R 1

[4] Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, para. 5.110 and Proposal 13 (§8.134)

[5] s.45 Crime and Courts Act 2013

potential for prosecuting a company in such circumstances, where it has breached the terms of a DPA[6].

(viii) Whilst others will be better placed to comment on the reality of modern corporate decision-making (see Paper at §2.69), there is obvious force in the comment that it will be more difficult to prove the fault element of an offence allegedly committed by a company via the identification principle, if the relevant decisions are not made by individuals, whatever their title or function, but rather by 'synthesis' or by 'reference to corporate ethos'.

(ix) We are not in a position to comment on the prevalence, if at all, of companies arranging their internal structures and communications so as to evade prosecution via the identification principle. The current route to criminal liability does though allow for such an approach.

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?

It would be helpful to know the likely reasoning behind the decisions of individual states in Australia not to 'widely adopt' Part 2.5 of the Commonwealth Criminal Code, as reported in the Paper at §§6.18-6.21. It may be that the reasons were in part based on the practical experience of prosecution agencies. Presumably the applicable rules retained by the individual states in preference to the Code, are similar to the common law identification principle.

In any event, in so far as the federal approach in Australia and Canada is in part broadly comparable to the identification principle, in that the fault element can be attributed to the company by the state of mind of the board of directors or the 'high managerial agent' or senior officer, that approach will, we anticipate, be susceptible to many of the problems outlined in the answer to Question 2 above.

SFO v Barclays, on one view, demonstrates the difficulty of a rule which too tightly defines the title and/or function of the relevant individual whose state of mind the prosecution has to prove. If the identification principle is to remain the route to liability, then a focus on senior management together with the flexibility to identify the relevant individual in relation to the conduct at issue, would be an improvement.

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[6] It is interesting to note that to date the SFO, the sole prosecuting authority which has entered into a DPA, has failed to secure any convictions of individuals in respect of alleged offences which were the subject of a corresponding DPA

The definition of 'senior management' in s.1(4)(c) of the Corporate Manslaughter and Corporate Homicide Act 2017 could be used. It contemplates liability through both the fault of the decision makers in respect of the relevant corporate activity and those responsible for the management and organisation of those activities. Arguably the adoption of a similar revision to the identification principle in *SFO v Barclays* might have enabled a successful prosecution of the company (or at least a case of sufficient evidential strength to be left to the jury).

In principle we agree that whatever test for corporate *mens rea* is to be adopted, it should be set out in statute. It is unfortunate, to say the least, that lower courts since 1972 have had to grapple with slightly different and potentially inconsistent speeches from individuals Law Lords in the leading authority.

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?

We note that the 'corporate culture' provision in the Australian Commonwealth Code was 'little-used', notwithstanding that it had 'overwhelming' support from respondents to the Australian Law Reform Commission's consultation (Paper at §6.37). Again, it would be helpful to know the underlying reasons and why there is a disconnect between its theoretical support and its practical application.

The *mens rea* for most, if not all, of the principal fraud offences in this jurisdiction require dishonesty, and intent or recklessness. In the short explanation of the 'corporate culture' offence in the Paper at §6.25 (the limitations outlined at §§6.26-6.27 are a peculiarity of the drafting of the Australian Code), is a variation of criminal offending in this jurisdiction committed via vicarious liability, which (with very few exceptions) is restricted to strict liability offences. As we understand it, the proposal is that the relevant conduct of *any* employee, agent or officer of the company with the attendant mental element of the specific offence would result in the company being guilty of the same offence provided that the employee, agent or officer 'believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence'.

The formulation may need clarity as to (i) whether it would be sufficient that the belief or expectation is directed at senior management in general (as opposed to named individuals) and (ii) whether senior management (whether a named individual or not)

would have authorised or permitted both the conduct and fault elements of the offence. Assuming (i) and (ii) are the intended elements of the offence, this raises the real possibility of a company being convicted when *in fact* no member of senior management did or would have authorised or permitted the offence, which is close to vicarious liability (see Question 5 below). It may also set the bar for conviction too low (or acceptably low depending on the prevalent policy relating to corporate prosecutions) if *any* rogue employee could persuasively make allegations against generic 'management'.

Taking bribery as an example, it is difficult to conceive of how a senior manager would reasonably be believed/expected to condone the specific bribe without proof that he *in fact* knew that the instant payment was being made or that previous such payments had been made. If there was such evidence available, the company could be prosecuted on the basis of the model in Question 3. It may be that the corporate culture model is better suited to environmental and similar offences which are not implicitly (or expressly) dependent on the proof of dishonesty on the part of senior management.

On a practical level, we would also observe that, in our experience, 'corporate culture', and (wider) 'market practice' is sometimes invoked by defendants to meet the charge that they have been dishonest. Where such an issue is raised, the prosecution will typically seek to rebut it by demonstrating that the corporate culture / market practice was not such as to sanction the conduct under examination. In practice, the process of seeking to identify the relevant corporate culture to a jury's satisfaction requires rather more than (on the one hand) relying on what is portrayed by the company in official / promotional literature, and (on the other) accepting what is said to be the case by individual employee defendants. This is rarely likely to be a straightforward process, and requires among other things considerable discipline in case management from the trial judge to ensure that the scope of such an exercise remains relevant to the issues in the case.

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?

The principle of *respondeat superior* appears to be a variant of vicarious liability; namely that a company could be found guilty of an offence without any fault being attributed to it other than the unwitting employment (or similar) of another person. In *Sweet v Parsley* [1970] AC 132 at 163, Lord Diplock held that to impose liability for offences of

a 'truly criminal character' on a natural person without a fault element would be "contrary to a rational and civilised criminal code". Whether the suggested adoption of a similar model for the prosecution of legal persons should attract similar opprobrium is for others to determine. Such an extension of corporate criminal liability would require a radical shift in hitherto accepted prosecution policy, involving a host of related issues, not least the capacity of the criminal justice system. While this is ultimately a question of policy, such a radical shift does not appear to the Bar Council to be necessary and we have considerable doubts about its desirability.

It is also worth noting that, in areas such as anti-trust/competition law, the US uses the criminal law to deal with corporate wrongdoing of a kind that, in the UK, is dealt with by a civil regulatory regime. In the anti-trust/competition context, the policy case for a respondeat superior rule of corporate liability is very strong: but since such matters are, in the UK, not dealt with by the criminal law (the relevant criminal offence applying only to individuals), that policy case has no application in the UK context.

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?

There is a clear risk, if the basis of corporate liability were extended, and proportionate to the extent that it is, that it would allow rogue employees to commit criminal offences for which the corporation is then unfairly held responsible. It would therefore be in the interests of justice to ensure that as criminal liability is expanded, so too companies are afforded a degree of protection if they can show that they have taken all steps that could reasonably have been expected of them.

An illustration of this is afforded by the Australian example at §6.24(2), whereby a defence of due diligence is available where fault is established through the conduct of a high managerial agent of the body corporate.

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) to (5)?

This question relates to economic impact and is outside our remit.

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?

The need for further failure to prevent offences should be considered in tandem with the need to expand the identification principle, given the potential advantages identified at §3.22 of the Paper. To the extent that they may more accurately represent the culpability of companies where employees offend but the company does not encourage their offending, there may well be a case for further offences.

Which offences should be covered is a matter of policy, but the suggestion that it might mirror the list of offences for which a Deferred Prosecution Agreement is available would be a sensible starting point. It would place a significant burden on companies, and raise very serious concerns, if offences of a wholly different nature, where individual liability is most appropriate (e.g. sexual assault), were to be included.

However, a powerful argument against the extension of "failure to prevent" outside the specific fields of bribery and tax evasion is the range of ways in which fraud, for example, can be committed. While it may be relatively straightforward to set out policies and procedures designed to guard against the commission of offences such as bribery, it would be very much harder to prospectively identify potential ways in which frauds may be committed, and even harder to put systems in place to guard against them. That is not a problem that can be circumvented by the introduction of a role akin to a Money Laundering Reporting Officer responsible for establishing / maintaining / securing systems to prevent fraud, because the proper scope of the duties of such an individual would be just as difficult to define as the "adequate procedures" required to be put in place by the company.

Extending liability beyond the conduct of associated persons to, for instance, the users of services would be a controversial step and one that would warrant far greater consideration than the question posed at §3.24(3). Whether to do so is ultimately a question of policy.

If offences are to be created then there would be obvious benefits to mirroring the existing offences under s7 Bribery Act 2010 and ss45 and 46 Criminal Finances Act 2017 as closely as possible so that the burden of compliance is minimised and so that the slender body of authority that develops in this area is readily applicable to all similar offences (to that end the minor differences identified in the Discussion Paper at §3.20 may also warrant consideration as to whether they are justified). This would include the statutory defences and the obligation on government to provide guidance

to assist with compliance, noting the consistency in the six core principles that have already been identified in guidance issued.

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)?

This question relates to economic impact and is outside our remit.

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?

This is ultimately a question of policy.

There is clear merit in enabling regulators to be able to act swiftly to investigate and take action in relation to regulatory breaches and other conduct that would potentially also amount to a criminal offence. However, our experience is that a criminal conviction carries with it a greater stigma, both to those who are convicted of criminal offences, and to the wider public. (That seems likely to be among the factors which have determined the relative willingness of companies to agree to a DPA in preference to contesting criminal proceedings.)

As identified by the Law Commission in the Discussion Paper at pp35-38, there are currently a not insignificant number of regulators and other organisations with powers to impose financial penalties and other sanctions on companies, as appropriate in their various contexts. The extent to which these guard against corporate misbehaviour in their respective fields is a matter on which others would be better placed to comment. We are not aware of any clear lacunae, but no doubt this is something on which stakeholders with more focused points of view will be able to comment.

For completeness, we have considered whether there might be merit in a mechanism that allowed enforcement action to be taken in the civil courts in respect of a failure to prevent corporate crime (and otherwise than by way of civil penalty enforcement). For the reasons provided below, we anticipate that such an approach would be

unlikely to provide a viable means of enforcement on its own. We do not anticipate that such a duty would particularly reinforce other means of enforcement.

In terms of framing such a duty, company directors are already subject to duties that are partially codified in the Companies Act 2006. These existing duties are ordinarily considered to be owed to, and enforceable by, the company. As a matter of principle and in many cases, it would be possible for a company (or its liquidator) to construct a complaint against a director for a failure to protect the company from loss suffered as a result of a corporate crime, with such a claim likely being based upon some failure to observe the duties set out in ss.171, 172 and 174 of the Companies Act 2006. As such, there is already a framework that, at least to some degree, should encourage directors to avoid the commission of corporate crime.

A new civil duty would plainly need to add to the existing statutory expression of the duties of directors but would be enforceable by someone other than the company. Under the current scheme, the statutory encapsulation of the duties is designed to be applicable to all companies, whether large or small, and to provide a clear and accessible statement for all directors. Moreover, since those duties were based on duties that had been found to exist and developed under the common law and equity, such duties fall to be interpreted with that pre-existing caselaw in mind.

The introduction of a new duty upon directors for failing to prevent a corporate crime would need to be grafted onto this basic scheme. It would have no direct underpinning in any pre-existing caselaw and it would need to clearly explain the standards of conduct expected against which any failure would fall to be assessed and who might enforce it. If the new duty was only to apply to directors of particular companies (whether selected by size or otherwise), it should not suggest that directors of other companies are not expected to act in a way designed to prevent corporate crime.

Of course, the above analysis addresses only the position of directors. It may be that companies, in practice, look to prevent corporate crime at a senior management (ie non director) level. In terms of prevention, this might be an entirely responsible approach for a company to take - the appointment of a full-time trained expert, albeit as a senior manager, might even be a better way of upholding standards and preventing wrongdoing, than relying on even executive directors fulfilling a variety of responsibilities. However, provided sufficient monitoring of the senior manager was maintained by the board, it may be impossible to criticize the directors for a failure on the part of the senior manager <u>or</u> to rely on any civil duties against directors at all.

Leaving entirely to one side the difficulties of framing a purely civil remedy, there are clear practical issues with the reliance upon (non-regulatory) civil penalties. In particular, enforcement of such a duty in the civil courts may be a blunt tool, with such proceedings likely to be extremely complicated and expensive to pursue. Such claims may also be resisted by well-funded and well-represented defendants, with the prospect of significant delays and the possibility of substantial adverse costs being ordered against an unsuccessful claimant. Moreover, in a large group structure, it is likely that defendants will look to deflect blame across other employees and corporate representatives, such that enforcement fails to target those high enough in the group structure to effect real change and preserve (or drive up) standards.

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

The principles presently reflected in the guidance of the Sentencing Council (referred to in the Discussion Paper at §7.11 - §7.12) would appear to be comprehensive and we do not suggest any alternatives.

In terms of the available penalties (§7.13 onwards), we would observe that the criminal confiscation regime is likely to prove flexible enough to provide the benefit which it is suggested may result from the introduction of Profit Orders, and any need for a Publicity Order is likely to be met organically by the media.

However, the concept of a Corporate Rehabilitation Order which broadens the scope of the remedial orders that are currently available under health and safety legislation to the financial sector may well be worth exploring. The use of undertakings made by parent companies as to the future conduct of subsidiaries has recently become an effective term of DPAs (eg. the judgment of Edis LJ in *SFO v Amec Foster Wheeler Energy Limited* at §33) and has highlighted the limited range of remedies available in a corporate prosecution. That said, it may be that any orders for "rehabilitation" or remedial steps that need to be taken would be better administered by regulators, who are likely, by the time that criminal proceedings are concluded, to have already intervened in this regard.

In the regulatory sphere, the Law Commission may also like to consider the example of "enhanced consumer measures" which are remedies available to the civil courts when deciding whether to grant an enforcement order under Part 8 of the Enterprise Act 2002. Whilst these measures have not been widely deployed, they provide an example of the type of order which might be considered.

Question 12: What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory "consent or 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?

This is again ultimately a question of policy, which overlaps to some extent with the question of whether a "failure to prevent" offence should be introduced in relation to financial crime generally. The pros and cons of such an offence are dealt with above in our response to Question 8.

However, as a general proposition, there would seem to be a logic to holding company directors to a higher standard of conduct than that which would arise from the risk of prosecution as accessories to criminal offences. As noted above in our response to Question 10, the position of company director comprises responsibilities, to the company and to shareholders. Requiring directors to avoid consenting to or conniving in criminal offences committed by the company – or through neglect permitting such offences to take place – may not in practice add much if anything to their existing directorial responsibilities.

What would make sense is greater harmonisation of the various formulations of "neglect /connivance /consent" across the swathe of legislation providing for directorial liability for criminal offences committed by companies. While – as noted in the Discussion Paper at §8.12 – there is some logic to the way in which the scope of liability is drawn across offences – there are anomalies. See the examples provided at §8.14 & §8.15.

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?

We have taken this opportunity to consider where our responses to the questions above lead us.

It may ultimately prove impossible to devise a way in which criminal liability for offences requiring proof of intention – as opposed to those which can be committed by negligence or a lesser *mens rea* – can fairly be attributed to companies of all scales.

However, in some circumstances there may no pressing need for a prosecution of a company.

For example, if the entirety of the board of a company (unequivocally representing the DMW) were knowingly to sanction the commission of a fraud by and for the benefit of the company, then the fact that each individual could be prosecuted (for example) for conspiracy to defraud, would inevitably result in a comparable stigma from any criminal convictions attaching itself to the company, regardless of legal niceties.

Further, while one of the key advantages to being able to secure a conviction against a company that has benefited from a fraud committed by one or more employees is the realistic possibility of confiscation / compensation to the victims, other means could be employed to arrive at the same position in financial terms. For example, the civil recovery scheme under POCA 2002 could be extended.

Accordingly, while a regime in which corporate criminal liability is limited to liability for negligent acts / omissions may be the best that can fairly be achieved, a combination of such a regime with civil / regulatory sanctions or penalties, and the prosecution of individual employees (senior or otherwise) for offences requiring proof of intention, may prove capable of ensuring that corporate wrongdoing is fairly dealt with to best effect.