The Law Commission
Consultation Paper No 195 (Overview)

CRIMINAL LIABILITY IN REGULATORY CONTEXTS

An Overview

THE LAW COMMISSION

CRIMINAL LIABILITY IN REGULATORY CONTEXTS: AN OVERVIEW

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OVERVIEW
CRIMINAL LIABILITY IN REGULATORY CONTEXTS

OUR TERMS OF REFERENCE

1.1 In early 2009, it was agreed between the Ministry of Justice, the Department for Business, Innovation and Skills, and the Law Commission, that the Commission would undertake a project with the following broad aims:

> To introduce rationality and principle into the structure of the criminal law, especially when it is employed against business enterprises. In particular, this will involve the provision of non-statutory guidance to all Government departments on the grounds for creating criminal offences, and on what shape those offences should take.
>
> To consider whether there should be created a statutory power for the courts to apply a 'due diligence' defence (the burden of proof being on the accused) to a criminal offence.

1.2 It was agreed that the Law Commission would add to this project other issues arising out of its on-going work on corporate criminal liability, as a part of its 10th Programme of Law Reform. These issues were added because of their close connection to the project. These issues, which will be fully explained in due course, are:

> The scope of the consent and connivance doctrine. This doctrine imposes individual criminal liability on directors (or equivalent company officers) for crimes committed by their companies, if those individuals consented or connived at the commission of the offence.
>
> The status of the identification doctrine. This doctrine is used by courts to determine the basis on which corporate criminal liability arises under crimes requiring proof of fault created by statute. According to this doctrine, if a company is to be convicted of an offence, it must be possible to prove that the directors (or equivalent persons) themselves possessed the fault element in question.
>
> The status of the doctrine of delegation. According to this doctrine, if someone (X) delegates the running of the whole of their business to another person (Y), and Y then commits an offence in connection with the running of the business, it is not only Y who can be convicted of the offence. X can be convicted as well, even if X was in no way at fault respecting the commission of the offence by Y.

WHAT OUR TERMS OF REFERENCE MEAN FOR THIS PROJECT

The origins of the project

1.3 The genesis of the main part of this project, establishing a principled basis for the creation of some kinds of criminal law,[1] lies in unfinished business arising out of Professor Richard Macrory's report, *Regulatory Justice: Making Sanctions Effective*.[2]

1.4 In his report Professor Macrory said this:

> I am not prescribing changes to the legal framework or status of current offences relating to regulatory non-compliance. Offences relating to regulatory non-compliance come in many forms: some impose strict liability, some allow for defences like taking reasonable precautions or similar wording, some require proof of knowledge or intent. The rationale for the differences is not always clear. This is a subject I believe will merit further investigation in the future … . Some consultation responses have supported my view that there may be a case for decriminalising certain offences thereby reserving criminal sanctions for the most serious cases of regulatory non-compliance. It is however outside my terms of reference to consider this in great detail.[3]

1.5 We will explain shortly what is meant by 'regulatory' non-compliance;[4] but few are likely to disagree with the proposition that, in general terms, the criminal law can and should be used for the most serious cases of non-compliance with the law. The question is whether it is possible to develop some guidelines about the principles to be followed when considering the creation of criminal offences to support the regulation of the activities of individuals and businesses.

1.6 This is an important issue, not least because of the costs and uncertainty associated with use of criminal law and procedure in regulatory contexts. Giving evidence to Professor Macrory, the Environment Agency and the Health and Safety Executive said that many cases could take the best part of a year to bring from discovery of the offence to the point of prosecution, creating unacceptable delay for both prosecuting regulators and business or individual defendants.[5]

[1] We briefly consider the other part of this project, the doctrines of liability bearing on the liability of businesses, when setting out our provisional proposals and questions: see para 1.60 and following below.

[2] R Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive), (Final Report, November 2006).

[3] R Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive), (Final Report, November 2006) para 1.39.

[4] See para 1.9 and following below.

[5] R Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive), (Final Report, November 2006) para 1.30.

1.7 In an analysis we commissioned from Professor Julia Black, she also points out that, from a regulator's point of view, the outcome of criminal proceedings may not bring much benefit in terms either of individual retribution or of general deterrence.[6] When a case eventually reaches the criminal courts, even supposing that prosecuting regulators can meet the standard of proof – beyond reasonable doubt – they may nonetheless find that sentencing judges do not have the specialised knowledge required to ensure that appropriate and proportionate sanctions are imposed. This was a point also emphasised by Professor Macrory,[7] and has been noted in other jurisdictions.[8]

1.8 What this shows is that, in regulated fields, reliance on the criminal law as the main means of deterring and punishing unwanted behaviour may prove to be an expensive, uncertain and ineffective strategy. That leaves open the question of when reliance should be placed on the criminal law in those fields.

Regulation and criminal liability

1.9 We will be almost solely concerned with the use of the criminal law in 'regulatory' contexts. Very broadly, a regulatory context is one in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialised area of activity. For example, the Department for the Environment, Food and Rural Affairs describes as one of its Strategic Objectives:

> To enable society to adapt to the effects of climate change through a national programme of action to reduce greenhouse gas emissions by promoting and supporting the development of new technologies and initiatives to reduce UK energy consumption, and carbon intensity of energy production.[9]

1.10 Areas of activity subject to regulatory enforcement can be very varied. Examples are farming, animal welfare, food safety, waste disposal, health and safety at work, the dispensing of medication, retail sales, education, pensions' provision, the governance of many professions, banking and the giving of various kinds of financial advice. This means that the areas in which we will consider whether less reliance should be placed on the criminal law in principle cover a very wide range of activities, involving millions of people and thousands of businesses.

6 See Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, Appendix A.

7 R Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive), (Final Report, November 2006) paras 1.18 to 1.29.

8 See, generally, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002) p 112 to 115.

9 Department for Environment, Food and Rural Affairs, *Enforcement Policy Statement* (2010) p 3. In that regard, DEFRA is responsible for investigating and prosecuting offences under, for example, the Water Act 2003.

1.11 However, it follows that we are not concerned in this project with the question of whether less reliance should be placed on the criminal law, when what is sought is an improvement in standards of behaviour by the public at large. In other words, our terms of reference do not include consideration of whether less, or indeed more, use should be made of the criminal law to, say, encourage civilised behaviour in public and more tolerant attitudes, or to discourage the use of violence, sexual abuse, and so forth. Very important though these goals may be, they are not the responsibility of an expert regulatory agency with the power to develop standards, and to create and enforce laws directing at upholding those standards.[10]

1.12 So, to give a specific example, criminal offences supporting the regulation of the activities of chemists fall within the scope of this project. These offences apply to people already linked by licensed trade, and the offences support, amongst others, Chemist Inspection Officers in their work ensuring safe custody, disposal and record keeping in relation to drugs. By contrast, offences aimed at punishing and deterring members of the public from using or dealing in illegal drugs fall outside the project's scope. This is because illegal drug users or dealers almost all identify themselves as such, in legal terms, only by committing the offences in question. They are not already linked (as by engaging in a licensed trade), and do not form part of pre-determined group for regulatory purposes.

1.13 Accordingly, the most important task undertaken our Consultation Paper ("CP"), Criminal Liability in Regulatory Contexts,[11] is the introduction of rationality and principle into the creation of criminal offences, when these are meant to support a regulatory strategy. We have understood this to mean the development of a set of proposals to reduce routine reliance on relatively trivial criminal offences, as a means of trying to secure adequate standards of behaviour. In particular, we will consider whether much more use should be made of other, more cost-effective, efficient and ultimately fairer ways of seeking to achieve that goal than the creation of ever more low-level criminal offences. Consequently, we will explore whether all relevant Government departments should make a concerted effort to use these alternatives far more than they have in the past.

1.14 We will also set out the circumstances in which there is a legitimate case for creating criminal offences to support a regulatory strategy. We consider the longstanding argument that criminal offences should be created to deter and punish only serious forms of wrongdoing, as we will explain in Parts 3 and 4 of the CP. By serious wrongdoing is meant wrongdoing that involves principally deliberate, knowing, reckless or dishonest wrongdoing.

[10] Additionally, we will not be concerned with the merits of techniques of regulation, or of securing what is in the public interest, that do not involve using the criminal law, such as licensing, inspection, remedial notices, taxation, or public information campaigns.

[11] (2010) Law Commission Consultation Paper No 195.

1.15 In so far as enforcement measures are needed for less serious kinds of wrongdoing, it has already been accepted by Government that much more use should be made of civil measures, rather than criminal penalties.[12] Such measures include fixed penalties, but also warning, 'stop' or remediation notices (alongside powers of search and seizure where appropriate).

1.16 Our terms of reference do encompass special consideration of the position of businesses. Businesses are the most common target of regulatory initiatives. In addition to the issues just described, we will be addressing some questions about the criminal liability of businesses. We will consider a series of criminal law doctrines, described briefly above,[13] that have an impact on businesses. We will consider the extent to which these doctrines may be arbitrary, or unfair, perhaps especially where small businesses are concerned.

THE BACKGROUND TO THE MAIN PART OF THE PROJECT

Increasing numbers of criminal offences

1.17 Since 1997, more than 3000 criminal offences have come on to the statute book. That figure should be put in context, taking a longer perspective. Halsbury's Statutes of England and Wales[14] has four volumes devoted to criminal laws that (however old they may be) are still currently in force. Volume 1 covers the offences created in the 637 years between 1351 and 1988. Volume 1 is 1382 pages long. Volumes 2 to 4 cover the offences created in the 19 years between 1989 and 2008. Volumes 2 to 4 are no less than 3746 pages long. So, more than 2 and a half times as many pages were needed in Halsbury's Statutes to cover offences created in the 19 years between 1989 and 2008 than were needed to cover the offences created in the 637 years prior to that. Moreover, it is unlikely that the Halsbury volumes devoted to 'criminal law' capture all offences created in recent times.

1.18 These figures must be set alongside ways in which it has become more common for criminal offences to be created in regulatory contexts.

Bureaucratic bodies and criminal law-making

1.19 First, in such contexts, it is normal for primary legislation – a statute – to provide that criminal offences can be created by regulation or order (secondary legislation). Although the relevant government minister will be responsible for introducing secondary legislation creating an offence, the impetus will normally have come from the Government agency created by the statute in question. A statute will not usually itself set out all the criminal offences that might be needed to assist the agency to enforce appropriate standards of behaviour.

[12] See the Regulatory Enforcement and Sanctions Act 2008, based on the recommendations of Professor Macrory: see his report, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive), (Final Report, November 2006).

[13] See para 1.2 above. For more detail, see Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, Parts 5, 6 and 7.

[14] A source book of law generally recognised as authoritative and comprehensive.

1.20 Secondary legislation is easier to create than primary legislation. This is because once laid before Parliament, secondary legislation normally becomes law simply if no one objects to it within a certain period. In recent times, each year has seen the creation of well over 3000 pieces of secondary legislation (whether or not creating a criminal offence). So, as the number of agencies asking Ministers for secondary legislation to create offences themselves multiply, ever more criminal offences come to be created through such legislation, as well as through primary legislation (the statute itself).

1.21 It is worth saying something about the increase in the number of regulatory agencies. Agencies to which Government has granted powers to create and regulate standards of behaviour in particular areas have become much more common. There are now over 60 national regulators with the power, subject to certain limitations or checks, to make (criminal) law. These powers sit alongside the law-making powers already possessed by trading standards authorities and by the 486 local authorities.[15] Correspondingly, the numbers of criminal offences have increased, with the creation of these new authorities and agencies, to provide the support thought necessary for them to carry out their duties.

1.22 Here is an illustrative example. The Department for the Environment, Food and Rural Affairs (DEFRA) is a Government department with very wide-ranging responsibilities for standards relating to food, the environment, and the countryside. DEFRA (or its constituent parts) has always had at its disposal very many criminal offences to support its strategic objectives. For instance, in 2008, DEFRA introduced the Transmissible Spongiform Encephalopathies (No 2) (Amendment) Regulations 2008[16]. These regulations created 103 criminal offences aimed at reducing the risk posed by the spread of bovine spongiform encephalopathy.[17] The Department for Business, Innovation and Skills (BIS) is likewise a Government department with major and widespread responsibilities. The department regularly plays a role in the creation of criminal offences relating to its core concerns. For instance, in 2008 it introduced 74 offences by way of regulation or order, or in schedules to pieces of primary legislation.[18]

[15] See the discussion of the law-making powers of these and other agencies: J Kitching, "Better Regulation and the Small Enterprise", in S Weatherill (ed), *Better Regulation* (2007) p 157.

[16] SI 2008 No 1180.

[17] Some of these offences may be re-enactments of older offences.

[18] These included, for example, offences under the Companies Act 2006, the Export Control (Burma) Order SI 2008 No 1098, the Consumer Protection from Unfair Trading Regulations SI 2008 No 1277, the Batteries and Accumulators (Placing on the Market) Regulations SI 2008 No 2164, and the Cat and Dog Fur (Control of Import, Export and Placing on the Market) Regulations SI 2008 No 2795. Some of these offences may be re-enactments of older offences.

1.23 Notwithstanding the width of these already existing responsibilities, in 2008, a further Government agency, the Department of Energy and Climate Change was created, as an offshoot of DEFRA and BIS. The new agency has responsibility for the former's role in relation to climate change mitigation and for the latter's role in relation to energy policy. The new agency has taken three pieces of legislation through Parliament: the Energy Act 2008, the Climate Change Act 2008, and the Energy Act 2010.[19] The Energy Act 2008 contains 22 criminal offences, and the Climate Change Act 2008 three criminal offences.[20]

1.24 This is not the only example of expansion of the criminal law being driven, at least in part, by the continuous creation of new Government agencies.[21] Another example involves the relatively new Independent Safeguarding Authority. The Authority was established under the Safeguarding Vulnerable Groups Act 2006 to seek to ensure that inappropriate people are not employed in positions where they may exploit or endanger children or vulnerable adults. The Authority is supported by 18 new criminal offences, and by a power, created by section 14, granted to the Secretary of State to create yet further offences.

Criminal laws created, but then little used

1.25 It is not for us to say whether any particular agency, along with the offences created to support its regulatory activities, are unnecessary. However, it is important to point out that the offences created to support the activities of regulatory agencies are often rarely used. For example, section 8 of the Asylum and Immigration Act 1996, which prohibits the employment of illegal migrant workers, was meant to assist Home Office agencies in their work in reducing and deterring illegal immigration. Yet, that provision saw on average only one prosecution a year between 1998 and 2004, prior to the setting up of the UK Border Agency in 2008. As we explain in Part 3, this new agency now has the power to impose fixed civil penalties, instead of taking prosecutions under section 8.

[19] Department for Energy and Climate Change, "Legislation" http://www.decc.gov.uk/en/content/cms/legislation/legislation.aspx (last visited 12 July 2010).

[20] It would be right to point out that some of these offences may be re-enactments of older offences.

[21] See, for example, the law-creating powers given to appropriate national authorities by the Animal Welfare Act 2006.

1.26 More generally, a rough estimate is that only 1.5 to 2.0% of defendants tried in the Crown Court are tried for offences arising out of regulatory contexts (excluding motoring offences). In the magistrates' courts, perhaps around 10% of criminal cases arise out of regulatory contexts (excluding motoring offences[22]). Moreover, the steep increase in numbers of criminal offences since 1997 has not led to a corresponding increase in prosecutions and convictions. In 1997, 2 million defendants were proceeded against in magistrates' courts, but in 2008, only 1.6 million faced prosecution. In the Crown Court there was some increase from 80,000 defendants facing prosecution in 1997, to 89,000 in 2008, but that increase may be explained by a number of factors, such as a greater number of cases being transferred from the magistrates' courts. The total number of people found guilty in both kinds of courts put together was 1.49 million in 1997, but only 1.36 million in 2008.

1.27 If a very large number of offences are being created, but these offences are not being used, resources put into creating them are being wasted. Further, ordinary people and businesses are being subjected to ever increasing numbers of what, in all probability, will turn out to be illusory or empty threats of criminal prosecution.

OUR PROVISIONAL PROPOSALS AND QUESTIONS

General principles: the limits of criminalisation

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

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

> **(a) in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or**
>
> **(b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences.[23]**

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

[22] If motoring offences are included in the magistrates' courts figures, then the figures rise to around 50% of cases. The reason for giving figures that exclude motoring offences is that these figures give a better picture of the limited extent to which the criminal courts feature across the entire spectrum of regulatory activity.

[23] Putting aside factors such as whether the individual has previous convictions for other offences, and so on.

1.31 We will not argue specifically for proposal 1, which is really in the nature of a conclusion that follows from our other recommendations. Nevertheless, we believe that it is important to have a proposal in the form of a general statement of principle. This can act as a way of setting the justificatory bar high when the question facing a Government department is whether a criminal offence should be created.

1.32 Proposal 2 follows our analysis of the current use of criminal law in regulatory contexts in Part 3 below. As indicated above,[24] we find that an important explanation for the rare use of low-level criminal offences is, quite simply, that the cost, uncertainty and delay involved in undertaking criminal proceedings are not worth bearing, if the outcome will be little more than a fine (the amount of which is at the court's discretion). The stakes must be higher, if the criminal law is rightly to be invoked, on grounds of fairness to accused persons and on grounds of economy, efficiency and effectiveness from the prosecution's perspective.

1.33 Proposal 3 follows from proposal 2, but is concerned specifically with the reduction of the number of criminal offences on the statute book, whether created by primary or by secondary legislation. If low-level criminal offences are rarely used, there is a compelling case for removing them from the statute book if civil (non-criminal) measures will do as good a job, in terms of punishment and deterrence. Whether or not that is true depends in part on the nature of the civil measures at issue. Until recently, there were relatively few such measures available for Government departments to employ instead of criminal sanctions. So, it is in a way perfectly understandable that reliance has been so frequently placed on the criminal law.

1.34 During the 20th century, an increasing number of areas of business – and, indeed, individual – life became subject to regulation, or to more intensive or wider-ranging regulation. So, for example, there is now more regulation of the way individuals and businesses dispose of waste, treat the environment, address health and safety concerns, produce and sell food or other products, care for their animals, and so on. Without an adequate range of civil measures to carry through the regulatory goals in these areas, the volume of criminal law thought necessary to help achieve those goals was almost bound to increase. That is what has happened, and happened quite dramatically over the last 20 years.[25]

1.35 Fortunately, following the enactment of the Regulatory Enforcement and Sanctions Act 2008, there is now a wider and more flexible range of non-criminal measures available to regulatory authorities, to help them to achieve their goals without relying in the first instance on criminal prosecution. For example, under section 39 of the 2008 Act, a fixed monetary penalty (like a parking fine) may be imposed by a regulatory authority in respect of an offence, whether or not that offence is also a low-level criminal offence.

[24] See paras 1.6 to 1.7 above.

[25] See para 1.16 above.

1.36 Further, under section 46 of that Act, a regulatory authority can issue a 'stop notice', requiring someone to stop carrying on a specified activity, unless and until certain steps (such as those designed to make the activity safer) have been taken. Similarly, under section 50 of the Act, a regulatory authority can negotiate an 'enforcement undertaking' with someone, according to which that person agrees to take action to prevent what would otherwise be offending behaviour, or to restore damage done. It is only if these measures are not complied with that criminal prosecution will be contemplated: breach of a stop notice is itself a criminal offence.[26]

1.37 The introduction of these civil measures creates a real opportunity for an achievable reduction in the number of criminal offences on which departments and regulators used to have to rely. It is important that a determined effort is made to secure that reduction.

General principles: avoiding pointless overlaps between offences

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

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

1.40 So far as proposal 4 is concerned, there are specific statutes dealing with 'inchoate' offending in English law.[27] Very broadly, inchoate offending is a lawyer's term for conduct that is criminal when directed at, or posing a risk of, harm done, whether or not the harm in question is actually done. So, for example, when people conspire or attempt to commit offences, the acts in question (reaching the agreement to commit the offence; trying to commit the offence) are themselves prohibited by the criminal law. Someone can thus be prosecuted for conspiring or attempting to commit an offence, whether or not the offence actually took place.

[26] Regulatory Enforcement and Sanctions Act 2008, s 49.

[27] The main examples are the Criminal Law Act 1977 (conspiracy), the Criminal Attempts Act 1981 (attempts) and the Serious Crime Act 2007 (assisting and encouraging crime).

1.41 It is far too common for offences in regulatory contexts to make special provision for conspiracies or attempts to commit those offences, or for acts of encouragement or assistance to that end, when the general provisions in the specific statutes just referred to[28] already cover such conduct. For example, under section 8 of the Animal Welfare Act 2006, it is an indictable offence (an offence that may be tried in the Crown Court) not only to cause an animal fight to take place, but also to attempt to cause such a fight to take place. However, if causing an animal fight to take place is an indictable offence, then an attempt to commit it was already an offence in 2006, by virtue of section 1 of the Criminal Attempts Act 1981. So, the creation in section 8 of the offence of attempting to cause an animal fight was unnecessary. In Part 3, we will explain why this kind of duplication is not simply unnecessary but may lead to unanticipated expansion of the scope of the criminal law.

1.42 Turing to proposal 5, an objection to many fraud-based offences that are being created in regulatory contexts is similar to the objection just outlined in relation to inchoate offences. In other words, too many fraud-based offences are being created where the conduct in question is already covered by the Fraud Act 2006. For example, in 2008, around 30 fraud-based or fraud-related criminal offences were created.[29] It would have been perfectly acceptable, in a substantial proportion of these cases, to leave the conduct in question to be dealt with under the Fraud Act 2006.

1.43 Fraud under the Fraud Act 2006 is a serious offence, carrying a maximum sentence of ten years' imprisonment, following conviction in the Crown Court. It is questionable whether someone who commits a fraud-based offence created for a regulatory context should be exposed to what is commonly a much shorter maximum sentence for that offence, if the conduct in which they engaged would have amounted to fraud under the Fraud Act 2006. Quite simply, that looks unfair and may create anomalous differences in sentences handed down for similar kinds of acts. This is because a far higher maximum penalty is likely to face those who have engaged in almost identical kinds of fraudulent acts, but are charged with fraud under the Fraud Act 2006 because their conduct happens not to fall within the jurisdiction of a regulatory scheme that has a fraud-based offence with a much lower maximum penalty.

General principles: structure and process

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

[28] See n 27 above.

[29] It is hard to be very precise about numbers because some offences do not easily lend themselves to precise categorisation.

1.45 In Part 3 of the CP,[30] we will examine a number of different areas subject to regulation and consider how appropriately criminal offences are used by regulatory authorities in those areas. Our discussion leads us to propose that the criminal law is best employed as a measure to target the worst examples of non-compliance, as when an offender has deliberately not complied with an obligation, or has made a fraudulent application for a grant, or the like.

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

1.47 Following the passing of the Regulatory Enforcement and Sanctions Act 2008, there are now clearer duties on regulatory authorities to warn offenders or potential offenders that sanctions or other measures may be imposed on them. This is an aspect of what might be called 'process fairness'; in other words, fairness in the way that sanctioning procedures are undertaken. In that regard, we provisionally propose that process fairness in regulatory contexts should be central to the way that courts approach regulatory prosecutions. Courts should have the power to stay – that is to say, to stop – criminal proceedings if, in their view, the requirements of process fairness have not been met in an individual case. This can be through the use of warnings, enforcement undertakings or stop notices, or other analogous measures.

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

1.49 As we suggested above,[31] and as we will argue in Part 3 of the CP, it has become far too easy to create criminal offences through secondary legislation. The creation of a criminal offence should be regarded as a law-creating step of great (arguably, of something approaching constitutional) significance. That significance can only adequately be reflected in a commitment to create criminal offences in primary legislation (statutes). Should the criminal law have the reduced scope for operation in regulatory contexts that we propose, that ought not to be the radical step that it might otherwise appear to be. This is because the offence will be one concerned with serious wrongdoing.

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

[30] See Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195.

[31] See paras 1.19 to 1.20 above.

1.51 Only a tiny minority of convicted people challenge their convictions under regulatory legislation in the higher courts. However, as a matter of fair procedure (and of constitutional and European obligation), it is important to provide access to an independent tribunal, such as a Crown Court, when someone subject to a regulatory penalty, or equivalent measure, wishes to challenge that measure. In particular, we doubt whether it is in all instances likely to prove adequately fair or efficient for the regulatory authorities to seek to restrict appeals, in whole or in part, to bodies that the authority has itself set up for this purpose.

General principles: fault in offences supporting a regulatory structure

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

1.53 As a general rule, criminal offences created in regulatory contexts prohibit conduct that creates unnecessary and undesirable risks, although harm actually done is also targeted when it is not covered by the general law governing offences against the person or against property. Conduct that poses an unjustified risk of harm may in many instances be very remote from harm done. For example, the making of a misleading statement about safety procedures to be followed in manufacturing a product, submitted when an application is made for a licence to produce that product, may be an act very remote from any harm that might result from someone's reliance on that statement.

1.54 Just because an unjustified act, such as the making of a misleading statement about a product's safety features in a licence application, is remote from any harm to which it might lead, does not mean it is wrong to make the doing of that act a criminal offence. However, the remoteness of an act that creates risk from the harm that may result provides a reason to include stringent fault requirements – such as intention or dishonesty – in the relevant offence, to avoid over extension of the criminal law. That is the explanation for proposal 10. Proposal 11 below provides an example of how this works, in the key area of information provision.

1.55 **Proposal 11: In relation to wrongdoing bearing on the simple provision of (or failure to provide) information, individuals should not be subject to criminal proceedings – even if they may still face civil penalties – unless their wrongdoing was knowing or reckless.**[32]

[32] It is important to emphasise that our concern here is with the simple provision of the wrong or incomplete information, and so forth, to a regulatory agency. Where false or misleading statements are knowingly or recklessly made in a dishonest way, with a view to gain or to imposing (the risk of) loss on another, they will fall foul of the Fraud Act 2006; and rightly so.

1.56 In very many areas of regulation, the provision of the wrong or of misleading information, or a failure to provide the right information, to the regulatory authority, will involve the commission of a criminal offence. Of course, we understand that regulatory authorities could not do their job properly unless those subject to regulation had to provide the authority with the right information on many issues. However, it will rarely be right to make a simple failure to provide the right information, or even the provision of the wrong or of misleading information, a criminal offence. At best, such conduct should be subject to a civil measure of some kind. Businesses and others who faithfully seek to comply with regulatory requirements to provide information should not be penalised by the criminal law simply because they fall short of the precise requirements.

1.57 However, it is a different matter when information is deliberately or knowingly withheld, or when the wrong or inadequate information is knowingly or recklessly provided. Such conduct may not involve fraud, as understood by the criminal law. Even so, it does involve the deliberate or knowing adoption of an obstructive approach to defeat the regulatory objectives in relation to the individual's own business, when others may faithfully have sought to comply.

1.58 **Proposal 12: The Ministry of Justice, in collaboration with other departments and agencies, should seek to ensure not only that proportionate fault elements are an essential part of criminal offences created to support regulatory aims, but also that there is consistency and clarity in the use of such elements when the offence in question is to be used by departments and agencies for a similar purpose.**

1.59 We hope that this proposal needs little by way of further explanation. Naturally, the Ministry of Justice does not have the expertise in the regulatory fields that fall under the jurisdiction of other departments. Having said that, people are entitled to treat the Ministry of Justice as having the highest level of authority, short of Parliament itself, for the general standards observed in criminal law-making of all kinds in England and Wales. We know that the Ministry of Justice already takes its responsibilities in this regard very seriously. Even so, we believe that more could be done across departments, and publicly, to spell out the permissible limits of the criminal law.

Doctrines of criminal liability applicable to businesses

1.60 We now turn to the part of this project concerned with particular doctrines of criminal liability whose importance, in this context, is their application to businesses.

1.61 In practice, businesses – and especially small businesses – are in many fields the main targets for regulatory offences. This fact will have an impact on the shape of our proposals for the use of criminal offences in achieving regulatory objectives. Our specific concern is whether or not particular doctrines of liability applicable to businesses are unfair to such bodies, and in particular, whether or not they are unfair to small businesses.

The doctrine of identification

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

1.63 When companies are charged with criminal offences involving proof of fault, they are normally judged by reference to the so-called identification doctrine. This doctrine requires a controlling officer of the company him or herself to be proved to have had the fault element of the offence. We look at this issue in relation to the interpretation of statutory offences.

1.64 On the one hand, the identification doctrine can make it impossibly difficult for prosecutors to find companies guilty of some serious crimes, especially large companies with devolved business structures. For example, if bribery is committed by an employee of a company to win a contract for the company, it will only be possible to convict the company itself of bribery if, in some way, a company director (or equivalent person) him or herself had a hand in the decision to offer a bribe. If the employee was conducting business on the company's behalf as, say, a regional manager, that may be almost impossible to prove.

1.65 On the other hand, it follows that the identification doctrine can make it easier to convict small companies of offences committed by employees. This is because the smaller the company the more likely it is that the directors played some kind of active role in the commission of the offence, for example by explicitly or implicitly authorising it. In itself, that might not seem problematic, if the directors did play such a role. However, it gives a perverse incentive for companies to operate with devolved structures that insulate directors (or equivalent persons) to a certain extent from knowledge of what their managers or employees are doing, when that knowledge might involve awareness of offences being committed for the benefit of the company.[33]

1.66 It follows that the identification doctrine also provides an incentive for prosecutors to pursue small businesses in respect of offences committed to benefit the company, rather than larger companies in respect of the same kind of offences. This is because it will be faster, cheaper and easier to prove directorial involvement when small companies are being investigated (something referred to as the temptation of 'low-hanging fruit'). Such a policy development may undermine a statutory scheme of liability aimed at small and large companies alike.

[33] For an illustrative example, see *Director-General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456.

1.67 By contrast, our provisional proposal involves the court in looking to the underlying purpose of the statutory scheme for guidance on the right basis on which to hold companies liable for offences committed relating to that scheme. This is something that the courts have already started to do.[34] It is an approach that is preferable to the application of the identification doctrine as the default doctrine of liability. Of course, it is always possible that, having considered the underlying purpose of the statutory scheme, a court could conclude that Parliament intended the identification doctrine to apply.

A general defence of due diligence

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

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

1.70 We also ask:

> **Question 1: Were it to be introduced, should the due diligence defence take the stricter form already found in some statutes, namely, did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence?**
>
> **Question 2: If the power to apply a due diligence defence is introduced, should Parliament prevent or restrict its application to certain statutes, and if so which statutes?**

1.71 Proposals 14 and 15 are linked to proposal 13. When considering criminal offences under statute that do not involve proof of fault, the courts sometimes apply a presumption of fault. In other words, they read in to the statutory wording a requirement of fault that the prosecution must prove, as a matter of fairness to persons accused of the crime in question.

1.72 As we will argue in Part 6 of the CP,[35] one difficulty with the approach is that it has never been clear when the presumption applies or what evidence will be sufficient to displace or overcome it. The presumption thus adds persistent uncertainty to the process of interpreting the scope of criminal offences.

1.73 We have no difficulty with the idea that courts should interpret criminal offences in such a way that they strike a fair balance between the interests of the prosecution and the interests of the defence. However, in our view, the presumption of fault is not the right way to strike that balance, especially in regulatory contexts when companies are most likely to be the defendants.

[34] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

[35] See Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195.

1.74 The presumption of fault commonly involves a presumption of 'subjective' fault, such as intention, knowledge or recklessness. That means that, when a company is charged with a criminal offence to which the presumption has been applied, the prosecution must satisfy the identification doctrine, described above. As we have seen,[36] satisfying that doctrine requires proof that a director (or equivalent person) him or herself possessed the fault element. This is not only something that may be an increasingly difficult task for the prosecution, the larger the company involved. It also poses almost insuperable difficulties for the prosecution, when looking at the activities of large firms, when what must be proved is that an individual director (or equivalent person) knew or was reckless as to whether the wrongdoing would take place.

1.75 Modern statutes imposing criminal liability on companies have circumvented this problem. Such statutes permit companies (or individuals) to escape conviction for offences under the statutes, only if the defendant can show that all due diligence was exercised and all reasonable precautions taken to avoid commission of the offence. A court will not apply the presumption that fault must be proven to an offence that has a 'due diligence' defence applicable to it.

1.76 However, this leaves a difficulty with the large number of statutes, and possibly hundreds of offences of strict liability established by them, which were created before this policy of including a due diligence defence in the statute itself became more common. The presumption of fault is, sometimes, still being applied to these statutes when it would be fairer to apply a due diligence defence, with the burden of proof on the accused. The difficulty is that there is no due diligence defence at common law and so the courts have no alternative, when seeking to secure fairness to accused persons, to the employment of the presumption of fault.

1.77 Accordingly, we provisionally propose that the courts should be given the power to apply a 'due diligence in all the circumstances' defence (with the burden of proof on the accused) to statutes that are in whole or in part silent on the question of whether fault is required to be proved if the defendant is to be convicted. We are confident that the courts will use that power wisely, and will apply it only when it enhances the statutory scheme of liability.

1.78 Nonetheless, we also ask two questions (questions 1 and 2) about possible qualifications to our proposal.

1.79 Modern statutes that include a due diligence defence do not express it in the simple terms that form the basis of our provisional proposal: due diligence shown in all the circumstances. Instead, they commonly have a narrower version of it, less favourable to the defendant, a defence of having taken *all* reasonable precautions and having exercised *all* due diligence to avoid commission of the offence. We believe that this is somewhat stricter than is really necessary for a defence to a criminal charge, and is a kind of counsel of perfection. However, we ask consultees whether they would prefer the general defence that we propose to take this stricter form.

[36] See paras 1.62 to 1.67 above.

1.80 Finally, there may be some contexts – the road traffic context may be an example – in which, if our proposal becomes law, too much of the courts' time would be taken up by vain attempts to persuade the courts to apply a due diligence defence to offences under the relevant legislation. It might be better right from the outset to say that the defence simply has no application to offences created by road traffic legislation, and possibly other legislation. Do consultees think that is right, and if so, which statutes do they think should be exempted from the scope of the defence?

The consent and connivance doctrine

1.81 We will be making the following proposal about the basis on which directors can be made individually liable for offences committed by their businesses:

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

1.83 We will be asking the following question in relation to this issue:

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

1.84 Companies can commit a very wide range of offences, including, for example, corporate manslaughter and taking indecent photographs of children, as well as offences more commonly encountered in business contexts, such as false accounting. When a statute creates an offence that a business can commit, it usually provides that a director (or equivalent person) can also be found individually liable for committing that offence, if he or she consented or connived at the commission of the offence by the company. There is nothing especially controversial about this. It is a form of liability very similar to liability for an offence that arises when someone is found to have been complicit in another's crime (in this case, the other being the company).

1.85 However, in some statutes the basis on which a director (or equivalent person) can be found individually liable for an offence committed by his or her company is much wider. It extends beyond instances in which the individual in question has consented or connived at the commission of the offence, to cases in which the company's offence was attributable to neglect on the director's (or equivalent person's) part.

1.86 In our view, this broader basis for imposing individual liability on directors (or equivalent persons) for offences committed by their companies is unfair. For reasons that we will explain in Part 7, an individual (X) should not be exposed to conviction of a criminal offence committed by another person (Y), simply because the offence committed by Y was due to neglect on X's part. This is simply because in such circumstances, X him or herself has not engaged in any criminal act; only Y (his or her company) has. In such circumstances, only consent to or connivance at the offence committed by Y involves the kind of fault necessary to justify individual liability being imposed on X respecting Y's crime.

1.87 Clearly, some consultees may not agree that the criminal law should be so generous to individual directors. Accordingly, we go on to ask (question 3) whether, if an offence committed by a company is due to the neglect of a director (or equivalent person), a separate offence should be created to capture that individual's conduct. This would be an offence of negligently failing to prevent the offence being committed by the company.

The delegation doctrine

1.88 We will then turn our attention to what we regard as an antiquated doctrine: the so-called doctrine of delegation. According to this doctrine, where the running of a business is delegated from X to Y, X still remains liable to be convicted of an offence committed, in relation to the running of the business, by Y. We will ask:

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

1.89 Our objection to the delegation doctrine is similar to our objection to the extended version of the consent and connivance doctrine; that is to say, its imposition of individual liability for an offence committed by someone else may be wholly unfair and disproportionate, in the circumstances. To give a simple example, suppose X asks Y to run X's pub while X goes on a round-the-world cruise. In fact, Y turns the pub into an unlicensed lap dancing club and brothel. In this instance, Y can, of course, be convicted of running an unlicensed lap dancing club or brothel. However, the doctrine of delegation means that X can also be convicted of these offences, even if he or she had no reason whatsoever to think that Y would do as he or she did.[37]

1.90 We do not believe that this is right. There will always be a concern that business people may place the running of their businesses into the wrong hands. However, in order to penalise individuals for doing that, if it is necessary to penalise them at all, the criminal law should perhaps choose a different focus. It would be possible to focus on whether the original owner of the business (X) failed to prevent the offence being committed by the person to whom it was delegated (Y). A conviction for this separate offence would perhaps more fairly represent what X has done wrong than individual liability for the offence itself.

Law Commission
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[37] See *Allen v Whitehead* [1930] 1 KB 211.