CRIMINAL LIABILITY IN REGULATORY CONTEXTS: RESPONSES

GENERAL COMMENTS

RSPCA

1.1 Particular interest in the proposals because of RSPCA's role as private prosecutor as opposed to a "regulator" for offences relating to animal welfare. The RSPCA undertakes prosecutions in furtherance of its charitable objects which are "to promote kindness and to prevent or suppress cruelty to animals and to do all such lawful acts as the Society may consider to be conducive or incidental to the attainment of those objects" (s4, RSPCA Act 1932). The Society has strived to achieve these aims since its inception and since the 1822 Act to prevent the cruel and improper treatment of cattle, cruelty to animals has been firmly enshrined in the criminal law. It would be a backward step for animal welfare should this regime change.

1.2 In 2009, the RSPCA secured 2,579 convictions for offences relating to animals. Prosecutions were primarily brought under the Animal Welfare Act 2006 ("AWA"), other relevant legislation included the Wildlife and Countryside Act 2008 and the Wild Mammals (Protection) Act 1996. The Society is anxious to ensure that the existing enforcement work that it undertakes in conjunction with the police and CPS is not compromised by the proposals contained in the Consultation document.

1.3 The RSPCA also consider that the power to impose a system of civil sanctions already enacted in the Regulatory Enforcement Sanctions Act 2008 and introduced in the Environmental Sanctions Order 2010 should not be extended beyond environmental offences (which was the intended ambit of these pieces of legislation) onto the AWA. Prosecutions concerning sentient beings are in a different category to other types of prosecutions. Offences under the AWA should remain criminal offences without the introduction of a system of civil sanctions.

OFT

1.4 In order to better achieve its objectives, and in accordance with the principles and duties set out in the Legislative and Regulatory Reform Act 2006 (LRRA) (s21 requires regard to be had in the performance of regulatory functions to the need for transparency, accountability, proportionality, consistency and targeting), the Regulators' Compliance Code, and Part 4 of the Regulatory Enforcement and Sanctions Act 2008 (RESA) (see s72), the OFT has adopted policies which govern how it undertakes regulatory enforcement action. The OFT operates a case by case approach to investigations applying prioritisation principles.[11] Relevant considerations when determining whether to use civil or criminal mechanisms will include issues such as the extent and seriousness of consumer detriment and the likely impact for consumers of the chosen route. The OFT has a specific policy on criminal enforcement of the CPRs which is applied to all cases under those Regulations. In general terms criminal enforcement is depicted as being at the summit of the enforcement pyramid, taken, other than in exceptional cases, only after exhausting other options.

1.5 We note that the consultation document proposes, particularly in the field of consumer protection, that criminal sanctions in regulatory cases should be used as a follow on process where there has been a failure to comply with civil sanctions. As outlined above, it is OFT policy that prosecution is used where it is proportionate and appropriate, for example because of the seriousness of the detriment caused to consumers and where other types of intervention are unlikely to be effective. Making prosecution possible only as the final stage in a rigid procedural hierarchy to be in place under **all** circumstances is undesirable. Such a change would result in the loss of a deterrent which we consider has a very real effect on the level of detriment that may be experienced by consumers (Criminal Law and Business Practice: Drivers of compliance and non-compliance (OFT1225) June 2010). Our concern is that all or most breaches of the law that we and partner authorities enforce **can** sometimes demand prompt use of criminal sanctions. Most kinds of regulatory breach are capable of incorporating conduct that involves serious malpractice and/or a serious threat of harm to consumers, for example, rogue traders overcharging vulnerable consumers for unnecessary work.

1.6 The OFT would therefore consider the removal of the possibility of prosecution in relation to the consumer protection law that we deal with to be detrimental to the effectiveness of the regime and to pose risks for the consumer. Similarly it would be undesirable (and challenging) to reframe the law such that parties are subject to criminal prosecution only where significant harm results and/or there is evidence of a high level of culpability. While the proposed approach might logically appear to be consistent with the strong principle of reserving criminal sanctions for the worst behaviour, in practice it would complicate the process of effective enforcement, by making the prosecution of such offences – which by their very nature require prompt and targeted action – more difficult and resource intensive. Enforcers would therefore be less able to deal appropriately with the worst types of behaviour in a time sensitive manner, and may be put off altogether against a background of limited resources and outcome driven prioritisation. Under-enforcement would reduce the incentive for traders to comply not only with the law, but with the preliminary (or soft enforcement approaches) widely used by enforcement authorities as a mean of gaining compliance without resort to the courts.

1.7 Such a procedural approach appears unnecessary because: there does not appear to be any specific evidence that the criminal law **is** being used as the primary means of promoting consumer protection regulatory objectives. The statistical evidence quoted in the consultation document demonstrates that regulators are not abusing the low level offences; the law already makes extensive provision to minimise the risk of such abuse. Enforcers performing regulatory functions are already subject to a range of requirements designed to ensure they deal proportionately and fairly with those they regulate. We are not aware of any evidence that this legislation is failing to achieve its aim.

1.8 The current approach of making regulators accountable for their use of their discretion, rather than removing it altogether, is in principle the right one in terms of delivering the best outcomes for consumers and the economy. This approach reflects the fact that enforcers are accountable public bodies subject to a range of appropriate checks and balances. We believe the government's policy to introduce administrative sanctions under Part 3 of the RESA as an alternative to criminal sanctions will maximise the ability of enforcers to comply with their legal obligation to act proportionately and use criminal sanctions as a last resort.

1.9 NB The OFT's response has an annex of OFT criminal cases and offences under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

HSE

1.10 Agree with the principle that criminal law should be reserved for the most serious offences. Penalties should be effective, proportionate and dissuasive. Alongside this, regulators should operate in a transparent, proportionate manner, targeting serious issues and applying a consistent approach that is appropriate to the regulatory regime, so that businesses are clear on what the law says, what they must do to comply, and what to expect where they fail in their responsibilities. The legislative architecture for health and safety in existence currently, strikes a good balance and meets these principles.

1.11 Health and safety duties cover a diverse range of activity that could lead to harm and it is a matter of circumstances whether a major incident, serious injury, or death arises. The context of each breach of the law determines the enforcement action that arises with prosecution taken in the most serious cases only. A failure to comply with the law in respect of public safety, for example, may regulate in a major explosion at a chemical site causing devastation in a private dwelling due to faulty gas installation. HSE's enforcement response in respect of these breaches depends upon the circumstances of each case and is made in accordance with our Enforcement Policy Statement.

1.12 The Health and Safety at Work etc Act, regulations and associated enforcement approach is a mature regime that has overseen a considerable reduction in injuries and ill health in the last 35 years. We are keen to ensure that these proposals do not reduce the duties on those who create risks to manage those risks. Recommendation 16, for example, would mean a diminution of existing duties on directors under health and safety law, which we do not support. It is crucial that businesses display strong health and safety leadership at board level, taking ownership of risk and managing it. It is important that current duties on directors remain with penalties available to the Courts where there is a serious breach of the law and prosecution is the appropriate response.

1.13 We would not want to see a reduction in penalty options for serious offences which place people's lives at risk. We acknowledge that the use of civil sanctions may be a suitable alternative means in some regulatory regimes, but with our current wide range of enforcement options we have no, to date, identified any significant gaps which would warrant their use within HSE.

1.14 The first of the two broad aims of the CP is to introduce rationality and principle into the structure of the criminal law, especially when it is employed against business enterprises. The second aim is to consider whether there should be created a statutory power for courts to apply a 'due diligence' defence. Our comments under proposals 14 and 15 refer.

1.15 We agree that businesses should be clear on what the law requires and how it will be enforced, including sanctions that may be applied and in what circumstances. Transparency is an important principle in how HSE enforces health and safety legislation.

1.16 The Health and Safety at Work etc Act 1974 aims to secure the health, safety and welfare of people at work and the protection of people other than those at work from risks to their health and safety out of work activities. The Act applies throughout England, Scotland and Wales, with extension to offshore activities within the territorial waters of the UK sector of the continental shelf.

1.17 Health and Safety law aims to provide protection for people whose health and safety may be at risk from business activities. In 2009/10, 152 workers were killed at work, 121,430 injuries to employees were reported to enforcing authorities and 28.5 million days were lost due to ill health. These figures represent a considerable improvement following the introduction of the act. The number of fatal injuries, for example, has fallen by 84%. Although there are several factors, it is important that in striving to achieve the aim of rationality and principle across all regulation, we should build upon the achievements of regulator regimes to date in reducing the harm or risk of harm that they address. We would be concerned at any blanket approach to introducing concepts within criminal law that negated achievements to date, for example, by lessening duties on those who create risk, reducing the seriousness of sanctions available or placing a greater burden on the regulator in proving any breach, to the extent that the law becomes unenforceable.

1.18 The architecture of HSWA is relatively simple (see ss2, 3, 4, 6 and 7 for duties). The Act places goal setting duties on those who create the risk, setting out what must be achieved, not how this must be done. In the case of employers, for example, the duty is to ensure the health, safety and welfare of employees, so far as is reasonably practicable.

CPS

1.19 Proposals not likely to impact work.

Local Government Regulation (LGR)

1.20 Promote quality regulation to councils in the areas of trading standards, environmental protection, street scene, licensing and gambling, food hygiene and standards, animal health and welfare, animal feed, health and safety and private sector housing. For purposes of the response, LG Regulation is representing all local authorities across England and Wales.

1.21 We remain concerned that many of the proposals in this consultation paper have limited value in the field of consumer protection. Many appear not to fully consider the position of the consumer. Businesses exist to make money and they can only do that if they have a 'consumer' to which they sell goods or provide services. The interests of the consumer, therefore, must be preserved in any such consultation exercise.

1.22 We feel unable to support some of the proposals as they currently stand. If criminal law in the regulatory context should be amended as a result of this consultation exercise, then it must be done in such a way that affords the greatest possible consumer protection and provides Local Authorities with the appropriate enforcement tools to do the job with which they are tasked.

1.23 The act is supplemented by specific regulations most of which are made under the Act following recommendations from HSE. In addition, we regulate licensing and permissioning regimes. The structure of penalties for offences under the Act and regulations is similarly simple (see response for further information).

1.24 Although the consultation is about the structure of the law and associated penalty options, we feel it is important to mention HSE's approach to enforcement, both in policy terms and in practice. We enforce in accordance with our Enforcement Policy Statement (EPS) and the Regulators Compliance Code. The enforcement principles of proportionality, targeting, consistency, transparency and accountability are enshrined within our EPS. When taking decisions on what is the appropriate enforcement response, HSE works within an enforcement framework – the Enforcement Management Model and Enforcement Management Arrangements. This ensures we manage a consistent decision making process that leads to appropriate responses.

Professor Colin Reid, University of Dundee

1.25 As we contemplate an ever-wider range of responses to infringement of the law, the tendency is to see these as lying on a spectrum ranging from the most formal type of criminal prosecution at one end to essentially voluntary responses at the other, with a range of quasi-criminal, civil, administrative and non-legal processes in-between. Yet traditionally the law has not recognised such a spectrum but has drawn a sharp divide between the imposition of penalties, which is the exclusive domain of the criminal law, and other forms of obligations between parties which form the civil law. This is not just a quirk of United Kingdom law, since it is repeated in the European Convention on Human Rights, where a party facing significant penalties has particular rights, and the case-law of the European Court of Human Rights has made clear that these rights depend not on the label attached to the procedure (criminal/civil/ administrative) but on its nature (*Öztürk v Germany* (1984) 6 EHRR 406 – itself a case based on the "administrative penalties" in German law often held up as a model of non-criminal enforcement; see also *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 278). This underlying conceptual mismatch between traditional constructs and the current ways of thinking needs to be more explicitly addressed.

1.26 The focus of the debate is arguably too narrow. The important fundamental distinction could be seen as marking out not the criminal law, but those laws through which the state (in whatever form) imposes penalties. The criminal law is only a subset of this bigger genus. Given the proportion of criminal offences nowadays dealt with by fixed penalties and a range of other statutory diversions from prosecution, how much of even the mainstream criminal law lives up to the traditional paradigm of criminal law which entails those accused of offences being brought to trial with punishment being imposed only by a court after due process designed to protect the rights of the accused? The question then becomes one of identifying the fundamental elements, substantive and procedural, which justify the state in imposing penalties of any sort and then finding appropriate ways of applying these in different contexts, only some of which may be "criminal" in our minds, but all of which must provide appropriate safeguards against abuse of state power. Most discussion over "criminalisation" misses out this vital preliminary stage, suggesting that the options are criminalisation or nothing, as opposed to seeing the criminal law as part of this wider penalty-imposing framework.

1.27 Throughout recent debates on regulatory enforcement, we also find an odd contradiction. Whereas the normal attitude is that the more serious the sanction the higher the procedural safeguards before it can be imposed, in the regulatory field what people seem to want is the imposition of more serious sanctions than the criminal law is currently delivering yet inflicted through procedures that do not invoke the procedural safeguards inherent in the criminal process. The sanctioning regime is to become both more serious and more informal at the same time. This inconsistency too rarely attracts comment. Yet it can be resolved by an approach which emphasises that when things fall outwith the criminal process they are not outwith the wider "penalties" genus and still subject to the limitations which justify any imposition of sanctions.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.28 The consultation paper recites the enormous increase in the number of criminal offences created over the last 20 years or so and describes some of the difficulties that have resulted from this such as increased complexity, variable quality of drafting of new offences and the consequent ambiguity and uncertainty this has created for regulators and those who they regulate. We believe, however, the review could be wider in scope to consider the circumstances in which civil penalties may be appropriate, the hierarchy between civil penalties and prosecution and the control of civil penalties processes to ensure natural justice. Specifically creating civil penalties as an alternative to criminal offences rather than to replace offences may further increase the proliferation of regulation identified in the consultation paper.

1.29 Thee views expressed do not necessarily reflect those of each individual member of the GC100 or their employing companies.

Michelle Welsh, Monash University

1.30 This submission draws on the findings of the author's empirical study of the Australia Securities and Investment Commission's ('ASIC') use of the civil penalty regime contained in Part 9.4B of the Australian *Corporations Act (2001)*(Cth).[1] This civil penalty regime deems certain provisions of the *Corporations Act 2001*(Cth) to be civil penalty provisions.[2] The deemed civil penalty provisions include, but are not limited to, the duties of directors, insolvent trading, share capital provisions, duties owed by entities responsible for managed investments schemes, duties of officers and employees of those entities and the market misconduct provisions. If ASIC believes that a civil penalty provision has been contravened it can issue proceedings seeking a declaration of contravention and civil penalty orders.[3] The civil penalty orders are pecuniary penalty, disqualification and/or compensation orders.[4]

1.31 Civil penalty proceedings differ from criminal prosecutions in that proceedings for a declaration of contravention and civil penalty orders are treated as civil proceedings and the civil rules of evidence and procedure apply.[5] The standard of proof is proof on the balance of probabilities.[6] It is possible to divide the civil penalty provisions contained in Part 9.4B of the Australian *Corporations Act (2001)*(Cth) into two categories. One category is the civil penalty provisions that may under certain circumstances be enforced by a criminal prosecution or a civil penalty application. The civil penalty provisions that are not enforceable by the criminal regime fall into the second category and are the non-criminal civil penalty provisions. A civil penalty application is the most severe enforcement action that can be instigated by ASIC when a non-criminal civil penalty provision is contravened.

David Goodman

1.32 Using out-of court, non-judicial alternatives to criminal prosecution have proved to be fraught with problems and not to serve the community in any way except that they are cheap, for the following reasons:

1 Detailed findings of the author's empirical study are reported in; Michelle Welsh, 'Civil penalties and strategic regulation theory: the gap between theory and practice' (2009) 33(3) Melbourne University Law Review 908-33, Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 Company and Securities Law Journal 370 and Michelle Welsh, 'Civil penalty orders: Assessing the appropriate length and quantum of disqualification and pecuniary penalty orders', (2008) 31(1) Australian Bar Review 96.

2 Corporations Act 2001 (Cth) s 1317E.

3 Corporations Act 2001 (Cth) s 1317J.

4 Corporations Act 2001 (Cth) ss 1317G, 206C, 1317H and 1317HA.

5 Corporations Act 2001 (Cth) s 1317L.

6 Corporations Act 2001 (Cth) s 1332.

1.33 Using fixed-penalty fines or cautions for any criminal offence other than one which may be proved without oral evidence (eg speeding) diminishes the message to the offender that the offence is sufficiently serious. If a person can received a £60 fixed penalty ticket for speeding, and an £80 fixed penalty ticket for theft from a shop or using violence in the street, the message given to him (I shall use 'he' and 'him', but these apply equally to female persons) is that stealing from a shop is no more serious than a motoring offence.

1.34 Even if the fixed penalty was increased from £80, the point remains essentially the same: that if a criminal offence is no more serious in its disposal than a motoring offence, defendants will see them as no more serious or blame-worthy, and – worse – those who might be tempted to commit such offences will not be dissuaded from committing them if they know that there will be no public knowledge of the penalty.

1.35 What message is given to the public when they see a man fighting in the street, see him arrested and then learn (if they do) that he has been given just an £80 ticket?

1.36 Half of such tickets are unpaid. There is, therefore, no punishment in those cases.

1.37 Cautions are given on serious offences in some areas, including Domestic Violence. Given that two women each week, on average, are killed in domestic violence situations, that is surely the wrong message to give to both offender and victim.

1.38 The stigma of going to court, with the potential for reporting in the local newspapers, has some deterrent effect.

1.39 Giving an offender a fixed penalty or caution is 'justice behind closed doors'. The public do not know about it (although Staffordshire Police have been doing some excellent work to try to let local people know about such matters in their area – but that defeats the object, namely of saving police time in prosecuting offenders, given that they then have to spend time putting a report together to go out in a glossy publication to local people).

1.40 Is it justice at all? Everyone can tell of cases in which people have admitted guilt simply to get out of the police-station. No matter how well the police officer explains that an offence should only be admitted if the person is sure he committed it, many such cases are dealt with without legal advice and admissions are made because the person believes that will be the end of it. In one case brought to my attention by a Magistrate who is also a Chair of School Governors, a teacher admitted theft from a shop for that reason, only to find that a CRB check told her Headteacher that she had admitted the offence. Both he and the Chair of Governors accepted her explanation, but unfortunately that school is to close, so that she now has to apply for other teaching jobs – with an offence of theft against her that will show up on each CRB check. She says that she was told that if she admitted the offence that would be the end of it, whereas if she continued to deny it, she would be charged and probably convicted, with attendant publicity. She chose to admit the offence and accept the caution – with the above consequences. There will be many such cases.

1.41 Looking for alternative disposals to criminal prosecutions is contrary to the principles of criminal justice that made this country a model for criminal justice systems across the world. Those 'at the sharp end' know that this is not justice. It is worth noting that Sir Paul Stephenson, Metropolitan Police Commissioner, has abandoned the use of such disposals in favour of criminal prosecutions. Can we no longer afford justice?

Institute of Employment Rights

1.42 There are positive aspects to the document and proposals (eg 14 and 15) however, and in general, we also wish to record our dissent from many of the claims, assumptions and proposed directions set out in the document. These for the most part follow from the organising assumption of the document, namely 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" (para 1.8).

1.43 While not unfamiliar, the *frequency* with which such a claim is made stands in the place of the *evidence upon which* such a claim may be made. That evidence is lacking.[7]

1.44 From this initial, dissenting viewpoint, several specific areas of concern then follow.

1.45 We have serious concerns in relation to the decriminalization of corporate offending. First, these concerns are based upon the state of research-based knowledge about 'what works' in relation to improving standards of compliance with law. For example, and most authoritatively, Davis, in the most wide-ranging of several meta-reviews of literature, concluded that the only factors consistently identified by UK research to prompt health and safety improvements were the fear of loss of corporate credibility and the need to comply with health and safety legislation.[8] Second, these concerns are rooted in our own, recent research regarding recent trends in the decriminalisation of health and safety offences. Those concerns are addressed, briefly, below, but are set out much more fully in a recent publication by the Institute of Employment Rights, a copy of which is attached.[9]

7 See Tombs, S and Whyte, D (2007) Safety Crimes, Collumpton: Willan, p. 156 and passim.

8 Davis, C. (2004) Making Companies Safe: What Works? London: Centre for Corporate Accountability.

9 Tombs, S and Whyte, D (2007) Regulatory Surrender: death, injury and the non-enforcement of law, Liverpool: Institute of Employment Rights.

1.46 There is no evidence that criminal penalties are being used against corporate offenders for anything other than the most serious offences. Prosecution for some of the most serious offences, those that involve potentially criminal killings, have become increasingly rare. This point relates directly to proposals 1, 2, 3, 6 and 10 and raises serious concerns about the assumptions underpinning the argument for a hierarchy that is emerging here. There is little evidence that there is a need the criminal law to narrow its focus, not least because regulators are currently only able to use the law to respond to a very small minority of cases. In the vast majority of cases, potential offences are not even investigated to establish their seriousness.

1.47 Between 1999/00 to 2008/09, there was a 63% decline in absolute numbers of Health and Safety Executive investigations, while during the same period the proportion of incidents reported to HSE that were investigated also fell - by 54%. This absolute and relative decline in investigation has occurred across every category of RIDDOR reportable incidents to which HSE might be expected to respond through an investigation – that is, dangerous occurrences, injuries to members of the public, over 3-day injuries, and major injuries. So, between 1999/2000-2008/09, investigations of major injuries fell by 49% over 3-day injuries fell by 85% dangerous occurrences fell by 35% injuries to members of the public fell by 75%. By 2008/09, less than one per cent of over 3-day injuries that were reported to HSE were actually investigated. Less than one in ten - 8% - of reported major injuries were actually investigated.

1.48 It is therefore rather presumptuous to ask whether we might seek to use the criminal law to target only the 'worst' examples of non-compliance, when in the case of safety offences, we have no way of knowing, in the vast majority of cases of recordable harms, whether these occurred as a result of any deliberate act or omission.

City of London Law Society, Company Law Committee

1.49 Supports most of the Law Commission's proposals in principle. However, this support depends upon the proposed approach for civil penalties being satisfactory and providing appropriate safeguards. We think more information on what would be proposed is needed before a final view can be reached. Although we agree that, in theory, it would be better to reduce the number of matters dealt with by way of criminal offences, we do not think there will be better regulation if matters currently dealt with by criminal law are instead subject to a number of different regulatory regimes which are inconsistent and dealt with by different regulatory bodies.

1.50 It is important that any regime for imposing civil penalties (i) requires the same burden of proof before liability is established where the civil penalty replaces an existing criminal offence (i.e. the burden of proof before a civil penalty is imposed should be the same as that applicable for the criminal offence) (ii) offers appropriate protections in relation to evidence (iii) ensures that the decision to seek a civil penalty is kept separate from other regulatory decisions (iv) requires a clear approach to determining any penalty to be imposed and (v) provides for full rights of appeal to the courts. We are also concerned about the speed with which action is taken and decisions are made and the inter relationship between any civil penalty proceedings and any criminal prosecution. We are also concerned that sufficient resources are available for such an approach to work in practice.

Clifford Chance

1.51 Primary concern is offices arising from financial and related regulation (cf the full range of "regulatory offences" eg under Firearms Act and Sexual Offences Act). Very wide range of "regulatory" offences (from matters traditionally the concern of the criminal courts to matters that would normally be considered purely regulatory) may mean that a single approach to all is not practicable. But, supports the aim of imposing greater coherence and consistency in the handling of regulatory offences.

1.52 Clifford Chance's approach to regulatory offences: No practicable distinction can be drawn between criminal and regulatory offences. However it is categorised, its purpose is the same: by enacting the law, the state seeks to encourage certain behaviours and/or discourage others through deterrent measures and then the imposition of punishments. Penalties may vary as may the stigma according to public perception but the purpose of the law is the same.

1.53 The real issue is the matter in which the prosecution of any offence should be handled by the state. Currently the state prosecutes criminal offence either in the magistrates' court or the crown court. Proliferation in recent years has brought prosecution of "criminal" offences by "civil" means. We support the use of the "civil" means, including the imposition of "civil penalties" (although consider "administrative" a better term). Support this new means; the criminal courts are unsuitable for determining liability under that legislation. Should be greater coherence and consistency in the decisions taken as to which of the three means the state employs to enforce its laws.

1.54 A new regulatory approach should not be introduced simply because doing so will make it easier or less burdensome for the regulator to secure convictions or because the regulator can impose higher penalties than criminal courts are prepared to do. The protections for those accused of criminal offences that make prosecutions burdensome are there for good reason and should never be abolished for convenience. Decisions should be based on the nature and seriousness of the conduct and the nature and content of the law.

1.55 The effect of whatever sanction is the same – the state requires the offender to pay a large sum of money (CC ignore punishments that can only be imposed on individuals eg imprisonment). Whether it is called a fine and imposed by criminal courts or a "civil penalty" and imposed by a regulator or tribunal, the state will still be seizing the assets of the offender.

1.56 Giving that there is no sensible distinction between criminal and regulatory offences and because the effect of punishment is the same regardless of name, people accused of an offence categorised as "civil" should still enjoy the procedural and substantive protections required to protect their basic rights and reduce the risk of oppressive conduct by regulators. This doesn't necessarily have to mirror protections in the criminal procedure, but should include at least: protection against self-incrimination, burden of proof should always be on prosecution; and if a penalty is imposed initially other than by an independent and impartial tribunal, the accused should always have the right to refer the matter to an independent and impartial tribunal for a complete re-hearing at which the burden of proof rests on the prosecutor.

1.57 "Re-hearing" used in the CP is a misnomer because there will not usually have been an initial hearing in the normal sense when a "civil" penalty is imposed by the regulator. Recourse of the person found liable for an offence by a regulator should not be confined to a review of a regulator's decision or an appeal on a point of law. A regulator's decision to deprave someone of his or her assets should never be regarded merely as an administrative or discretionary matter subject only to some form of JR. Should have the opportunity to refer the mater to an independent and impartial tribunal for a full hearing at which the regulator must prove all matters necessary to establish that an offence has been committed and the appropriateness of any penalty.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.58 Increasing burdens on courts. Financial restraints affecting and likely to further affect the work of the courts. Also a steady increase in number of criminal offences created many described as regulatory or quasi-regulatory. Regulatory Enforcement and Sanctions Bill addressed some of our concerns but left large areas of regulator enforcement in the CJS. Local Better Regulations Office established and is listed as a quango being reconsidered by Government in a "leaked" list.

1.59 Passage of time has not altered views expressed in Macrory review response (annexed here). The role of the CJS arises where regulatory breach involves a truly criminal act. Concerned about increasing use of criminal law as a way of promoting regulatory objectives and public interest goals. A criminal offence is only needed where conduct or action regulator involves really serious consequences for public and breach is intentional or reckless. Otherwise, inappropriate. Support idea of variable Monetary Administrative Penalties outside criminal process for regulatory breaches enforced by way of civil remedy (eg Rule 75 Civil Procedure Rules).

1.60 There will be some situations where criminal sanction is appropriate where breach does not appear to introduce the risk of really serious consequences for the public at large but where the public interest factor is significant. Might introduce some anomalies but it is a matter of making these situations an exception (eg school attendance where the consequence of breakdown in meeting educational needs may justify the intervention of the CJS where other efforts have failed or failing to pay for motor insurance.)

1.61 Range of matters that may be subject of regulator enforcement action is large. Strong case for decriminalising large areas of regulatory non compliance taking many current examples of regulatory breach outside the CJS. Agree that using criminal process results in expense and delay for parties. It also adds expense in provision of the courts. Sceptical about "regulators" perceived view that judges do not have the specialised knowledge or training to ensure what the "regulators" perceive to be appropriate and proportionate sanctions. Very many prohibited activities are far from being truly criminal acts. Nonsense to find some truly criminal activities (eg throwing stones at trains) are dealt with by fixed penalty outside court process and some truly regulatory matters (eg not processing a TV licence) take up court time. CP is aimed less at ways in which the current position might be reformed but more at when criminal offences might be created in future. Further creation of offences against the background of what we consider to be overuse of criminal law in the regulatory field must be approached with great caution and reservation.

1.62 Worried re increasing trend towards legislation by delegation. Too often that primary legislation provides for the creation of offences by regulation or order where there are no proper checks and balances and criminal offences are created without reference to legislators. Legislation creating "agencies" often result in those "agencies" pushing for powers by way of secondary legislation, the consequences of which include lack of appropriate legislative overview and disproportionate response to what those "agencies" consider to serve their best interests. Proliferation of "agencies" might be addressed through Government's intended reduction of quangos.

1.63 Caution against placing too much reliance on statistics in CP 1.26 as support for contention in CP 1.27. Worrying increase in number of criminal offences dealt with by fixed penalties and cautions. Coupled with absence of any real consistency from one criminal justice area to another has resulted in an overall drop in the numbers of criminal defendants appearing in Mags' courts. May be that an increase in regulatory offences has been masked by a drop in proceedings taken against those engaged in truly criminal activity.

1.64 Criminal law should only be employed when engagement in the prohibited conduct in question warrants official censure because it involves a harm related moral failing.

Food and Drink Federation

1.65 Broadly support the Commission's stated aims to introduce rationality and principle into the structure of the criminal law, especially when it is employed against business enterprises.

Food Standards Agency

1.66 Agree that the Macrory sanctions under Regulatory Enforcement and Sanctions act are potentially attractive, but no acknowledgement of difficulties involved in achieving access to them eg the requirements for a second assessment of Hampton compliance and reconciliation of the complication that the Act doesn't apply to Scotland and NI. FSA is UK-wide and civil sanctions are relatively untested.

1.67 Fully support use of due diligence defence (similar to that under Food Safety act 1990 to food-related offences). Welcome proposal for non-statutory guidance to all Government departments. FSA already considering its sanctioning regime and investigating what works in particular circumstances. Further guidance might generate useful discussion of more imaginative approaches to creating and using sanctions. Need to focus on what sanctions work to ensure practicality. Would like clarification of when the guidance would take effect (would departments apply it retrospectively?)

1.68 Consultation focuses on theory but fails to acknowledge practicalities. Gaining access to Macrory-type sanctions under Regulatory Enforcement and Sanctions Act is onerous. No recognition of difficulties. Sanctions not available in Scotland and NI. Consideration should be given to potential complication of differing enforcement regimes across UK.

Lord Goodhart QC

1.69 Use of civil penalties increasing in recent years. Now well established. Likely to be quicker, cheaper and often fairer than criminal penalties. In many cases, civil penalties will suffice and criminal should be repealed. IN some cases, room for both penalties – criminal penalties where there are grounds for imprisonment or where defendant has acted knowingly and deliberately in breach of the law.

1.70 Suggestion that criminal offences should be created only through primary legislation is interesting. House of Lords' Delegated Powers and Regulatory Reform Committee (chairman between 2006 and 2010) was frequently faced with Bills which contained powers for Gov to make regulations by SI which would impose criminal liability, including possibility of imprisonment. Caused concern to Committee, but Gov as a rule accepted that it would not use secondary leg to create offences giving rise to a potential prison sentence of +2yrs. I think there should be no power to create prison sentences by secondary legislation but I do not think there should necessarily be a ban on imposing criminal sentences by secondary legislation where penalties do not include imprisonment (see some reports of Committee where issues were raised or talk to senior legal adviser to Committee, Allan Roberts).

1.71 Was a member of joint pre-legislative committee on Bribery Bill. Doctrine of identification is profoundly unsatisfactory and should be abolished. Government's original draft of the Bill accepted the doctrine. Throughout meetings I pressed for it to be removed, which was eventually agreed. The Act does contain a due diligence defence, which is in the circumstances appropriate because of the difficulty of controlling foreign agents. Not appropriate in all circumstances.

1.72 It may be unclear until evidence is heard in court whether D has been acting deliberately or recklessly or has been merely negligent or careless. In such cases, it is necessary (at least desirable) that where there is a criminal prosecution and the judge is satisfied that there has been a failure to comply with regulations but the failure does not justify a criminal sentence, the judge should be able to impose a civil penalty.

Raymond Schonfeld, Single Market Ventures

1.73 Deal with practical impact of European technical regulations and international treaties on trade. Add EU law to list of areas for attention.

1.74 Implementation of EU laws in Britain offers multiple examples of gross misuse of criminal law: minor issues of admin compliance into criminal offences and British businesses can augment the absurdity by panic-stricken over-reaction (eg implementation of 1989 EMC Directive aimed to prevent electrical interference between appliances in homes gave "power" to regulatory bodies to imprison people for administrative or technical non-compliance; EU Savings Directive, requiring evidence of addresses of holders of savings: core EU text is simply and unbureaucratic but has been converted into "an absurd process involving notarised verification of every single document, presumably to protect the registrars."

Nationwide

1.75 Interesting points especially the concerns around the number of criminal sanctions attached to regulatory breaches which are disproportionate to the breach and in most cases not invoked. Not an effective use of parliamentary resources or time. Criminal sanctions should be used only to tackle serious wrongdoing. Inappropriate for regulators to rely wholly on criminal law to punish and deter activities that are merely "risky" unless risk is serious. Very supportive of need to make individuals accountable for systematic failures and certain criminal provisions may need to be attached to, eg, gross corporate negligence.

1.76 Supportive of principles underlying majority of proposals, but would need to see details.

Allen & Overy

1.77 Breadth of consultation very ambitious and proposals would have very wide ranging consequences. Many would require further analysis before changing the law. Limited comments to proposals 13 to 16 because relate specifically to businesses and therefore most relevant to practice.

Association of Chief Trading Standards Officers (ACTSO)

1.78 Local Authority Trading Standards Services play a key role in implementing and enforcing consumer protection legislation and proposals within this consultation would have a significant impact on the approach and effectiveness for these services if implemented. General principle is that most Trading Standards Services adopt intelligence-led approach to service delivery, ensuring targeting of limited resources at areas of most potential harm to consumers and legitimate businesses. Achieving compliance through advice and support to businesses is preferred approach, enshrined in Regulators Compliance Code. Formal enforcement action normally only undertaken when necessary and when other means to secure compliance inappropriate.

1.79 Trading Standards Services deliver locally focused service and ensure level playing field for businesses. Important for fair markets and attracting local investment. Recent published LBRO report From Business End of the Telescope provides useful analysis of perceptions of micro-businesses to local regulation. Concerns not relating to sanctions that could apply in event of a breach or subtle differences in fault requirements and defences. Summary of key findings:

1.80 Many agreed inspections can be useful, but mercy of individual inspector and no one to turn to if disagree.

1.81 Would like more local support and somewhere for clarification about all regulators. Significant number do not use internet as part of business.

1.82 A proportion believe seen less favourably in planning and by other enforcement agencies as group most likely to be in breach of regulations.

1.83 Regulatory enforcement can be inconsistent but connections with inspectors can prove valuable. Comments re inspectors varied. Some see them as valuable source of advice. Pockets of poor practice remain.

1.84 Many regulations and the way they are applied by enforces are not proportionate to business size or ability of individual business owner to cope.

1.85 Micro-businesses feel vulnerable to particular interpretation of regulations by individual inspectors and when they disagree, they do not know who they can seek advice from to complain to.

1.86 Some local inspectors have been a source of complaint by local businesses. Overall consultations found that they are often source of good advice and support.

1.87 Thus, ACTSO would question the evidence that supports any argument that significant change is required. Change creates uncertainty and potential for greater inconsistency. CP provides pure legal analysis of regulatory law but it is unclear how significant the differences in regulation are in practical terms.

1.88 Disappointing CP doesn't refer to framework against which enforcement decisions must be made (see Regulator's Compliance Code) and local authorities will have Enforcement Policies which will refer to Macrory principles. Failing to comply with these policies will result in enforcement actions (see *R v Adaway* [2004] EWCA Crim 2831). The Code and Policies are published and openly available, therefore transparent. Whilst the CP provides detailed legal analysis of case law and legislation it omits consideration of process that must be followed in reaching decisions. Therefore risk that respondents fail to understand full context of the proposals particularly those relating to how the criminal law is applied.

1.89 For less serious offences, robust enforcement policies will ensure prosecutions are only commenced when circumstances support this as appropriate course of action. Prosecutions for less serious offences commonly only commenced when D fails to respond to advice and attempts to end breach through cooperation.

1.90 Sometimes appropriate to prosecute less serious crime – can be effective for tackling more serious issues eg under Cancellation of Contracts Concluded in a Consumer's Home or Place to Work Regulations 2008. Initially may appear waste of courts time and disproportionate to scale of offence, but doorstep crime is usually overpriced, prevalent, can lead to serious fraud, and shown to be liked to distraction burglary. Prosecution for fraud or attempted will be considered if possible but where no evidence, but circumstances suggest offender would have progressed to more serious offending had enforcement agencies not stepped in, prosecution under Regulations may be only option for Trading Standards Services.

1.91 Other enforcement options (eg penalty notices) welcomed in many circumstances. Legal action normally only for more serious offences, for less serious offences linked to more serious offences or where regulated person has failed to respond to advice. Civil penalties should only be considered as additional option and not pre-requisite. Would significantly hamper local Trading Standards Services abilities to address issues causing harm to consumers and communities if in all circumstance s they were unable to commence a prosecution until other options had been attempted and had failed. Significant difficulties for local Trading Standards Services in use of civil sanctions and concerning that these are not detailed in CP. May lead to responses that are not fully informed to implications of proposals.

1.92 Pursuing matter through civil courts incurs costs same as in criminal proceedings; no evidence to suggest civil court case is cheaper in fact may be longer and more complex than criminal proceedings. Civil Procedure Rules are more demanding on claimants in terms of time limits and court requirements. May be that cost of proceedings for local authorise will increase and more actions will fail for technical reasons alone should proposals be implemented. Also while prosecutor can recover costs in a criminal prosecution it is harder for claimant to do so in civil court claim and may involve further hearings. Therefore civil way may result in greater costs and increased court time as well as increase the frequency of cases failing for technical reasons.

1.93 In many prosecutions brought by Local Trading Standards Services, prosecutor is a Trading Standards Professional and not a solicitor or barrister. Keeps costs to a minimum and ensures costs of prosecution that may be requested from defence in event of a guilty plea is less than would otherwise be the case. But Trading Standards Officers do not have any rights of audience in civil courts therefore would increase costs to public purse. Consequence needs to be considered.

1.94 Not necessarily reasons to discount civil law as means of securing compliance with regulatory law, but implications must be carefully considered. ACTSO concerned that proposals make no reference to issues and therefore might reduce effectiveness of local Trading Standards Services when Government has stated importance of putting local Services at centre of consumer protection.

1.95 ACTSO understands legal reasoning behind proposals that Fraud Act could be used instead of regulatory offences where overlap. Important to consider practical consequences. Offences under Fraud Act viewed seriously by courts and defendants. Commonly committed to Crown Court – adds burden to court system (at least 2 additional hearings before trial) and Crown Courts are already stretched to deal with more serious cases. Thus, can be almost a year before trial once case is committed. If changes are implemented, likely to see less serious offences proceeded as Fraud Act charged rather than regulatory offences. Should have significant impact on Crown Courts and speed of prosecutions. Also Trading Standards Services have no powers under Fraud Act and if this is not addressed, and other offences repealed where overlaps, may render some current consumer protection unenforceable.

1.96 CP doesn't address question of use of regulatory offences by other agencies eg police (eg using criminal sanctions under Licensing Act by police). Views of police and CPS should be sought.

1.97 ACTSO concerned that blanket application of hierarchy may make it harder to tackle issues eg anti-social behaviour from alcohol. Proposals in respect of doctrine of delegation would have impact on same issue, making it harder for action to be taken against businesses that fail to take effective action to prevent illegal sale of age restricted products. Consequences of these proposals need to be carefully examined to avoid unintended impact on issues outside intended scope of paper (eg wider societal benefits from regulatory law).

1.98 Question comment at CP 1.21 regarding increase number of regulatory agencies. Why are Trading Standards authorities mentioned specifically alongside local authorities? TSS are part of local authorities and do not have specific law making powers beyond powers available generally to local authorise in respect of bye-laws. Some but little use of bye-laws for regulatory purposes relating to Trading Standards recently. Statement therefore appears erroneous and misleading.

1.99 CP 4.35. Fails to acknowledge that person likely to be harmed may have no awareness of failure of regulated person (eg person who provides financial advice without being accredited to do so may be putting the recipient of advice at risk of loss). Recipient will not incur loss without acting on that advice, but whether they act on advice or not will be unrelated to original regulatory breach and will frequently be decision taken without knowledge of breach. Therefore decision to act without legally require licence or accreditation should not be considered less significant breach simply because recipient of service has to act further to suffer harm as result.

BBA

1.100 Welcomes recommendation to decriminalise minor regulatory offences. Increase since 1997 a waste of resources which merely services to create inefficiencies within criminal legal system and financial services industry. Some offences so trivial and potential penalties so sever, law comes into disrepute (eg s39(3) Consumer Credit Act 1974 makes it an offence for a controlling company of a licensee company to fail under s36(3) to give licensee notice within 14 days of a change in controlling company's directors; under s169 directors may be personally liable and are potentially subject to 2 years imprisonment (sch 1)).

1.101 Note Commission's point in relation to fact that there are wide and more flexible range of non-criminal measures available so that regulators do not have to resort to criminal prosecution at such an early stage. Agree with underlying proposal to reduce imposition of criminal liability to instances of serious reprehensible conduct, express reservations where there is a corresponding increase in powers/discretions of regulators to act in a prosecuting capacity. Regulatory Enforcement and Sanctions Act does not provide accused an opportunity to defend itself before judge/jury and so despite often providing more appropriate and proportionate approach to liability in regulatory context, suggest that power for regulators to administer civil measures should not restrict fair process and company's fundamental, right to defend itself.

NHS Counter Fraud and Security Management Service

1.102 NHS CFSMS is exploring use of alternatives to prosecution (eg conditional cautions against people who defraud NHS, although this is a meal of disposal of criminal offences rather than an alternative to the CJS). Proportionate approach to low-level fraud and avoids criminal prosecutions which in low-level cases are sometimes considered too costly and therefore are not pursued. Use of administrative penalties has been explored but unlike conditional cautions they are not recorded on Police National Computer. This is considered a weakness particularly in case of staff fraud because employers can use National Computer to check an individual's record. Therefore administrative penalties were not considered effective in terms of deterrence and prevention.

1.103 NHS CFSMS will take account of proposals when considering introducing new offences relating to fraud or security management, will make an effort to introduce new legislation only when absolutely necessary, and will continue to push for more proportionate, cost-effective alternatives to criminal prosecution in cases of low-level fraud.

Chris Williamson MP

1.104 Perhaps should consider less reliance on the criminal law for less serious offences for a number of reasons. One is that the burden of proof, if pursued under the umbrella of civil sanctions, would be significantly reduced. If we are to use the criminal law in a regulatory context as opposed to a punitive one, we do not have the intent to increase the burden on the penal system, but simply to regulate activity of business. We can do this just as effectively by employing the civil law to glean the correct outcomes, coupled with a higher proportion of positive results due to the lower burden of proof ie on the balance of probabilities as opposed to that beyond a reasonable doubt.

1.105 I believe it is advisable that all Government departments should seek to find a more cost effective and fairer way of seeking to secure the legality of business behaviour. It makes sense for Government agencies to use other avenues open to them because we have become accustomed in this country to seeing masses of secondary legislation which conflicts with other secondary legislation and even some primary legislation. We must stop creating "dead law" to add to the statute book. Secondary legislation can be created with virtual ease and this is something which contributes to this problem greatly.

The Magistrates' Association

1.106 Concerned that if many regulatory offences are decriminalised, larger companies may not pay heed to being penalised again and again. Criminal sanction and court process can be strong deterrent to companies particularly with the internet (in the public arena forever). Regulatory penalties would be largely hidden from public view and concerned that size of penalties will not be large enough to provide deterrent to large companies.

1.107 Want to highlight the responsibility of prosecution to assist the courts in sentencing by drawing attention to appropriate guidelines and guidance.

Local Better Regulation Office (LBRO)

1.108 Support initiatives and politics that promote consumer confidence, tackle rogue trading activities and drive economic prosperity. The RES Act includes provisions to implement civil sanctioning powers providing a more flexible and appropriate toolkit to deal with non-compliance and regulatory requirements. LBRO has responsibility under RES Act to advice ministers on suitability of local authority regulators to have access to these powers in relation to areas of regulation that they have responsibility for enforcing. Working closely with government departments and national regulators looking to implement new civil sanctioning powers because we recognise they offer the potential for a more proportionate and flexible approach.

1.109 Keen to see a coordinated approach to the process by which local authority regulators might be granted the civil sanctioning powers and also to the development of guidance fit for purpose across jurisdictional areas. Keen to try to develop guidance agreed by all government departments and national regulators for use by local authority regulators to ensure consistency for business.

1.110 Important that the business perspective is considered here. LBRO works closely with businesses and representatives to improve the accountability of local authority regulation, helping create effective conditions for proportionate regulation. Keen to establish a clear method of capturing this business perspective in an objective format so that it is possible to measure effectively the impact of any changes in approaches to regulation, including the introduction of civil sanctioning powers.

1.111 LRBO works closely with OFT and number of local authorities within BIS Civil Sanctions Pilot to provide necessary support and guidance that they will need in order to use new powers effectively. Key to this will be developing agreed approach towards the identification of those instances in which restoration might be a suitable element and towards the calculation of such restoration. Work with businesses and business representative groups to ensure we take on board their perspective in developing agreed approach. Work complements the revision of the law of misrepresentation (look forward to working with Law Commission).

1.112 Important to capture data relating to number and type of enforcement actions taken as regulatory changes are introduced. Will enable an accurate measure as to how often and how consistently any new powers are used. LBRO is working to establish conditions for creation of an enforcement actions database, via which regulators can share information and from which enforcement statistics can be drawn.

1.113 Welcome Commission's desire to introduce rationality and principle into creation of criminal offences through development of proposals to reduce routine reliance on relatively trivial criminal offences as means of trying to secure adequate standards of behaviour and to consider whether much more use should be made of other ways of seeking to achieve the goal.

1.114 Suggest that the current approach to regulation by local authority regulators could be taken into account (eg local authority regulators are required to follow statutory Regulator's Compliance Code, Enforcement Concordat and publish compliance and enforcement policies outlining their graduated approach to securing regulator compliance). Local authorises are required to apply risk based approaches, considering harm and the businesses likelihood of achieving compliance when considering how they apply regulatory tools they have available.

1.115 Much more use should be made of civil measures (eg those in RES Act) as these will enhance ability of regulators to bring businesses into compliance through more effective means. Should also encourage a better dialogue between regulators and the regulated – will enable businesses to be proactive in putting things right once a breach of legislation has occurred. Fully expect businesses to offer enforcement undertakings in most instances where a breach has occurred. Should comprise some element of restoration. Introduction of restoration into regulatory framework constitutes a major change and will have the capacity to bring direct and immediate benefits to consumers, workers and environment.

1.116 We produced report for Welsh Assembly Government on good regulation as set out in RES Act. It recommended improving transparency of compliance with statutory Regulators' Compliance Code to improve accountability of local authorities among those they regulate. Report basis for ministers' decision to grant civil sanctioning powers to local authorities under Single Use Carrier Bag Charge (Wales) Regulations 2010, enforceable from October 2011. Report has established clear process by which civil sanctioning powers could be granted more widely to local authority regulator services across UK.

Legislative and Parliamentary Sub-Committee of the Association of Pension Lawyers (APL)

1.117 Act for both companies (as pension plan sponsors) and trustees (individuals and corporate trustees in capacity as fiduciaries. Therefore act for small, medium and large businesses and pension plans. Given diversity, we recognise that any proposed changes may affect a significant number of individuals and businesses whom we advise. In practice, have seen first hand the adverse impact that over regulation may have on ability and willingness of a business to act as a sponsor of a good quality pension arrangement and of an individual to volunteer to act in as trustee. Potential imposition of criminal sanction does weight heavily in the balance. Endorse proposed framework "to reduce routine reliance on relatively trivial criminal offences as a means of trying to secure adequate standards of behaviour".

1.118 Number of criminal sanctions that can be imposed in pensions law context but with exception of provisions eg employer related investments under s40(5) Pensions Act 1995 and disclosing restricted information and acting as auditor or actuary when ineligible, under s82 and 179 Pensions Act 2004 and s28 Pensions Act 1995), pensions legislation either (a) contains within it the appropriate degree of proportionality – if prosecution can show that burden of proof of a serious wrongdoing has been discharged or there is already a form of due diligence defence that can be put forward or (b) has the scope for a criminal sanction to be imposed on a strict liability basis but in relation to an offence that is sufficiently serious that such a sanction could be justified. Further under due diligence (proposals 14 and 15).

1.119 Would also support amendments to employer related investment regime to allow trustees, where appropriate and where due diligence defence would not otherwise avail them, to take action without exposure to criminal sanction. Outside Commission's remit, but mentioned for completeness.

MOJ

1.120 Welcomes broad proposition underpinning proposals, namely that criminal law should be developed in a rational and principled way. Significant developments in Government since agreement for this project. Coalition agreement sets out that the Government is committed to introducing "a new mechanism to prevent the proliferation of unnecessary criminal offences" as part of its civil liberties work to protect freedoms and review the line between the citizen and state. To implement this, MOJ has established a gateway to scrutinise all legislation containing criminal offences. SS examines all proposals to create criminal offences to ensure they are necessary. Gateway provides a vehicle for Government to improve consistency and clarity of approach across departments and agencies.

1.121 Government agrees with general propositions that conduct should only be criminalised where genuinely necessary to do so. Also agrees that it is important for coherent development of criminal law to have due regard to the seriousness of the harm being targeted and hierarchy of enforcement mechanisms in particular context concerned. Criminal law should not be default means of enforcing regulatory obligations. In practice, recognised by Regulators' Compliance Code and enforcement policies of individual regulators.

1.122 Key aim of project was to inform guidance on creation of criminal offences. Government proposes to draw on principles underpinning CP in guidance for MOJ's gateway. In particular, that existing criminal offences should not be duplicated and there are a number of helpful examples of this. Agree that it is undesirable to create new offences overlapping existing law on inchoate offending and fraud when assessing whether new offences proposed are genuinely necessary.

1.123 Is looking closely at recommendations on corporate liability. Welcomes analysis and will be interested in views of consultees.

Trading Standards Institute (TSI)

1.124 Local Authority (LA) Trading Standards Services (TSSs) aim to promote a fair and safe trading environment for businesses and consumers. The implications of this consultation could, therefore, mean drastic changes for TSSs. TSI believes that confident consumers can only add to a prosperous economy. Most of Trading Standards work involves the investigation and prevention of crimes in varying degrees - from what may seem the relatively trivial (not providing written cancellation rights), all the way up to high-level investigations of companies that are defrauding consumers of millions of pounds.

1.125 All through the varying degrees of their work, Trading Standards Professionals rely on criminal law to assist them in changing behaviour, punishing wrongdoers, and encouraging compliance in order to achieve their aims. TSI believes that these aims can only work with the effective deterrent of a criminal prosecution. Civil powers under the Enterprise Act 2002 can help with large scale consumer complaints, often involving national high street retailers, but the Act is often ineffective with authority-hopping rogue traders who commit offences in one LA area and then move on to the next. This is happening at a time when the consumer landscape is about to change significantly. For example, in mid-October the Government announced the future abolition of Consumer Focus. Furthermore, most of the consumer protection functions of the OFT are likely be transferred to TSSs. To then have many TSS functions 'diluted' will only weaken the effective consumer protection environment that we now have.

1.126 It should also be mentioned that TSSs are going through significant cuts at the moment and that, in our experience, civil action can take a long time and often is not considered to be 'value for money'.

1.127 We would like to add the following comment from one Trading Standards Professional after reading the consultation: “Removing “minor” offences and replacing them with civil sanctions [could lead to] TSSs being seen as money making, target hitting issuers of hidden taxes instead of professional, independent inspectors.”

Care Quality Commission (CQC)

1.128 Some proposals have considerable merit, others may lead to difficulties for the regulation of health and social case in England. Users of health and social care services are often vulnerable or at vulnerable points in their lives. Where a provider is capable of meeting essential standards of quality and safety but has not done so and people have suffered harm as a result, it can be appropriate to hold them to account using proportionate criminal processes as well as taking action to ensure safety using civil processes. The ability to prosecute providers for carrying on services without being registered is particularly important – no other action is possible. CQC’s ability to prosecute is a deterrent. Removing powers would increase risks to people. The ability to hold directors and senior public officials to account avoid their being able to hide behind a corporate identity.

1.129 Changes in legislation and policy on health and social care delivery have been rapid in recent years. New or amended secondary legislation has been essential in allowing regulatory processes keep up with this. If changes in regulatory legislation were made only at primary level, regulation of health and social care would not be able to keep pace with developments in service provision and commissioning. Health and social care providers range from large corporations with complex organisational structures to medium and to very small businesses. Need a proportionate regulatory regime able to hold the range equally effectively and meaningfully to account.

UK Environmental Law Association (UKELA)

1.130 *Are there too many offences?* Do not want to give a view on this; numbers alone are too crude a measurement but we must recognise circumstances where a proliferation of offences is inappropriate and problematic. Overlapping requirements and offences can be confusing and hard for businesses to understand. Offences can vary in approach, causing uncertainty. The same business may be regulated by two or three different bodies, applying legislation which takes different approaches to liability (strict, a duty subject to reasonableness or subject to a statutory defence). Often difficult to find a principled or rational explanation for the different liabilities. In such cases, the answer may be to simplify or rationalise the rules. The environmental permitting system is an example of this – single scheme with one set of regulations and one core offence replacing a proliferation of regimes, regulations and offences for different kinds of polluting activities. UKLEA supports this type of better regulation initiative – makes the law more intelligible, consistent and less bureaucratic but it does not amount to an exercise in de-criminalising because regulatory breaches under environmental permitting still amount to an offence, albeit the rules are expressed in a more coherent way. UKELA is not convinced that the answer to a proliferation of offences is necessarily to repeal low-level criminal offences.

1.131 *When is de-criminalisation appropriate?* UKELA distinguish between de-criminalising by repealing an offence and by dealing with offending by means other than criminal prosecution. UKELA aggress with general conclusions of Macrory that prosecutions may be an inappropriate response to certain breaches of environmental regulation. It may be more appropriate and environmentally desirable in some cases to require a polluter to deal with the source of the pollution, clean up or penalise them by way of a civil fine. This view lead to the creation of the scheme of civil sanctions under the RES Act and a number of sanctions will be used by the Environmental Agency from 2011. RES Act civil sanctions have not replaced environmental offences but introduced as an alternative way of dealing with offending in appropriate cases. It is therefore not an example of decriminalisation by repeal and replacing them with civil sanctions, but an example of expanding regulators tools sot that they can decide in any given case whether civil or criminal sanctions are appropriate. This allows “decriminalisation” by regulatory response if the regulator chooses to issue a civil sanction instead of prosecuting.

1.132 CP has misunderstood this important aspect of RES Act. CP 3.111 refers to a two-step approach. In fact, where RES Act civil sanctions are available, a regulator may nonetheless deal with non-compliance from the outset by prosecuting the offence. UKELA supports regulators having an expanded regulatory toolkit so they can respond to a breach in the most appropriate way (by prosecution, civil warning, warning etc) and agree that criminal prosecutions should be reserved for more serious cases. This should be a central consideration in a regulator's enforcement policy.

1.133 UKELA has misgivings, however, about the prescriptiveness of the proposals on these issues and in particular the general proposals for decriminalisation by repealing low-level criminal offences completely and reserving offences for certain categories of breaches. A single offence may embrace a high range of different factual scenarios of offending (eg breaching a permit condition may range from the minor to the very serious depending on the circumstances) and therefore it seems artificial to try to fit all offences and breaches into a hierarchy of seriousness. In the environmental law certain activities are required by Environmental Crime Directive to be subject to criminal offences and most domestic environmental legal requirements implement European legislation. Remedies for breaches must be effective, proportionate and dissuasive. CP suggests the introduction of civil sanctions means regulators need no more rely on criminal offences to implement European law but this conclusion seems to be based on a misconception that RES Act civil sanctions replace criminal offences, when in fact they coexist as alternative enforcement tools.

Nicky Padfield

1.134 Difficult not to agree with the vast majority of sensible proposals. Any attempt to introduce rationality and principle has to be welcomed. CP particularly useful in underlining the huge growth in the number of criminal offences in recent years, many of which are rarely used; and the detailed and wide-ranging description it provides, illustrating that costly and uncertain criminal prosecutions are often ineffective (in terms of retribution or deterrence).

1.135 Four issues seem to have been ignored:

1.136 EU law and the law of other European states. Need to think harder about internal consistency when so many civil penalties which arise have developed in the EU context? Surprised that the CP does not use more examples from EU countries. Amazing that the Data Commissioner can impose fines of up to £500,000 (Data Protection (Monetary Penalties)(Maximum Penalty and Notices) Regs 2010/31). Think the German example (CP 3.34) is wrong – money laundering always an imprisonable offence if committed intentionally; if committed with gross recklessness it is punishable by a fine or up to 2 years in prison; and money forgery carries a maximum penalty of 1 year imprisonment.

1.137 Enforcement policies: often concern that some regulators may prosecute, fine or warn according to their own misguided priorities rather than any transparent policy. Should urge regulators to publish their prosecution politics and there should be more effective regulatory oversight.

1.138 An overview: looking at the subject as a whole, it is important for a number of reasons, for example developing consistent appeal mechanisms for civil penalties etc.

1.139 Criminal records: is it clear what happens to someone's criminal record? Fixed penalty notices do not appear on antecedent forms, but cautions do; a criminal record is an important punishment in itself and we should be wary of inconsistent practice. There is increasing confusion in relation to foreign convictions in English courts (see Coroners and Justice Act 2009 (Commencement No 5) Order 2010 which brought s144 and Schedule 17 of the Coroners and Justice Act 2009 into force). Something to be explored further here?

1.140 Corporate liability remains a thorny problem. The current law can be arbitrary and unfair, especially on small businesses and remain unconvinced that companies and corporations should ever be "criminal". Those who work in them should certainly be prosecuted for serious reprehensible conduct, but why prosecute the company? Civil penalties can be heavy. Criminal law should be for humans?

M Wallis (small farmer)

1.141 Has become concerned at the large number of regulations and how they are enforced in the industry. Several regulations require an inspection to ensure compliance. Some regulators are using a higher level by assessing regulations by using possible risk as a level to comply with the regulations. As a result, someone can comply with the regulations on the day of the inspection (usual procedure eg MOT inspections) but fail the assessment if the regulator decides there is a possibility he may fail at a future date.

1.142 Recently involved in a prosecution involving regulatory enforcement (M Wallis v Bristol Water [2009] EWHC 3432 (Admin)). His farm was inspected by water supplier to see if the water fittings complied with the Water Supply (Water Fittings) Regulations 1999. He did not agree with the assessment and was prosecuted. The case was heard in the magistrates' court and defence was that the water fittings complied with the regulation on the day of the inspection, as supported by an expert witness. He was convicted and fined with costs because there was a risk that someone could make the fittings illegal at a future date, which could be a risk to public health ("likely to cause contamination"). Appeal made to the High Court on a point of law – to use criminal law to enforce regulations required the same standards of proof. Under criminal statute "likely" means probable. The appeal failed, however, because the court decided that where there is a risk to public health which could be dangerous the work "likely" also means "possible" risk. Therefore, there are now different standards of proof for regulations (see Public Order Act 193x under which "likely" means "probable"). The word has different meanings depending on the possible outcome of an event which has not taken place. It is difficult to go to court not knowing which standards of proof is to be used.

1.143 Permission was sought to appeal to the Supreme Court on the issue of public interest (different standards of proof for regulation enforcement) and this was granted. The Supreme Court refused to take the case. The Law Report intend to publish details of the case.

1.144 There are different levels of possible risk but he is not sure if the courts are to use all levels of risk including extreme possible risk where the risk has not yet taken place, but could happen. His view is that this case has set an important precedent which reduces the individual's rights under law. The level of proof needed to convict someone under criminal law depends on the possible outcome of an offence, which has not taken place.

1.145 *Suggestions for improvement:* (1) Regulations should be assessed on the actual risk, not possible. If a property is inspected, it should comply with the regulations on the day of the inspection and not on what could happen after. (2) There should be a procedure for resolving disputes without going to court, which is costly for all sides. (3) Consistent interpretation of regulations. (4) Consistent interpretation of the criminal liability in regulatory context: the ruling of the High Court that the level of proof required for conviction depends on the possible outcome of an event which has not taken place put D in an impossible position because he does not know beforehand what to defend against. There should be a consistent level of proof so that all sides know the position before a hearing and not after.

1.146 Individual's rights should be the same for all criminal prosecutions. Cannot eliminate risk from everyday life and to base criminal convictions on an attempt to do so is an infringement on the individual's rights in law.

Engineering Employers Federation (EEF): The Manufacturers' Organisation

1.147 Welcomes CP – challenges some important and fundamental aspects of regulation that have hitherto been accepted as inevitabilities. Strongly supports the key proposals. Regulation has an important part to play in providing protections and ensuring a level playing-field. However, at present there is too often a lack of proportionality in the way it is framed, imposing unnecessary burdens that reduce global competitiveness and the jobs that it brings. There is a pressing need for a set of binding over-arching principles to be established such that regulation is properly considered, prioritised into a hierarchy of seriousness and balanced by an appropriate due diligence defence.

Engineering Construction Industry Association (ECIA)

1.148 ECIA were involved in developing EEF's consultation response and are fully supportive of the points made in that response. This response deals with matters of broader principle. The point the ECIA wish to make is more of a practical one, which could become important if allowed to escalate.

1.149 The proposal is that less serious matters should be taken out of the criminal context and placed into an administrative regulatory regime. Presumably this means that any breaches of administrative requirements would be dealt with by administrative sanction, which would be much simpler to apply. There is a danger that this simplicity will prompt a mechanistic and bureaucratic approach to 'enforcement' of administrative requirements. For instance we might envisage that oversight6 of record keeping requirements could be devolved to insurance companies, they could easily automate administrative sanction taking by computerisation (literally). This would inevitably lead to anomalies and do nothing to distinguish between those who make an honest mistake and those who knowingly don't comply.

1.150 The changes of principle proposed are simple to understand and we support them. The point made above is indicative that great care must be taken later on when these proposals are turned into practical procedures.

Faculty of Advocates

1.151 Aim of introducing rationality and principle into the structure of the criminal law, especially when employed against business enterprises, seems laudable and they share the concern about the proliferation of offences created by subordinate legislation without any overall coherence in terms either of the choice to proceed by the creation of an offence or of the approach taken to the formulation of those offences.

The Law Society

1.152 The Criminal Law Committee has long been concerned about the expansion of the criminal law into new areas of human activity, with the considerable increase in complexity and lack of clarity that has occurred as a result. It has been felt that criminal law has been too quickly resorted to by parliament and regulators, leading to the inappropriate criminalisation of conduct.

1.153 This has resulted in an overly criminalised society. It has had the effect of making the criminal law far more complicated than it should be. It is in this area of the law that it is perhaps most important that the law-abiding citizen and company can ascertain easily and precisely what it is that they are permitted, and are not permitted, by law to do. Lawyers should be able to advise on this with certainty.

1.154 Therefore, it is to be applauded that the consultation paper proposes that behaviour that is not, strictly speaking, criminal and should not be dealt with by the criminal justice system be taken out of the criminal law.

1.155 However, this support depends upon the proposed approach for civil penalties being satisfactory and providing appropriate safeguards. We think more information on what would be proposed is needed before a final view can be reached. It is important that any regime for imposing civil penalties (i) requires the same burden of proof before liability is established where the civil penalty replaces an existing criminal offence (i.e. the burden of proof before imposing a civil penalty should be the same as for the criminal offence it replaces) (ii) offers appropriate protections in relation to evidence (iii) ensures that the decision to seek a civil penalty is kept separate from other regulatory decisions (iv) requires a clear approach to determining any penalty to be imposed and (v) provides for full rights of appeal to the courts. We are also concerned about the speed with which action is taken and decisions are made and the inter-relationship between any civil penalty proceedings and any criminal prosecution. We are also concerned that sufficient resources are available for such an approach to work in practice.

1.156 We note, however, that it is important that certain conduct, the proscription of which may be defined as regulatory in nature, is properly deterred. Society is entitled to say if people are engaged in a particular sort of business, they should take steps to avoid consequences X, Y and Z, because these have serious and harmful consequences, and it is therefore right that failure to take these steps attracts a criminal sanction.

1.157 In the main, the proposals are good in principle, but when applied to a specific offence it will be necessary to look at the detailed effect of applying them and the potential consequences of removing any existing criminal offences.

1.158 The theory of deterrence is important in the regulatory context. If a person wishes to engage in a particular sort of business, which creates environmental or consumer risks, it is not unreasonable that they should be expected to take steps to mitigate or avoid these risks. As some are serious risks, failing to mitigate or avoid them may properly attract a criminal sanction.

1.159 Conversely, we acknowledge that where too many offences are created and the law becomes too complex, the law may be ignored, and its deterrent effect is diluted. We agree that if there are too many regulatory offences this is undesirable, not least as it means that there will be offences which are never prosecuted.

1.160 There are already historical examples: the criminal offence of insider trading was rarely used and a more realistic alternative of market abuse was established when the Financial Services Authority was set up to address the same conduct. Therefore a precedent has been set for finding alternative civil methods and sanctions for covering activity which was previously only governed by the criminal law.

1.161 The Bribery Act 2010 is an example of legislation where Parliament has decided that corruption is a serious form of criminality which requires commercial organisations to take positive steps to avoid committing the offence of failure to prevent bribery (section 7). This new criminal offence has been widely publicised and it is likely that it will cause a wide scale change in corporate behaviour and procedures.

1.162 If it is intended that regulatory breaches should be dealt with by regulators rather than being subject to inappropriate criminalisation, it is essential that there are organisations with sufficient resources to be able to prioritise this activity and enforce the law. We are not sure how this sits with the Coalition Government's desire to reduce the numbers of Quangos and regulatory bodies and would want to be sure that any changes will not have a negative impact in the active enforcement of regulation, or the appropriate safeguards for those subject to regulatory enforcement.

1.163 We agree there are too many detailed regulatory offences, and many of them overlap with other criminal offences or are inappropriately detailed when dealing with a particular subject matter.

Ivan Krolick

1.164 Criminal Wrongdoing and Regulation: Chapter 3 CP appears to consider regulatory sanctions and enforcement, and criminal proceedings and consequent punishment, as alternatives. It does not appear that the CP has considered the situation where both regulatory steps and criminal proceedings are brought in respect of the same transgressions.

1.165 For example, the Company Directors Disqualification Act 1986. On a number of occasions I have had clients who were directors of companies which became insolvent and wound up by the Court. The Secretary of State then brought civil proceedings against the defendants in the Companies Court seeking an order that they should be disqualified on the grounds that they have infringed specific provisions of the Insolvency Act 1986 in relation to the liquidation of the company, or the Companies legislation in relation to the conduct of the company's affairs (for example see section 389 of the Companies Act 2006 with reference to maintenance of accounting records). After those proceedings are resolved (usually when the director is disqualified by the Court from being a director for a period of between 2 and 15 years or gives an appropriate undertaking not to be a director for a specified period), it is not uncommon for criminal proceedings to be brought against the director indicting him with precisely the same statutory offences which gave rise to the earlier disqualification. If convicted the director is liable to suffer a prison sentence, and, in addition, he is usually given an addition period of disqualification in accordance with sec 2 of the CDDA 1986.

1.166 A further example of both criminal punishment and civil sanction can be seen in section 216 Insolvency Act 1986, where a defendant who was a director of a company which went into insolvent liquidation, and subsequently is a director of another company known by a prohibited name (that is a name similar to the earlier liquidated company) he commits an offence for which he is liable to be sentenced to prison *and* under section 217 of the Act he is responsible personally for all of the debts of the second company. Section 216 is an absolute offence, and a recent client of mine committed the offence by omission, rather than commission. He had a small asbestos removal company, which ran into financial difficulties, and, fearing that his company would be wound up, he formed a new company, with a similar name. There was nothing unlawful about that, since the first company had not been ordered to be wound up. However, the moment the first company was ordered to be wound up, he committed the offence by not resigning his directorship in the new company.

1.167 *The distinction between "truly criminal" and "so-called regulatory offences":* I believe that there is an important omission from your considerations, and this concerns the effects of the Proceeds of Crime Act 2002. The Act must be considered in two respects. The first concerns confiscation. Under section 6 the Crown Court embarks upon confiscation proceedings if a person is convicted by the Crown Court of any indictable offence, or if he is committed for sentence by a Magistrates' court (and this includes the circumstances indicated by section 70 of the Act). There is no distinction between true criminal convictions and regulatory infringements (if statutes provide for criminal proceedings). In *Seager [2010] 1 WLR 815* an attempt by the Crown to recover the turnover of a company from a defendant who had been a director, in breach of a director's disqualification order, was partially frustrated by the Court of Appeal. It should also be noted that, in accordance with the 2nd Schedule of the Act, specified offences under the Copyright Designs and Patent Act 1988, and offences under section 92 Trade Marks Act 1994 are deemed to be criminal lifestyle offences which give rise to the necessity that a defendant should justify all of his income and property over a period of 6 years. On making a confiscation order the judge must impose a default sentence (and if the order exceeds £1 million, the maximum is 10 years imprisonment). Thus, in some circumstances contravention of regulatory provisions could lead to a substantial term of imprisonment.

1.168 The second respect concerns Civil Recovery under Part 5 of the Act. The Act defines recoverable property as property obtained through unlawful conduct. Section 241 of the Act refines that definition by stating that unlawful conduct is conduct within any part of the United Kingdom which is contrary to the criminal law of that part. If the conduct occurred outside the United Kingdom, then it must be conduct contrary to the criminal law of the country where it occurred (and also contrary to the relevant part of the United Kingdom if it had occurred in that part). Again, no distinction is made between truly criminal conduct and merely regulatory infringements if the infringements have a criminal sanction.

1.169 I have only touched upon these issues, but I believe that they should be considered as part of Chapters 3 and 4 of the PC, since any distinction between regulatory contravention and criminal offence will also require reconsidering the drafting of the above legislation. For example, what should be the situation where a person fails to obtain the appropriate licenses for his business, or, through inadvertence, allows his licenses to lapse. He will almost certainly commit some kind of offence. Could it be said that whatever he subsequently obtained was the proceeds of crime, and thus, on conviction liable to be included in a confiscation order (and the judge is obliged to set a default term of imprisonment when making the order). Even if the person is not prosecuted, civil recovery proceedings could be used to recover property which could be traced to assets obtained through the unlicensed activity. Neither the Crown Court judge dealing with confiscation, nor the High Court judge trying the civil recovery claim, has any discretion. If property falls within the definitions, then the appropriate order must be made.

1.170 *Corporate Criminal Liability*: In her Appendix C, Professor Wells acknowledges that corporate personality is not limited to companies, but this is not referred to in the body of the PC. The criminal liability of partnerships (and in particular in relation to regulatory offences) was considered by the Court of Appeal in *R -v- W. Stevenson and Sons [2008] 2 Cr App R 187* in which it was held to be a matter of statutory interpretation. In that case the statutory obligations had been expressed to extend to partnerships. Many statutes are silent or insufficiently clear. For example, section 3 of the Protection of Children Act 1978 refers to offences committed by "a body corporate", under the heading "Offences by Corporations". Some definitions of "body corporate" include partnerships and associations, but, so far as I am aware, there is no general decision as to whether, absent statutory provision) an unincorporated association or partnership (including a limited partnership) can have criminal liability, and on what terms. For an express provision relating to partnerships etc, see section 1255 Companies Act 2006. It would appear from section 3(2) Protection of Children Act 1978 that it was intended to extend the meaning of "body corporate" to partnerships and non-registered associations, because it refers to bodies which are controlled by the members, but it is a surprisingly unclear reference. Similar provisions are included in section 202 Copyright, Designs and Patent Act 1988, and section 285 of that Act makes much more detailed reference to partnerships and bodies corporate.

1.171 Although the CP considers that the criminal liability of a company is a matter of statutory interpretation, it must be recognised that there are still common law offences which are not governed by statute. The most relevant of these are the offences of conspiracy to defraud (which has survived the Fraud Act 2006) and cheating the public revenue. In *R -v- ICR Haulage Ltd [1944] 1 All ER 691,* the Court of Criminal Appeal upheld the conviction of a company for conspiracy to defraud. The argument concerned whether a company could have a guilty mind, and the decision was based on the question of agency. It was subsequently criticised by Lord Reid in *Tesco Supermarkets -v- Nattrass.* So far as I am aware there has been no subsequent reported case in which a company has been convicted of conspiracy to defraud. However, the existence of common law offences prevents any general principle that corporate liability should not be dependant on the identification doctrine.

1.172 An additional observation under this topic concerns the motivation issue. There are many cases where the actual offender is carrying out a function given to him by a company, of which he may be a senior manager/director, but he offends for his own personal benefit, and not for the benefit of the company (for example, he may dishonestly appropriate something which has been bailed to the company). I can see no logical reason why the company should be held criminally liable for this criminal conduct (I do not consider any civil liability for compensation), but the issue is not discussed in the CP. Should a jury be directed that a company can be convicted of an offence *only* if the individual committed the offence for the benefit of the company?

1.173 *Defence of due diligence*: One of the factors which can lead to a person committing an offence, especially where the offence amounts to the contravention of a regulatory provision. Is his ignorance of the statutory obligation (even when it is contained in principal legislation). My case of the asbestos remover, referred to in paragraph 4 above) is an example. He was not a man who was conversant in legalities, and in particular did not know, or would have understood, the provisions of section 216 Insolvency Act 1986 (see above). He was dependant on his accountant for all technical advice, and indeed the accountant formed the new company having advised his client to do so. The accountant gave evidence for the prosecution, and when cross-examined admitted that he had not advised the defendant about section 216 or its effect when the old company was ordered to be wound up. His explanation was that he himself did not know of the provision. Of course he was negligent, but that did not avail the defendant who was obliged to plead guilty to the absolute defence, for which he received a concurrent sentence of 6 months imprisonment.

1.174 The proliferation of regulatory offences (and I must include local bye-laws) must now lead to many people being convicted of offences when they did not even know, or believe, that they were breaking the law. But to recognise this as a potential due diligence defence factor it would be necessary to break into the hallowed legal doctrine that everyone is presumed to know the law, and ignorance of the law never being a defence. Yet I can see no reason why a person should be held not guilty if he applied due diligence (whatever that may mean) to prevent the breach of an obligation of which he was aware, yet be guilty of the breach of an obligation of which he was unaware, notwithstanding that he had used due diligence in informing himself of relevant obligations.

Food Law Group

1.175 Broadly welcome the stated aims of introducing rationality and principle into the use of the criminal law in the regulatory context. Some members have been able to see the draft response to the proposals put forward by the Bar Council. Where we see clear points of departure or agreement, we have tried to indicate this.

1.176 A staged approach to the introduction of such a change in regulatory liability would be advisable rather than to try to decriminalise at a stroke.

1.177 It may perhaps be appropriate to adopt the policy on decriminalising regulatory offences first in the case of EU legislation such as laws covering food additives, flavourings and health and nutrition claims where an administrative approach was most probably contemplated as a sanction at the EU level. The outcome would be more fruitful and compatible.

1.178 In the case of an administrative offence, for example in the food sector the use of an expert, as outlined in the case of other European jurisdictions, is useful in determining prosecution priorities.

CBI

1.179 Supports the general thrust of the proposals. However encouraging more use of civil / administrative sanctions in respect of a regulatory breach should not mean or imply any lesser requirements for the need for, and importance of, fair and appropriate due process in civil regulatory cases, the existence of appropriate evidence of a regulatory breach, and the party whose conduct or performance having the ability to conduct appropriate defences, and to be heard before an appropriate tribunal and appellate tribunal.

1.180 Civil / administrative sanctions still involve the levying of fines and other extraction of property, requiring appropriate procedures and processes to be in place in order to pursue and enforce the regulatory breach complained of. The need for due process is particularly important, in view of the fact that the costs involved in satisfying (for example) a variable monetary penalty notice, restoration notice or other Regulatory Enforcement and Sanctions Act (RESA) sanctions might in some instances exceed the level of fine that might be awarded by a court following a formal prosecution for the same breach.

1.181 Regulators should not use the threat of a criminal prosecution to coerce or encourage a settlement and/or an admission of liability using civil or administrative processes. Nor should regulators apply a higher fine in a civil / administrative process as a quid pro quo for not pursuing a criminal prosecution. A binding and clear code of practice and a set of Principles as how regulators exercise their powers and enforcement processes would therefore be appropriate, together with a review of any existing codes and sets of Principles already in place. As per RESA, only regulators who meet Hampton guidelines should be permitted to exercise civil enforcement powers.

1.182 Liability for civil / administrative sanctions should normally be on the basis of knowledge or recklessness, and not negligence or strict liability. Nor should there be liability if the regulatory breach was caused by the act or omissions of a third party, for whom the party accused is not responsible.

1.183 On the separate specific issue of corporate liability, we comment in detail below in response to the Law Commission's proposals and consultation questions, but in summary we broadly support the Law Commission's general approach.

North East Trading Standards Association (NETSA)

1.184 The regulatory framework in which Trading Standards enforcement staff operate has seen developments over the course of the past decade, with the introduction of the Enterprise Act 2002 and the more recent framework being proposed by the provisions contained within the Regulatory Enforcement and Sanctions Act 2008, which have changed and modernised the traditional approach to achieving compliance by business.

1.185 These measures provide trading standards enforcers with a range of formal sanctions covering both criminal offences and civil remedies to address past, present and future conduct. We would, however, be concerned if the outcome of any such review weakened the tools available to address such conduct where it falls short of professional competency or blatantly misleads consumers.

Residential Landlords Association

1.186 This response looks at the issues raised in the consultation paper in the context of regulatory enforcement in the field of housing law and environmental health law as it relates to housing, in particular. The last major piece of legislation in this field was the Housing Act 2004. Along with the British Property Federation this Association took the lead in representing landlord's interests. We promoted various amendments to the legislation which were debated in the House of Lords and some of which amendments were accepted by the Government. We liaised on an ongoing basis with the Bill Team and the Bill Lawyer.

1.187 The Association warmly endorses the various proposals put forward by the Law Commission in this report. It is long overdue but, regrettably, we are very doubtful that any Government (of whatever political complexion) will listen. Further, there is the undoubted problem that much of regulatory law now emanates from the European Union. The standing of the criminal law which must be grounded in morality is, we believe, undermined by the ceaseless deluge of new criminal offences which have been created particularly under the last Government. There seems to be a wish to criminalise the entire business community. Since so often much of this legislation remains unenforced, it simply undermines it and brings it into contempt. We are very pleased to see that the Law Commission has identified the ease with which criminality can be brought about through secondary legislation as an insidious force driving the plethora of new and unnecessary criminal offences. Having said this, when dealing with primary legislation, Government Departments delight in introducing new criminal offences. There appears to be a touching faith on the part of Civil Servants and legislators that if they decree that something is to be criminalised that will solve a problem.

1.188 This Association's experience is that however worthy individual pieces of legislation may be the totality of such legislation, particularly if criminal sanctions are attached, is to dissuade responsible business people, in our case residential landlords, from engaging in the activity or it becomes such that it is undoubtedly an element in their decision to disengage. It may be a matter of perception but the law abiding landlord, who in reality would have little to fear, is concerned with their reputation. This can therefore influence them in their business decisions. On the other hand our experience is that so far as the small rogue element is concerned one can create criminal offences until you are blue in the face but it makes not one jot of difference to their activities. In between, you have people who are often ill informed or ignorant who can as a result breach their legal obligations. They do not merit the full weight of the criminal law. Rather, it is often a matter of training and education. We believe that an informal approach to enforcement should be the first method adopted, followed by non criminal sanctions of the kind talked of in the consultation.

1.189 Rightly, as a result of initiatives such as the Enforcement Concordat, regulators are now enjoined to look at informal enforcement. For example, if Environmental Health officers receive a complaint of a broken tap there should be an informal approach with a telephone call (perhaps followed up by a letter or email) without the need to serve even a formal enforcement notice. At this stage there should be no need to resort to any kind of formal enforcement action unless the landlord concerned has a track record of non compliance or it is a very serious situation and there is a real risk to the health or safety of residents. We therefore believe that it is important that in its report the Law Commission recognises the importance of informal enforcement even before one gets down to considering non criminal sanctions, let alone enforcement through the criminal law. The reality is that in the best run businesses can, on occasion, go wrong. After all, we are all human. So long as matters are not serious in the way described someone who is then willing to put matters right and should not, in our view, be penalised. We accept on the other hand that if there are breaches of a regular nature indicative of poor management then that may be the time to step in with a sanction but, again, this does not need to be of a criminal nature.

1.190 In our view it is important that consideration is given to forms of regulation short of either criminal sanctions or the application of regulatory enforcement. This is particularly important at a time of public expenditure savings. As the consultation paper identifies, a considerable amount of enforcement action is directed towards the generally responsible and compliant both to prevent them transgressing or, on occasion, to deal with what in reality are minor breaches. The problem is that it is much easier for the regulator to focus its attention on the generally compliant. They are easy to deal with. They will respond to put matters right. We also need to face the reality that in order to regrow the economy we have to adopt as low a profile as possible when it comes to regulation. Regulation increases costs and is often a disincentive to those who are least affected in reality by regulation because of the perceptions it gives rise to, whilst as always the rogues slip under the radar.

1.191 We believe that much more attention needs to be given to self regulation as a form of co-regulation in co-operation with regulatory authorities. This can be applied in all sectors but so far as we are concerned it is of course of particular importance to the RLA in relation to the PRS.

1.192 We would emphasize that those who are subject to self regulation in this way are expected and required to comply with the same legal standards as everyone else. Those deemed suitable for self regulation should be pre-vetted. There needs to be meaningful checks and inspections on a sample basis although not excessive, in order to ensure compliance. There is also the considerable potential for those subject to self regulatory regimes to pay for regulation themselves. In return for a more user friendly form of regulation they will, in our view, be willing to contribute towards the cost which reduces the burden on the tax payer generally.

1.193 Any self regulatory scheme itself has to be such that it complies with minimum requirements. It will need to have a code of compliance, a complaints procedure and a disciplinary procedure. Ultimately, the sanction will be removal from the code and a return to the usual regulatory enforcement methods, but the reality of course in such a situation is that a person found to be in breach and expelled from the self regulatory scheme is likely to merit more careful scrutiny by the regulatory body itself.

1.194 The RLA has devised a scheme and details of this scheme appear in the Appendix. We strongly believe that this is a model which can be applied more widely. Importantly, in our view, legislative encouragement needs to be given by the making of appropriate orders using the existing legislative vehicles.

1.195 The RLA has worked with Hull City Council and Humber Landlords Association to develop a model of self inspection of properties in Hull (known as the PEAL Project). Its worth has been proven by a significant reduction in the number of service requests from tenants for housing interventions by the local housing authority/environmental health team. This model has now been incorporated into Hull City Council's housing enforcement policy so that if a service request is received then it will initially be dealt with by the landlord concerned. The local authority will carry out appropriate checks to ensure compliance and training of landlords is a precondition.

1.196 Importantly, this leaves the regulator to deal with those people who really need effective regulation.

1.197 In this Country the regulatory burden has undoubtedly increased over the years. As Governments come and go its nature changes but inevitably there is always a call for greater rather than less regulation. The reality, as the consultation paper rightly points out is many laws are actually not enforced or, if they are, it is very much on a hit and miss basis. If anything happens there is always a call for more regulation; "something has to be done about this". If there is a major problem then there is a knee jerk reaction. We believe that there is a need for more cost effective but smarter regulation, reducing the overall burden of regulation as well. In turn hopefully this would reduce over time the perception we have already referred to. This is vital in competitive globalised economy. Therefore, the RLA very much welcomes the whole tenor and thrust of this consultation paper. We are of the opinion that schemes such as informal enforcement and co-regulation outlined in a previous sections in this response are the way forward and that it is not just about looking at decriminalising regulation as far as possible,, but also looking at ways of improving regulation altogether. For example, coupled with accreditation in the PRS, one can introduce say gold and silver standards over and above the basic bronze standard. This is what has happened through self regulation in the hotel industry. Thus, self regulation can act in a positive way to raise standards.

1.198 We hope this example of the RLA experiences in relation to the Housing Act 2004 will be of use to the Law Commission in illustrating the problem. The RLA was the lead representative for landlords when the Bill passed through Parliament. We could give a number of instances but the best one is possibly this. It relates to houses in multiple occupation (HMOs) (i.e. bedsits, shared houses etc), all HMOs are subject to the Management Regulations. These regulations create an absolute criminal offence subject to the defence of reasonable excuse. However, under the previous legislation now superseded by the 2004 Act a local authority enforcing the regulations had a choice of remedies. It could serve a statutory notice requiring the carrying out of remedial works. It could also prosecute. Provision for the Management Regulations was re-enacted in the 2004 Act but the Government of the day decided that the only enforcement method would be by way of prosecution! The Government deliberately deleted the provision for service of notices from the legislation. At our behest amendments were put down in the House of Lords to overturn this but the Government was adamant so that the Act was enacted without the previous provision which allowed service of works notices to enforce compliance! This is typical of the attitude which has permeated Government. Due to the Enforcement Concordat hopefully, but not necessarily, local authorities will usually take informal enforcement action i.e. a warning letter in less serious cases but a formal sanction short of prosecution has been written out of existing legislation. This is typical of recent trends. It was a wholly unnecessary omission.

1.199 One area for concern surrounding formal enforcement steps short of criminal prosecution is the question of fees being levied by a regulatory authority for enforcement actions. For instance, under the Housing Act 2004 fees can be levied to reflect the time involved in taking formal enforcement action. One advantage of informal action is to avoid fees. Landlords in our experience are, however, concerned about the use of fees as effectively a back door form of "fine". On occasion objection has had to be taken to informal enforcement letters which then threaten the service of formal notices accompanied by payment of fees, particularly if there are issues over the requirements made. This gives rise to concerns. Recipients of informal enforcement may feel under compulsion to carry out unnecessary remedial action which they would wish to challenge simply because of the threat of fees. You have to bear in mind that often the recipients of these notices are not particularly versed in the ways of regulatory enforcement.

1.200 Under the Housing Act 2004 an appeal against fees can only be allowed if the underlying notice is appealed successfully. One issue of concern is why it was necessary in many cases to take formal enforcement action at all bearing in mind the provisions of the Enforcement Concordat. We therefore feel that it is important that if there is any fee levying power this should also be subject to an unlimited appeal process with the power to overturn the fee or reduce it even though the notice itself may not be appealed against at all or any appeal against the notice may be disallowed. This would provide some form of restraint.

1.201 Another issue in the case of enforcement by regulatory bodies (as opposed to the Police) is the way in which orders for costs are made. Unlike the Police not only does the Defendant, if convicted, have to pay the legal costs of the prosecution, potentially, but also the investigatory costs. A shop lifter does not have to pay the police officers costs of investigation. In some respects, this may be as "broad as it is long" because, certainly for smaller business people, courts in many cases probably look at the overall financial penalty, inclusive of these costs, "in the round". On the other hand, this may, of course, induce a perverse incentive to pursue a prosecution. It is always a difficult situation where the regulatory body is, in effect, financially interested in the outcome. This issue is looked at further in the next section. Overall, however, we believe that issues such as this support the proposals contained in the Consultation Paper that criminal prosecutions should be avoided as a way of enforcing regulatory requirements in cases where matters complained of cannot be said to be "seriously reprehensible".

1.202 As indicated in the previous section the RLA is worried about situations where the regulator can financially profit from the outcome. We believe that it is an important principle that not just fines but also penalties resulting from regulatory enforcement should go to the National Exchequer rather than be retained by the regulator. Otherwise, there is the temptation for the regulator to impose a disproportionate penalty because they directly benefit from it.

1.203 The RLA considers that the time has come to completely re-appraise the concept of the absolute offence. This is a Victorian concept which was brought about at the time when social regulation was in its infancy. However, times have changed and there is far far more regulation now than there was then. We do not believe that the absolute offence actually provides any kind of deterrent because it is not understood generally anyway, particularly amongst the small business community, such as landlords. Without being tempered in some way in any case it is an unfair concept. This is particularly the case if criminality is to be attached because, as we have pointed out elsewhere, the ordinary person would expect some moral lapse to accompany a criminal offence and that there is some blame attached. We believe that as a starting point if an existing offence is of an absolute nature then it should be decriminalised and replaced by non criminal sanctions of the kind envisaged by the Law Commission in these proposals. Indeed, this would be a very useful working rule if existing offences were to be reviewed en masse. This goes further, in effect, than the Commission's suggestions at proposal 14. We would endorse the idea of a general defence but, we believe, that it is second best to a wholesale review.

Trading Standards South East Ltd

1.204 TSSE accepts the role of the Law Commission is to promote reform of the law. TSSE also accepts that the basis for this consultation was the report, *Regulatory Justice:Making Sanctions Effective* by Professor Richard Macrory. In his comment quoted at paragraph 1.4 of the consultation document, however, Professor Macrory states:

> Some consultation responses have supported my view that there **may** be a case for decriminalising certain offences

1.205 TSSE notes, however, that Professor Macrory did not indicate that there was a definite case for decriminalisation. The overall structure of the consultation paper, however, gives the impression that the 'need' to decriminalise certain offences has already been established and it is merely a question of the methodology that needs to be ascertained. TSSE is of the view, however, that the consultation paper has not adequately addressed this aspect of necessity. There are no examples, or evidence based fact, included in the consultation to suggest that frivolous prosecutions are already occurring, with respects to low level offending, within the Regulatory Context.

1.206 TSSE is firmly of the view that there is no basis for the majority of the proposals put forward as part of this consultation and will comment on individual proposals in due course. TSSE believes that the majority of the concerns raised in the consultation are already capable of being addressed within the current regulatory framework. Robust enforcement policies provide clear and coherent indications as to what type of regulatory action may be taken and when; due regard must be had by local authorities to the Statutory Code of Practice for Regulators; due regard must be had for any primary authority relationship (overseen by the Local Better Regulation Office) that exists in relation to any particular company; local authority prosecutors will apply the same tests contained within the Code for Crown Prosecutors as do the Crown Prosecution Service.

1.207 TSSE further notes that Professor Macrory also stated that a sanction should be 'responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction'. TSSE believes that in order to consider what sanction is appropriate for a particular offender, the widest possible range of sanctions should be available to prosecuting agencies. To remove a particular type of sanction would effectively mean that it is not always possible to target the particular offender effectively.

1.208 TSSE is also concerned that to remove categories of offences from the criminal arena will impede the investigative ability of local authorities. Statutory powers of enforcement associated with criminal legislation may no longer be available where they are based upon 'suspicion of an offence' or 'belief of an offence'; surveillance techniques and acquisition of communications data under RIPA may no longer be available; money laundering investigations or confiscation proceedings may no longer be available under the Proceeds of Crime Act 2002.

Kiron Reid, Liverpool Law School

1.209 It is very welcome that the Law Commission has called for a principled approach to creating new criminal offences and for unnecessary minor offences to be scrapped. In conclusion this respondent argues that the general principles they set out are correct.

1.210 This response will refer (unless stated otherwise) to the Overview paper. Law Commission papers are usually very thorough and well written, a great resource for reference, for teaching (and for students) and for analysis of flaws in and explanation of the current law but time has not allowed me to read the full paper.

1.211 I agree with the core proposals set out in the press release (25 August 2010):

> "regulatory authorities should make more use of cost-effective, efficient and fairer civil measures"
>
> "a set of common principles should be established to help agencies consider when and how to use the criminal law" and
>
> "existing low-level criminal offences should be repealed where civil penalties could be as effective."

1.212 The consultation paper argues that "the criminal law can and should be used for the most serious cases of non-compliance with the law." (Para. 1.5).

1.213 I specifically agree with these but will comment on background issues relating to over criminalisation and poor quality criminal law; on the rational for the focus on the regulatory context (that is largely relating to businesses) and to a limited extent on specific proposals and consultation questions. The key interest of this writer is how the criminal law effects individuals, while also being concerned about effective action against harm caused by companies. Therefore I will make some comment on the need for both consistency of principles as they apply to businesses (this paper) and individuals (largely outside the scope of this paper), and on the prospective benefits of the Law Commission carrying over the principles set out in this paper to its projects on the liability of individuals in criminal law. The principles set out in this paper should be used to inform the Commission's work to help improve both the general principles of criminal law and specific categories of offence.

1.214 The general principles the Commission sets out should be consistent where possible across criminal law, interpreted in the relevant context.

1.215 The suggested "statutory power for the courts to apply a 'due diligence' defence" would certainly ensure the law was ECHR compliant in particular cases, even though strict liability in general cannot be held to be in breach of the ECHR.

1.216 Background: The Labour Government were obsessed with creating new crimes to appear tough on crime but that is often not an effective way to solve social problems or change behaviour.

1.217 Lord Judge in the Supreme Court recently exclaimed "that for too many years now the administration of criminal justice had been engulfed by a relentless tidal wave of legislation. The tide was always in flow: it had never ebbed*." Regina (Noone) v Governor of Drake Hall Prison* (2010) Times Law Reports, 2 July, SC.

1.218 The statistics at para. 1.17 are telling. Many examples can be given of the concern or criticism expressed directly or implicitly by eminent judges, peers, lawyers, and politicians concerned for civil liberties. (A few are cited at K. Reid 'Strict liability: Some Principles for Parliament' (2008) 29 Statute Law Review 173, n. 27). Peter Glazebrook has commented fluently on this trend in successive editions of his *Blackstone's Statutes on Criminal Law* (for example in the preface of the 2010-11 edition, OUP, Oxford, 2010, p v). There has likewise been much compelling critique of the incoherent rag bag style of much Government inspired criminal legislation since 1994.[10] The Commission correctly cites Ashworth's analysis, among others; Spencer has been particularly frank - An "unhappy practice of our present Government is to reform the law in demagogic dialogue with the tabloids".[11]

1.219 While the Commission disagree with my specific suggestion that a code of administrative offences should be created (as in France), taking them outside of the criminal law (see paras. 3.27 and 3.30 full report) their emphasis leads to a similar effect in relation to the liability of businesses. The thrust of the paper agrees with the sentiment of Professor Richard Macrory (quoted at p 2), as does this respondent.

1.220 The paper clearly explains what is meant by 'regulatory' contexts, and the reasons for concentrating on this area (paras. 1.9 and 1.11). The Consultation Paper expressly explains that this project is not concerned with use of criminal law to improve the standards of behaviour by the public at large. To this writer that is a false division but it is understandable in the Law Commission being asked to undertaken a specific project about the law affecting specific (albeit very wide, para. 1.10) areas of business activity.

1.221 It is impossible to disagree with the argument that vitally important "is the introduction of rationality and principle into the creation of criminal offences, when these are meant to support a regulatory strategy" (para. 1.13).

1.222 That view heeds Lord Windlesham's plea that "Dispensing justice is more than a rhetorical slogan: it should be accepted as an indispensable requirement at every stage in the criminal process".[12]

10 For example see 'Inaccessible and Unknowable: Accretion and Uncertainty in Modern Criminal Law' Candida Harris and Kim Stevenson (2008) 29 Liverpool Law Review 247.

11 J. R. Spencer 'Legislate in haste, repent at leisure' (2010) 69 The Cambridge Law Journal 19, at p. 21. Thanks to Sally Goodhall for this quote.

12 Responses to Crime, Vol. 4 'Dispensing Justice' p. 308 (Clarendon Press, Oxford, 2001).

1.223 The paper says (n. 10) it is not "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". However implicitly they have to consider alternatives to criminal law if the Law Commission is suggesting restricting the use of criminal law; they are not working in a vacuum, as their citation of a wide range of sources shows. While the Law Commission is dealing with principles, Government and Parliament will be concerned with practicalities, including the effectiveness of alternatives, such as licensing, inspection, remedial notices, taxation, or public information campaigns (listed in the paper). Government and Parliament will also be greatly concerned with enforcement – following the lead of Macrory's report under the last Government this is about more effective enforcement (including measures in the Regulatory Enforcement and Sanctions Act 2008). If more cost effective civil methods are used there will be more emphasis on enforcement by regulators. Dave Whyte and Steve Tombs recently published research showing that health and safety inspections have fallen dramatically potentially putting workers at risk at a time of cost cutting. Whyte decried a "collapse in inspection, investigation and enforcement".[13]

1.224 The new coalition Government's bonfire of the quangos may reduce the exponential growth of secondary legislation (para. 1.20) but is also likely to lead to pressure on the budgets of regulators.[14] The Labour Opposition will presumably forget their role in creating the problem. Regardless of that MPs and peers on all sides should be concerned that regulatory bodies and potentially local authorities have the training and staff and legal support to do their jobs when their role is enhanced. Reference is made in the full paper to the important role of local authorities and specifically to Trading Standards. One would expect the umbrella body, Local Authorities Coordinators of Regulatory Services (LACORS), to have significant input into the consultation.

1.225 On a related note the emphasis that "there is too much reliance on direct criminalisation to implement European law" (full paper, para. 3.20) can be welcomed by critics of the over-implementation ('gold plating') of EU law and constitutionalists alike. The exploring of other strategies to secure compliance could in part also alleviate concern that there are inadequate constitutional safeguards at EU or UK level over the creation of criminal legislation by the European Union.[15]

1.226 Principles and consultation questions: The paper is based on the principle "that criminal offences should be created to deter and punish only serious forms of wrongdoing". "By serious wrongdoing is meant wrongdoing that involves principally deliberate, knowing, reckless or dishonest wrongdoing." (Para. 1.14).

13 'Workplace safety at risk due to deregulation of health and safety policies' University of Liverpool Press Release, 13 July 2010. The report is 'Regulatory Surrender: death, injury and the non-enforcement of law' (Institute of Employment Rights, 2010).

14 The scale of the growth in regulatory agencies set out at para. 1.21 was not appreciated by this respondent.

15 For example Bleddyn Davies PhD thesis 'Fit for Purpose? A legal analysis of the European Union's constitutional arrangements in the field of criminal justice' (University of Liverpool, June 2010).

1.227 That is that wrongdoing is regarded as serious if *mens rea* is required. This author would agree with that principle but it is insufficient as a definition of serious wrongdoing. The level of harm caused or potentially caused must also surely be an element in considering whether wrongdoing is serious – that is potentially serious harm (or serious potential of harm, discuss?) accompanied by a fault element unless specifically and deliberately legislated for otherwise. Proposal 1 in effect sets out the above principle and proposal 2 does relate the justification for criminalisation to a level of harm (based on potential penalty).

1.228 Conclusion: I have elsewhere argued in favour of the following reform ideas, the first and last of which are discussed in detail in the full paper: use of reverse onus clauses (similar to above); use of constructive liability; use of civil administrative penalties. (Another example of use of the latter is the Code in Moldova where I am writing).

1.229 I argue that: "Parliament [should] clearly set out when strict liability was to be used for serious crimes and, in matters where the public interest can be achieved without the criminal sanction, to set out an alternative regulatory or administrative system, similar to the situation in France or Germany (Reid 2008, pp 188-91)."

1.230 Your paper highlights difficulties with this "generating as many problems as it solves" (full paper para 3.28, 3.30). I disagree with one specifically that the application of the ECHR would be problematic. I put that difference aside here.

1.231 The Law Commission proposals are very welcome and I agree in general with the principles expressed and specifically with nearly every suggestion. The general aims that the burden on business should be reduced; the law made more effective; the law be rationalised and that small and medium sized businesses face a reduced administrative burden where appropriate appear to be shared aims of both the previous Government and new one, and of the Law Commission.[16] This paper takes an innovative approach to the problem but arguably could go further in some respects.

1.232 This is outside the scope of this paper but should form a basis for your future criminal law work. The quote from para. 2.24 of the full paper, below, illustrates that the links are equally obvious to your team.

1.233 After hopefully these Law Commission proposals are implemented the Government should ask the Commission to prepare a similar report on the over use of criminal law against individuals. Better enforcement of the law is needed, not more law. Similar principles should be developed for individual, non-business liability as well. I said earlier it is impossible to disagree with the argument that vitally important "is the introduction of rationality and principle into the creation of criminal offences". That must apply to both regulatory and general criminal law.

16 Here is one comparison on the final point. Liverpool LL.M researcher and health and safety expert John Anderson has noted that in Denmark there are less onerous health and safety requirements for small businesses and more rigorous ones for big companies.

1.234 While for many arguments in this paper I would apply the same principles to individuals I would not do that in relation to proposal 3. That is because of the large degree of nuisance and detriment to peoples quality of life caused by low level harm. I agree with the Commission that "Criminal sanctions should only be used to tackle serious wrongdoing" in these business related areas but (and the Commission do not argue this) it cannot be inferred about individuals that the cost of prosecution as against any fine levied should be an overriding concern. Non criminal penalties can be very useful at dealing with low level problems. RIPA may not be appropriate but people do want councils to tackle dog fouling and dumping of rubbish or benefit fraud. Penalty notices can help the police tackle nuisance behaviour but with both of these areas adequate safeguards are needed. My research suggests that the police may be giving penalty notices for disorder out when no offence has been committed that could be proved in court for example. Heavy handed use of laws (whether RIPA intrusive surveillance or anti-terrorist stop and search powers) needs to be reined in as has been promised.

Michael Jefferson, University of Sheffield

1.235 This wide-ranging and cross-cutting Paper seeks to restrain the deployment of regulatory criminal law. It is well worth reading, as are the three Appendices by various professors including Celia Wells, the UK's foremost expert on corporate criminal liability; appendix A by Prof. Black seeks to deal with the policy choice among civil, criminal and administrative sanctions and this should prove very useful to readers and policy-makers.

1.236 The Paper's highlights are these proposals, some of which are stunning.

1.237 Criminal law should be used as a last resort and only for serious violations of business regulations. Instead there should be a pyramid of sanctions, with the replacement of low-level criminal law (which would be repealed) with a 'toolkit' of 'civil penalties', a term which strikes some as strange, to say the least. Agencies which use criminal sanctions should be subject to a common set of principles to be employed before they consider using criminal law for those serious infringements. 'Our overarching theme is that the criminal law is too often used in instances where a non-criminal civil penalty, or other non-criminal measure, would better fit the regulatory context and would be fairer to those subject to regulation.' (para. 3.2)

1.238 The Commission also rejects creating a category separate from civil and criminal law, that of 'administrative offences' such as exists in Germany and France. While there are already some such offences e.g. in relation to parking, the Commission thinks that the practical difficulties of establishing such a scheme are too difficult: Art 6 of the European Convention on Human Rights would have to be complied with if the issue fell within 'criminal' matters as defined by case law; distinguishing which offences fit within the concept of administrative offences and which do not will lead to lengthy arguments; and (para. 3.34) '... there is a risk that, for reasons of political or bureaucratic expediency, conduct which ought to be regarded as truly criminal will be classified as merely administrative', the Commission instancing money laundering in German law, which to UK criminal lawyers is weirdly classified as an administrative offence, not a truly criminal one.

1.239 Criminal law should be made and amended only by primary legislation. This is the most surprising proposal (from what might be called a non-specifically substantive criminal law viewpoint).

1.240 Criminal law in the regulatory context should be restricted to offences with mental elements such as 'knowingly' or 'recklessly'. Strict offences would not in the future exist in this area of law without Parliament's express drafting, and they would 'fade into the background' (para. 4.3). The Commission criticises the current state of the law of strict liability including the difficulty in predicting when the 'presumption of fault', a perhaps strange term meaning the presumption that courts will read in a requirement that fault must be proved. Criminal proceedings for simple failure to provide information should not exist; instead there should be 'civil penalties'.

1.241 However, there should be a defence of due diligence to all offences which do not require proof of wrongful conduct, with the possible exception of road traffic offences: Part 6 of the Paper. The burden of proof should be on the accused but the standard of proof would be the civil law one. The institution of a due diligence defence would obviate the need to consider whether the presumption of fault applies. The proposal for the burden of proof may be criticised but in fact the placing of the onus was part of the terms of reference: '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'.

1.242 The 'antiquated' (para. 1.88) doctrine of delegation in vicarious liability should be abolished. The Commission (para. 1.89) provides the following 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. (footnote omitted)

1.243 The doctrine applies even though the licensee has specifically prohibited the employed manager from doing as she did: see *Allen v Whitehead* [1930] 1 KB 211 (DC). If there is a need for liability on such facts, the crime should be one failing to prevent the offence being committed, which more fairly represents the accused's wrongdoing than does the current doctrine of delegation.

1.244 The identification doctrine in corporate liability is critiqued: '... 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' (para. 1.65, footnote omitted). It is recommended that the statutory interpretation approach of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC on appeal from New Zealand) should be adopted as the default setting but of course Parliament can ordain differently. Individually tailored statutes such as the Corporate Manslaughter and Corporate Homicide Act 2007 may be the way ahead and such solutions can get round the difficulties found in the identification doctrine: see Part 5 of the Paper.

1.245 There should be an offence of 'negligently failing to prevent a crime' when a company commits an offence and an individual director or equivalent officer does not prevent the company from committing that offence. This recommendation is subject to the withdrawal of criminal law in this respect: where, however, statutes provide for liability of individuals for the offence which the company provides and the individual did not consent to or connive in the offence, that liability should no longer exist because it is 'unfair' (para. 1.86). The recommendation is tentative and will come into play only if consultees believe it is needed after the withdrawal of individual liability as stated above.

1.246 Criminal laws should not be drafted in the inchoate mode when there already are offences of assisting, encouraging, conspiracy and attempt. Drafting offences in the inchoate mode (e.g. preparing to commit terrorism) should be eschewed because Parliament legislates against the background of inchoate offences (e.g. creating the crime of terrorism automatically creates the offence of attempted terrorism; if one has an offence of preparing to commit terrorism, one automatically creates an offence of attempting to prepare to commit terrorism). Such offences are too far removed from the core crime (here, terrorism). Similarly, there should be no additional offences of fraud if the Fraud Act 2006 already covers the misconduct. That statute has a maximum sentence of ten years' imprisonment: there is simply no need for other fraud offences with lesser maximum penalties.

1.247 One effect of the proposals is a new balance between civil and criminal law: the former in regulatory situations should be considered first; criminal law is to be used only when civil law does not aid in the enforcement of standards.

1.248 The matters covered by the Paper are highly important. As the Commission notes (para. 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.

1.249 '[M]illions of people and thousands of businesses' are covered. However, as the National Commission on Reform of the Federal Criminal Law pointed out as long ago as 1970 in the USA, penal regulation of companies has created 'hundreds of thousands of legal commands and prohibitions, violation of which may incur criminal liability' (1 Working Papers 403, quoted in L. Orland, *Reflections on corporate crime: Law in search of theory and scholarship* (1980) 17 Am Crim LR 501, 502). And as in the USA the law is 'vast and disorganized' (H. Packer, *The limits of the criminal sanction*, Stanford University Press, 1968, a book which remains essential reading). The Consultation Paper seeks to rationalise the law.

1.250 This piece concentrates on the first bullet point above.

1.251 Background to the Consultation Paper: There are four underlying developments which lead direct to the Paper. First is the growth of the number of crimes since 1997, and the Commission has great fun with statistics to illustrate the increase. Second is the push towards lighter regulation of companies with a move towards widening the range of penalties. Third is the return to the idea that criminal law has to have a moral basis, and linked with that and the previous principle is fourthly the notion that business regulation should use criminal law as a last resort. These themes are now briefly discussed.

1.252 The increase in the number of offences: '... 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 all the offences prior to that.' (para. 1.17) This statement is somewhat misleading because repealed statutes are not included in the volumes but nevertheless the point is well taken. It is thought that something like 3,000 offences were created in the Blair/Brown era, making the total number of offences around 11,000. So some 35 or 40% of crimes were created just between 1997 and 2010. The Law Commission asks itself the simple question: is there too much criminal law? And it answers just as simply 'Yes' (para. 3.1). However, the matter is not one of numbers such as: 'Let's repeal 25% of all offences'; it is instead one of policy. Fair labelling may require the separation of murder from manslaughter, the separation of rape from other sexual offences or from non-fatal offences or both, even though there *could* be one offence of homicide, one of sexual assault or one of non-consensual harm.

1.253 Decriminalising the regulation of businesses by reserving criminal law for serious wrongdoing: The final Report of the Professor Macrory, *Regulatory Justice: Making Sanctions Effective*, (2006) stated in para. 1.39 that this principle was outside the purview of his Report but that he considered that there was support for it. The Law Commission in para. 1.4 noted that its Paper may therefore be seen as unfinished business (para.1.3). Part of the terms of reference, as agreed among the Ministry of Justice, the Department for Business, Innovation and Skills, and the Law Commission was: '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.' This quote and the one above about the due diligence defence comprise the original terms of reference to which were added the 'consent and connivance' doctrine whereby directors or equivalent senior corporate officers are made criminally liable and the doctrines of identification in corporate liability and delegation in vicarious liability. One major criticism which jumps out at the reader is that the Commission vastly exceeded the terms of reference by proposing to excise the law-creating power from those Government departments!

1.254 The Commission does not really deal with law outside the business context. In other words, it reads 'especially' in the quote from the terms of reference as 'only'. There are therefore no proposals for say corporate liability in non-fatal offences, despite the fact that corporate liability is on the Commission's to-do list.

1.255 The *Macrory Report* had already led to the Regulatory Enforcement and Sanctions Act 2008, which had provided the toolkit of penalties mentioned above. The phrase 'civil penalties' is explained below, partly in the context of that statute.

1.256 The moral basis of the law of crime: Criminal law is about stigma (and official censure) following conviction and liability should be restricted to those involved in 'seriously reprehensible conduct' (para. 1.28). Therefore, criminal law should not be used as the primary means of promoting regulatory objectives' (same para.). The relationship between law and morals is a mammoth topic, but we can for the purposes of this update accept the proposition that criminal law 'involves a harm-related moral failing, not just a breach of a rule or simple departure from a standard.' (para. 4.6) If criminal law is used inappropriately, 'conviction may generate little stigma, little by way of deterrence may be achieved, and little by way of punishment may be justified. (para. 4.7) The effect is to undermine criminal law's efficacy. The Commission links morals and harm (or the risk of harm) to create a basis for creating criminal law and for restricting it to instances of morals and harm or risk of harm, though it notes that even then such conduct may be justified (para. 4.24).

1.257 Criminal law as a last resort: The Commission opines (para. 1.5) that '... 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.' Therefore, criminal law has a role to play in the regulation of business organisations but that role should be confined to the worst cases and criminal law should not be used in the first instance unless the facts are egregious. In particular, the Commission points to delay, cost and uncertainty in prosecutions (para. 1.6) as well as the inexperience of judges when sentencing organisations and the failure in many instances of criminal law to act as general deterrence or individual retribution. The Commission notes that regulatory enforcement is seeking not punishment but the improvement in standards. The criminal law is not of much assistance in raising performance levels.

1.258 The Commission refers to the fact that there are over 60 national regulators with the power to make criminal law as well as trading standards authorities and 486 local authorities. It instances DEFRA's (the Department for Environment, Food & Rural Affairs') Transmissible Spongiform Encephalopathies (no. 2) (Amendment) Regulations 2008 SI 2008/1180, which creates or consolidates 103 offences (para.1.22). Despite the numbers of regulators and the amount of criminal law, much of that law is simply not used – what a waste of drafting time!

1.259 These considerations lead to the Commission's recommendation at para. 1.29.

1.260 What are civil penalties? The Law Commission defines these in a somewhat hidden paragraph, 3.51: 'These are those penalties, orders and remedies that can be applied to someone without that application necessarily having to be decided through a hearing in a criminal court'. This is evidently not a pellucid definition and no bright line can be drawn using it: the definition permits some of the orders in criminal courts to be civil penalties despite the fact that non-criminal penalties are being invoked, an example being a parenting order. And of course the word 'penalty' itself invokes criminal law. It may be better to call these 'civil measures'. They include various notices such as stop, warning and remediation ones, fixed penalties and search and seizure powers. Sometimes as with fixed financial penalties, the difference from criminal sanctions may not be pellucid and if something called a 'civil penalty' attracts Art. 6 of the European Convention on Human Rights, then the law is a criminal one and the full panoply of protection including the presumption of innocence should and must apply. A civil penalty is 'likely to do as much as [low level criminal offences] to secure appropriate levels of punishment and deterrence.' (para. 1.30)

1.261 One reason for the plethora of criminal laws in areas of regulation is that until recently many regulators had no other dealing of dealing with infringements but after the Regulatory Enforcement and Sanctions Act 2008 there are now other penalties available such as fixed monetary penalties. The Commission seems to call these 'non-criminal measures' (para. 1.35) but they are in fact criminal ones, and do attract the full panoply of Art 6 protection, though the Commission's phrasing may be elliptical. The Commission notes that the Act provides for 'stop notices' and that the regulatory authority may negotiate an enforceable undertaking with the body and only if these are breached is criminal law invoked.

1.262 The present position: Using knife crime as an example, the Law Commission demonstrates how a strategy to reduce knife crime was rolled out under the previous government e.g. the maximum sentence for carrying a knife in a public place has doubled from two to four years (Violent Crime Reduction Act 2008, s 42); the minimum life sentence for murder where a knife has been used has increased from 18 to 25 years (Ministry of Justice, press release *25 Year Starting Point for Knife Killers*, 3 March 2010); school teachers were given the power to stop and search pupils for knives (s 45 of the 2008 Act); the age at which knives could be purchased was raised from 16 to 18 (s 43); and so on (see para. 2.21). This strategy the Commission called 'offence-led' and it noted that sometimes as perhaps with knife crime only such an approach might work; however, a different technique may be better in other areas. The Commission stressed that a non-offence led approach would not necessarily be cheaper than an offence-led one.

1.263 Regulation in the future: It should be first said that the Law Commission rejects having an 'administrative crime' system. The Commission is strongly of the opinion that criminal law should be used only where there is stigma: it should *not* be used simply to regulate behaviour. Linked with this thesis is the proposition that an offence should be regarded as criminal (and therefore subject to Art 6) if a conviction would stigmatise the offender and the offence. There is some loose language in the Consultation Paper (e.g. para 3.7 to 3.10, which can be read as speaking of civil offences!) but the intent is plain. There is to be fashioned a 'hierarchy of offences' (sic!) where 'civil penalties' deal with non-stigmatising behaviour and underpin criminal laws where the *mens rea* consists of subjective mental states such as intention and dishonesty and which is stigmatising; the worst cases are to be met with imprisonment. One major effect would be to sweep away minor regulatory offences.

1.264 This Paper is a Consultation Paper. In the normal run of things a Report would follow in due course. It may be, however, that there is a substantial amount of kite-flying here and some proposals such as that to take away the law-making powers of government departments may well come to nothing: it is just too easy for them to resort to criminal law. What is clear is that the Paper continues the procession of documents seeking to promote a 'hands-off' approach to the legal regulation of companies since the millennium and is in tune with governmental policies, especially the Conservative end of the Coalition spectrum.

Robin White, University of Dundee

1.265 This response addresses issues related to "civil penalties" only (including references in the "Review of Enforcement Techniques"), but not those related to corporate criminal responsibility or defences. It therefore considers some of the "Principles" enunciated (specifically Proposals 1-3, 7 & 9) and sections of the "Review" (chiefly paras A11-A,69), rather than the specific Questions.

1.266 It is consciously polemical, as it challenges much of the Consultation Paper at a fundamental level, and this style allows points to be made clearly, without risking confusion through standard academic caveats and qualifications.

1.267 It is noted that, while the Law Commission's original terms of reference were "To introduce rationality and principle into the structure of the criminal law ..." (para 1.1), the report which is described as the "genesis of the main project" undertaken (Macrory *Regulatory Justice: making sanctions effective*) referred to "the case for decriminalising certain offences" (paras 1.3, 1.4). There is an unresolved tension between these two statements: in brief, insofar as "decriminalising" simply means the re-labelling criminal offences as "civil penalties", it introduces further confusion, and risks producing ECHR incompatibility, rather than achieving "rationality and principle".

1.268 This unresolved tension expresses itself in several specific ways.

1.269 The Proposals considered in this response appear, with respect, to flow from (i) a somewhat insufficient and confused analysis, (ii) failure to properly consider the requirements of the ECHR; and (iii) a form of "agency capture".

1.270 (i) insufficient and confused analysis

1.271 It seems from Proposals 1-3 that:

(1) the terms "criminal" and "civil" are not properly defined;

(2) the test of what is "criminal" purportedly applied is unsupportable; and

(3) there is inconsistent thinking on the purpose of the sanction.

1.272 Thus, Proposals 1 and 2, read together, literally mean that any crime or offence for which a first offender is unlikely to be sent to prison for a first offence, or subject to a very large fine, should not be criminal at all. Since hardly anybody is sent to prison, or fined very heavily, for a first conviction for the classic "*mala in se*" offences of assault or theft, it would follow that, according to these Proposals, assault and theft should not be "criminal" either.

1.273 Proposal 3 compounds the problem by referring to "low-level criminal offences", which plainly should not be criminal according to Proposals 1 and 2, as undeserving of the "stigma associated with criminal conviction" because insufficiently "seriously reprehensible conduct". Despite this, seemingly inconsistently, it considers that they merit penalties which are retributive ("punishment") and/or deterrent. Can retribution and/or deterrence be imposed without stigma? (The significance of retribution and/or deterrence is also returned to in relation to the ECHR).

1.274 Moreover, in the "Review" which underpins the Proposals, there is inconsistency in the view as to how regulatory offences are to be regarded. On the one hand, para A.21(1) of the "Review" (concretised in the implication in Proposals 1-3 that "low-level crime" does not deserve the "stigma" of crime) plainly asserts that crime is too harsh a categorisation ("disproportionate") for "regulatory breach".

1.275 On the other, the immediately following para, A.21(2), asserts that the problem is that “regulatory offences” are not treated harshly enough (“undermin[ing] the signals of moral condemnation”, that is, failing to impose a stigma). This is reinforced by the assertion in para A.21(11) that “low fines” “trivialise the offence and remove any sense of moral [dis?]approbation”, and by the approbatory reference in para A.38 to the FSA’s “highest fine, £17m”.

1.276 These conclusions on Proposals 1-3 must cast doubt on the rigour of the general analysis.

1.277 In any case, as the paragraphs of the “Review” quoted above show, much of the criticism of the use of criminal law in regulation seems to boil down to sentencing policy, rather than categorisation of the conduct in question as criminal or otherwise, and is thus a matter for the Sentencing Council rather than re-organisation of the criminal law.

1.278 This somewhat insufficient and confused analysis in the Consultation Paper nevertheless means that, in the result, it appears to be recommending merely re-branding existing criminal offences as “civil penalties”.

1.279 (ii) failure to properly consider the requirements of the ECHR

1.280 The reference in Proposal 7 to more use being made of “process fairness to increase confidence in the criminal justice system” seems positively misleading, since para 1.47 makes it clear that this refers not to strengthening criminal procedures, but rather to “clearer duties on regulatory authorities to warn offenders .... that sanctions ... may be imposed upon them”,. Indeed, the role of the criminal justice system is reduced to “the power to stay ... criminal proceedings if ... the requirements of process fairness have not been met ...”, that is, a plea in bar of trial.

1.281 Equally, the reference in Proposal 9 to “unfettered recourse to the courts” seems positively perverse, for the whole thrust of the “civil penalties” Proposals is to fetter such recourse. This is the case, even though para 1.51 admits that “fair procedure” is a matter of “constitutional and European obligation” (seemingly a reluctant reference to the ECHR rather than EU law) and “doubt[s] whether it is in all instances likely to prove adequately fair ... for the regulatory authorities to seek to restrict appeals”.

1.282 These conclusions are reinforced by reference in paras 1.35-1.37 to the Regulatory Reform and Sanctions Act 2008, ss39 and 46. This reference makes it clear by implication that this is the form of “civil penalty (or other measure)” envisaged. However, in proceedings under these provisions:

> the burden of proof is reversed; and
>
> there is no right to trial, only to make representations and to appeal the imposition of a penalty after it has been imposed.

1.283 Effectively, this renders a governmental body prosecutor, judge and sentence.

1.284 In turn, this raises directly the question of ECHR compliance, barely touched upon in the Consultation Paper, although one of its Articles is clearly relevant, and there are relevant cases on it. In brief, firstly, it seems clear from *Engel and Others v Netherlands* (1976) A22, (1979-80) 1 EHRR 647, that "criminal charge" in Article 6 has an autonomous meaning. Thus, states cannot unilaterally decide what is a "criminal charge" for this purpose, and what is not. The test laid down of what is a "criminal charge" therefore largely discounts domestic classification, and depends chiefly upon two factors, that is, "the very nature of the offence", and the severity of the penalty (*Engel*, para [82]).

1.285 Nor should this surprise, for it will be recalled that in *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310, at 324, Lord Atkin clearly defined "criminal" simply as an "act prohibited with penal consequences", explicitly eschewing "intuit[ive]" or other standards, and this definition was approved in *R (McCann) v Crown Court at Manchester* [2002] UKHL 39 where, at [20], Lord Steyn described it as "classic".

1.286 Secondly, it seems equally clear from *Öztürk v Germany* (A 73) (1984) 6 EHHR 409, that minor offences, not domestically classified as "criminal", and enforced by fines and not imprisonment had, in *Engel* terms, an essentially criminal nature, so invoking Article 6(2) and (3). (Incidentally, on the facts, Article 6(3) was found to have been breached).

1.287 These conclusions have been frequently approved in other ECtHR cases and, moreover, applied by UK courts. An example in the UK is *International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158, in which the "civil penalty" in question was that in relation to carriers' liability for clandestine entrants, under the Immigration and Asylum Act 1999 ss32-39. In the House of Lords Second Reading, the Minister had boldly asserted that "As it is a civil penalty the normal requirements in relation to fair trials and so forth do not apply" (see HL Deb, vol 604, col 164). This assertion is worth noting, as the Court of Appeal demonstrated its complete inaccuracy. By a majority explicitly applying the *Engel/ Öztürk* criteria, the Court decided that the provision was a "criminal charge" in terms of Article 6, because it was essentially an alternative to an existing criminal offence, and had a punitive and deterrent penalty (*Roth*, at [33]-[38] and[164]-[172]). It will be recalled that the Consultation Paper concedes that even "low-level criminal offences" attract retributive and/or deterrent penalties.

1.288 Further, the Court decided that the provision actually breached Article 6. It was unfair as it involved a reversal of the burden of proof, prejudicing the presumption of innocence (*per* Jonathan Parker LJ, who was also concerned that role of the courts was "limited to the provision of the mechanism for recovery"), and a fixed penalty without possible mitigation, and enforcement provisions which were disproportionate (*per* both Jonathan Parker LJ and Simon Brown LJ: *Roth*, at [35]-[47], [150]-[170], [174]-[179] and [184]-[189]).

1.289 (It is to be noted that the Government response to Roth was to redraft the provision, which now appears in the Nationality, Immigration and Asylum Act 2002, Sch 8. As, while it permits mitigation of penalties, the new provision preserves the reversed burden of proof, liability decided by the Secretary of State, substantial penalties, and little modified enforcement provisions, it seems likely that it remains in breach of Article 6.)

1.290 Another UK example of application of the *Engel/ Öztürk* criteria is *Han and Another v Customs and Excise Commissioners* [2001] EWCA 1048, concerning "civil penalties" in relation to VAT and betting duty (then under the VAT Act 1994, s60(1) and Finance Act 1994, s8). The decision concerned only the preliminary issue of whether these "civil penalties" were "criminal charges" in terms of Article 6 or not. The Court of Appeal again, by a majority, on *Engel/ Öztürk* criteria, decided that they did. Potter LJ, noting "the clear state of the Strasbourg case law", was persuaded that this was the case where there was an intention to punish and deter, and the "civil penalty" provision simply creating "an alternative regime" to the normal criminal law, concluding that "a substantial financial penalty … imposed by way of punishment and deterrence will suffice" (*Han*, at [67] and [75]). It will again be recalled that the Consultation Paper concedes that even "low-level criminal offences" attract retributive and/or deterrent penalties.

1.291 The VAT provision has now been replaced by Finance Act 2007, s97, Sch 24, para 1, but as the new provision retains the essentials of the old, once again there is no reason to think the Court would reach a different decision on the matter.

1.292 Overall, therefore, what amounts to recommending merely re-branding existing criminal offences falls foul of the fact that such "civil penalties" appear to remain "criminal charges" in terms of Article 6(1), and examples are quite possibly in breach of Article 6(2) or, indeed, the Article as a whole.

1.293 (iii) a form of "agency capture".

1.294 The harsh analysis above begs the question of why the suggested insufficiency and confusion, and failure to properly consider the requirements of the ECHR, have occurred. The answer seems to lie in a form of "agency capture".

1.295 This conclusion flows from consideration of Proposal 1. Despite this Proposal being the first and seemingly over-arching one, para 1.31 concedes that it is not actually the starting point of the other Proposals at all, but is "really in the nature of a conclusion that follows from our other recommendations". What, then, was the real starting point of the Proposals?

1.296 The real starting point seems to be Appendix A, the "Review of Enforcement Techniques". This (like most of the legal literature on regulation) gives a very regulator-friendly view of regulation. Therefore, not only does it cast no critical eye on the concept of "civil penalties", is effectively promotional.

1.297 This is clear from several passages. For example, para A.2 refers to "deliberate ... separat[ion of] the discussion of the type of sanction that can be used from the legal status that sanction has". What this slightly obscure sentence seems to mean is that discussion of offences (however named) can take place without considering criminal procedure, and that the ECHR can be ignored. In other words, retributive and deterrent penalties can be discussed without involving any questions concerning the protections for against the wrongful imposition of such penalties (such as the presumption of innocence) which are provided by criminal procedure in particular and Article 6 in general.

1.298 By this means, proposals according to which a governmental agency is both prosecutor, judge and sentence, can be discussed without discomfort

1.299 Another example is in para A.21(8), where “procedural requirements”, in other words the law of criminal procedure, are not seen among the “Advantages of criminal sanction”, but among the “Disadvantages ...”, simply “discourag[ing] prosecution”. Removal of protections for the accused against wrongful conviction is seen as a good thing.

1.300 These examples seem to flow, in turn, from the general tendency to assume that “better regulation” means “less regulation”, an assumption that recent events in the financial markets ought to dislodge. Thus, “the introduction of rationality and principle in the creation of criminal offences” is taken to encompass “whether much more use should be made of other, more cost effective, efficient and ultimately fairer ways of seeking to achieve that goal” (para 1.13).

1.301 This tendency generates the “toolkit” approach found in much of the “regulation” literature, which assumes that there is no moral dimension to “regulation” (“more cost effective [and] efficient”: “fairer” is disposed of by the modifier “ultimately”). Thus, there is no need to protect the accused from unfair procedures, and consequently avoidance (if not evasion) of Article 6 is appropriate.

1.302 These examples also seem to flow from the parallel assumption that “regulation” is different from criminal law. The former is said to concern “developing and enforcing standards of conduct in a specialised area” (para 1.9) rather than “improvement in standards of behaviour by the public at large” (para 1.11). This may be conceded, but is a distinction without a difference. Why should “standards of conduct in a specialised area” be treated differently “standards of behaviour by the public at large”?

1.303 Indeed, it might be speculated that the distinction between penalty and tax is being blurred, so that regulators can seek optimal compliance, like tax authorities, and ignore the fact that they are enforcing prohibitions by applying sanctions (which, as the FSA example given indicates, may be large).

Chamber of Shipping

1.304 The Chamber broadly welcomes the proposals setting out the case for reducing the scope for criminal law to be used in regulated areas. The principles suggested would help to restore the increasingly blurred distinction between criminality as an act of moral wrongdoing and actions or errors which breach a rule or requirement but are not morally reprehensible.

1.305 We note the reservations expressed in Chapter 3 about the potential overlap and the sometimes less than obvious distinction between what is and what is not “truly criminal”. Nevertheless, the increasing trend towards the use of criminal sanctions to achieve bureaucratic or administrative ends can all too easily result in a criminal record, with all its attendant implications, for a breach, oversight or negligence. The suggested greater initial use of sanctions, such as stop notices and enforcement undertakings (and perhaps other forms of encouragement for delayed or non-submission of official returns) and, finally, the imposition of a fixed regulatory penalty would not detract from the importance of compliance. It would, however, represent a more proportionate response while criminal penalties should properly be reserved for activities which breach or offend the moral code.

Judges of the Court of Session

1.306 The paper refers to the law of England and Wales, and in certain areas comments and suggestions are made which are clearly applicable only to that jurisdiction and not to Scotland, for example reference to the Fraud Act 2006. However the matters which are covered by regulatory law include many which are reserved, such as health and safety legislation and consumer protection legislation. Thus there is an interest in this paper for Scots law.

Scotch Whisky Association

1.307 The SWA intends to comment primarily on a limited part of the consultation, namely the general proposition to decriminalise many regulatory offences. In particular, the SWA is very concerned that the laws governing the production and sale of Scotch Whisky should continue to include the possibility of criminal penalties. The SWA is proceeding here on the basis that the Scotch Whisky law in question would be regarded in this context as “regulatory", and is concerned that a 'one size fits all' approach should not be taken to decriminalising regulatory offences (as considered in paragraph 3.16 of the consultation paper).

1.308 Scotch Whisky has being defined in UK law since 1933. Recently, at the request of the industry, DEFRA introduced updated legislation, namely the Scotch Whisky Regulations 2009 (SWR). During the development of this legislation, the Ministry of Justice proposed that the penalties for breach of the SWR should be limited to improvement notices seeking compliance, and penalty notices, the amount which would be limited to between £1,000 and £4,000. The SWA argued strongly that limiting the tools available to enforcement authorities to such minor administrative measures was entirely inadequate for the purposes of ensuring compliance with the SWR, that this approach conflicted with eminently sensible recommendations made in various Reports prepared for the Government, and was contrary to the EU harmonisation of laws protecting IP rights and in particular geographical indications.

1.309 The SWA was therefore pleased when HMG agreed that criminal sanctions should be available to enforcement authorities as one of the range of enforcement measures available to them, depending on the circumstances of the case.

GOVERNMENT POLICY

1.310 The Hampton Report stated:-

> In designing regulation, and contemplating the inspection and penalty regimes that will need to be set up, regulators or policy staff in Departments should aim to devise regulations which, through their incentive structures, point towards self-enforcement. For example, if a regulation is hard to understand, poorly publicised, and the penalty for non-compliance is trivial, only the most determined business - assuming they know about it - will ever comply with it. If a regulation is clearly drafted and well publicised, with self-monitoring routines that fit with day-to-day business practice, and if checks on enforcement are known to happen from time to time, with condign punishments for non-compliance, then the regulation will, broadly speaking, be enforced of itself.

1.311 The Hampton Report recommended the use of a process, developed in the Netherlands, called the Table of Eleven, which identified eleven factors which enforcement regimes should take into account. The "chance of sanctions" and "the severity of sanctions", are two of those factors and are identified as tools which increase the likelihood of compliance.

1.312 The Hampton Report recommended that "administrative penalties should be introduced as an extra tool for all regulators…" (emphasis added). The SWA entirely agrees with that recommendation but notes that, by stating that administrative penalties should be made available as an "extra" tool, the Report anticipated that administrative penalties would be used in conjunction with other pre-existing remedies, such as criminal prosecution.

1.313 The Hampton Report stated, with regard to "penalty regimes", that:-

> Business and regulators have an interest in proper sanctions against illegal activity in order to prevent businesses operating outside the law from gaining a competitive advantage. At present, regulatory penalties do not take the economic value of a breach into consideration and it is quite often in a business' interest to pay the fine rather than comply.

1.314 Of course, making available a criminal sanction does not mean that the enforcement authority has to take criminal proceedings if, for example, the offender is a first time offender or the breach is not serious. The important thing is that the enforcement authority has a range of sanctions available to meet the circumstances of the offence.

1.315 The Government stated in relation to the Consumer Protection from Unfair Trading Regulations 2008:-

> The Government's aim is to establish an enforcement regime that is capable of tackling rogue and unfair practices effectively while minimising burdens on legitimate businesses. The Government agrees with the findings of the Macrory Review that this can best be achieved by providing enforcers with a wide range of enforcement tools so that they can carry out an entire range of enforcement activities, from assisting compliance to prosecuting truly criminal or rogue operators.

"CONDIGN PUNISHMENT"

1.316 The Hampton Report recommended "condign punishment" where regulations are breached.

1.317 Spirit drinks in the EU are controlled by EC Regulation 110/2008, which imposes on Member States a requirement to "take the measures necessary to ensure compliance". Member States are to exercise those controls, including controls on geographical indications (GIs), in compliance with EC Regulation 882/2004. Article 55 of that Regulation requires that "sanctions provided for must be effective, proportionate and dissuasive". The SWA believes that an enforcement regime which is limited to minor administrative penalties cannot be described as "dissuasive" and will not meet the requirements of Regulation 882/2004, in view of the significant profits which can be made by those selling imitation Scotch Whisky (see below).

1.318 Furthermore, while provisions relating to criminal enforcement were not made compulsory by the EU IP Directive (Directive 2004/48), that option is clearly provided for in Article 16, and indeed paragraph (28) of the preamble to the Directive states:-

> In addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.

1.319 Account must be taken of EU law, and the approach taken in other EU member states, in view of the harmonisation of EU laws in this field. In Europe, misuse of GIs is regarded as a serious offence and in most countries constitutes a criminal offence. For example the French Consumer Code (L.115-16 to L.115-18) provides that misuse of an appellation of origin can be punished by up to 2 years imprisonment and/or a fine of €37,500.

1.320 The SWA is assuming that the Law Commission would regard the SWR as a "regulatory provision", and it is of course the case that it is a regulation governing the activities of business. However, any suggestion that, because it is a regulatory provision and governs the activities of business, the SWR is somehow a minor law, which should not include criminal offences, would be entirely misconceived.

THE SCALE OF THE PROBLEM

1.321 Owing to the success of Scotch Whisky (see the introductory paragraph), there is unfortunately very widespread counterfeiting of Scotch Whisky, and other forms of unfair competition against Scotch Whisky worldwide. At any one time the SWA may be involved in 70 legal actions in courts worldwide, numerous administrative complaints and hundreds of investigations which may lead to enforcement action. What we cannot know is what percentage of fake Scotch Whiskies we are managing to identify, i.e. how many counterfeits are missed. Even in cases which the SWA brings, it is frequently not possible to find out the number of infringing bottles which are sold. However, when the SWA last estimated the volume of imitation 'Scotch Whisky', which was the subject of legal actions by the SWA over a two year period, in the cases where quantities were known, they amounted to over 107 million bottles. It is therefore evident that fraudulent use of the GI Scotch Whisky is depriving Scotch Whisky producers and the UK economy of significant amounts of earnings. Weak controls on the misuse of the GI Scotch Whisky will simply encourage fraudulent operators and result in further lost sales, and indeed damage the reputation of Scotch Whisky, which will impact on future sales.

1.322 While it is the case that the majority of the SWA's protection work takes place abroad, both in the EU and in third countries, significant problems have also arisen from time to time in the UK, as the following examples illustrate -

GLENCARNIE and LOWLAND GLEN

1.323 In 2000 the SWA learnt of the distribution in the UK through 'bootleg' channels of the brands LOWLAND GLEN and GLENCARNIE. The brands were traced to a French company which proved to be the manufacturer. Documents recovered in a raid on that company indicated that it had sold nearly 2.5 million bottles of these products over a 2 year period to the UK through several UK distributors. The products in question were neither whisky nor Scotch Whisky, a fact of which the UK distributors were well aware. Under the enforcement measures proposed for the Scotch Whisky Regulations before the introduction of criminal sanctions, the UK distributors could only have been served with an improvement notice. Provided they complied, they would have pocketed the profits without any further penalty, notwithstanding the scale of the deception of consumers and the damage done to the reputation of Scotch Whisky.

RED BIRD

1.324 In 2002 UK Customs seized a shipment of RED BIRD "Scotch Whisky", containing several thousand bottles, being imported into the UK at Dover. A further seizure was later made at Newhaven. Analysis indicated that the contents were neither whisky nor Scotch Whisky.

1.325 Whether or not HMRC succeeded in identifying the UK importer, the SWA never obtained that information. However, it did trace the producer in Spain and criminal proceedings were raised in Spain for misuse of a geographical indication, which is a criminal offence under Spanish law. The individual concerned was fined and given a suspended prison sentence of 17 ½ months during which time he was disqualified from voting and prohibited from being involved in any way with the alcoholic drinks industry. He was also ordered to pay costs. In December 2006 the Spanish Supreme Court upheld this conviction. It would be surprising indeed if those found guilty of misusing the GI "Scotch Whisky" abroad were subject to much more serious penalties than those who misuse it in its country of origin.

SCOTCHED

1.326 This product was being sold by an English company based in Harrogate. The labelling involved the misuse of the indications "Scotch" and "Highland".

SIR EDWIN'S

1.327 In 2006 UK Customs seized 18,000 bottles of a product called SIR EDWIN'S, the labelling of which falsely suggested it was Scotch Whisky. The product had been produced in Holland and was neither whisky nor Scotch Whisky.

1.328 The sale of imitation Scotch Whisky can be an extremely profitable fraud. It will be noted above that 2.5 million bottles of GLENCARNIE and LOWLAND GLEN were sold in the UK over a 2 year period. However, a counterfeiter in Austria was found to have produced 15 million cans of fake Scotch Whisky for export to countries in the Middle East. Until it was accepted that the SWR should include criminal penalties, irrespective of the severity of the infringement, the profit made by the infringer, and indeed the number of times that the offender has infringed, the only remedy available to enforcement officers would have been to serve an improvement notice, hardly 'the punishment fits the crime'.

THE IMPACT OF UK LEGISLATION ABROAD

1.329 While the SWA appreciates that the Scotch Whisky Regulations are probably fairly unique in this regard, they provide the cornerstone for protection of Scotch Whisky worldwide. These Regulations are enforceable throughout all member states of the EU as the law governing the production and marketing of the GI Scotch Whisky. (In the same way, the French law relating to the production and marketing of Cognac would be enforceable in the UK.) Outside the EU, Scotch Whisky is protected as a GI under the WTO TRIPS Agreement. Once a local court, or enforcement officer, accepts that Scotch Whisky is a GI and must be protected as such, they will turn to UK legislation to see how Scotch Whisky must be produced and labelled. Furthermore, those countries which have implemented their obligations under WTO TRIPS by setting up a Register of GIs require that the UK law on Scotch Whisky be filed as part of any application to register "Scotch Whisky", and the UK law becomes part of the rules for the GI in that overseas country.

1.330 As a result, the Scotch Whisky Regulations are scrutinised in every country abroad where the Scotch Whisky Association takes legal action to protect Scotch Whisky. It would be damaging in the extreme if it became apparent to foreign countries that breach of the Scotch Whisky Regulations were penalised only by minor administrative remedies and could not be the subject of criminal prosecution.

1.331 For example, in the last two years in China, the SWA has been obliged to take action against well over 200 brands of counterfeit Scotch Whisky. In each case it has persuaded the enforcement authorities to take administrative action carrying out a raid and seizing infringing stocks. However, the SWA has been lobbying the Chinese Government for several years now to follow such administrative action by criminal prosecution of offenders, as otherwise they will simply set up a new plant in a new location. If the Chinese Government were to become aware, and they would do so, that the Scotch Whisky Regulations did not apply any criminal sanctions to those who misuse the description "Scotch Whisky", the prospects of persuading them to apply criminal sanctions to counterfeiters in China would be non-existent.

1.332 The SWA appreciates that the position in overseas countries would not normally be regarded as being relevant in a consultation such as that being undertaken by the Law Commission. However, the purpose of this review should take into account the interests of the UK as a whole and hopefully it is clear from the above examples that there would be a severe detriment to the UK were criminal sanctions to be removed from the Scotch Whisky Regulations.

THE RANGE OF SANCTIONS AVAILABLE

1.333 The SWA entirely agrees with the findings of the Hampton Report that a range of sanctions should be made available to enforcement authorities. Where a breach of a regulation is accidental or minor, then it may be entirely appropriate for the matter to be resolved by service of an improvement notice, which results in no sanction whatsoever on the offender if the breach is remedied. In other circumstances, it may be appropriate for an administrative penalty notice to be served imposing a minor fine. However, in cases where there is a deliberate breach of the SWR, or where significant profits are made through that breach, or where the offender has breached the SWR on occasions before, then it is entirely appropriate that criminal sanctions should be one of the remedies available to enforcement authorities.

1.334 It is noted that, at paragraph 3.2 of the consultation, it is stated that criminal sanctions are used too often where other remedies should be used. That, however, relates to the choice of sanction by the enforcement official and does not mean that a full range of sanctions should not be available. If it is the choice of sanction adopted by the enforcement authority which is at fault, that problem should not be remedied by removing the option of criminal sanctions; it should be remedied by appropriate training or guidance of enforcement officials.

1.335 Furthermore, to suggest that, because very few criminal prosecutions have been taken for breach of a particular regulation, means that criminal sanctions are not necessary seems to us to be a non-sequester. It may well be that the existence of criminal sanctions is precisely what has deterred breaches of the Regulations in question (see the first quote from the Hampton Report above) and it is the deterrent effect which results in few criminal prosecutions having to be taken. Furthermore, as noted above, although breaches of the Scotch Whisky Regulations will not be a frequent event in the UK, and usually involve spirits imported from other countries, the scale of the problem, and the profits which can be made by the infringer, justify the availability of criminal sanctions. The maximum administrative penalty which could be imposed would be nothing like the profits which can be made by selling fake Scotch Whisky and such penalties would simply be regarded as a cost of doing business by the offending companies.

Institute of Chartered Accountants of England and Wales (ICAEW)

NB ICAEW also submitted their response to the Government's consultation on guidance about commercial organisations preventing bribery their document, Business and Economic Crime in an International Context.

1.336 This project has the wholehearted support of ICAEW. As noted by the Law Commission, the criminal statute law has grown so fast and to such an extent that consistency and logic are almost impossible to maintain, particularly without common principles on which new legislation is prepared. This has a number of potential dangers which (though difficult to measure) are, we believe, already causing unnecessary harm to the rule of law and the operation of commerce and other private functions in the UK.

1.337 There are a number of ways in which we wonder if the project could be further improved, without adding unnecessarily to the extent and nature of the work to be done. For example through:

More explicit coverage of all corporate and other business crime, not just regulatory crime (including in the title of the project). The text of the consultation in fact does this, through the use in discussion of a number of generally applicable crimes, such as bribery. The conclusions and recommendations made by the Commission should not exclude such activities which should be treated consistently, whether or not the crimes are imposed in a regulatory or general context.

More consideration of the need to promote good governance and management of companies and other businesses. In law and in principle the whole management of companies is, and should be, delegated by the owners (shareholders) to the Board of Directors who thus have the core responsibility for the ethical and legal behaviour of all its employees and other agents. This responsibility could be undermined by enabling Boards (and the natural persons who are members of Boards) to escape their responsibilities by the inappropriately wide application of the "identification" or similar doctrines, This could reduce the effectiveness of control procedures set up and maintained by companies. It could also damage the governance of companies, by giving the impression that the general theory of corporate governance is inapplicable in the area of the control of legal risk arising from criminal activity.

Explicit consideration of the desirablity of promoting equivalent standards of behaviour under the law by differently constituted businesses. Criminal activities carried out by, or within, the business of a partnership, a sole trader with employees, a mutual society or any other business should be treated with an equivalent degree of severity and on a similar basis to one carried out by a company. For example, some sole traders can grow into quite substantial businesses, with similar issues of the need for the proprietor to introduce controls or systems as is the case with small or medium sized companies. For any business, there is a need to ensure that ultimate responsibility lies at the appropriate level of either the owner(s) or the most senior level to which the owners have delegated responsibility for the management of their business/company.

Consideration of how changes in the number and detail of regulatory criminal offences might affect other regulatory rules and enforcement provisions. It is our experience and belief that the introduction of an explicit criminal offence where there has not previously been one, together with a belief that it will be enforced, concentrates the mind of Boards of Directors and other management and governing bodies, in a way that is difficult to duplicate in any other way. If a reduction in regulatory crimes leads to a need for even more alternative regulations and regulatory sanctions to try and compensate, this will add considerably to the costs borne by business. It may also lead to a strengthening of the adverse effect that high costs will be borne by compliant businesses, without effective sanctions being applied to those which do not.

M J Devaney

1.338 Agrees with all proposals. With regard to CP 5.107 and Appendix C, commends Australian model of corporate liability. Would be a more flexible and effective response to corporate crime, particularly if it were combined with US-style corporate compliance programme for establishing culpability and sentencing purposes. Pressing need for general offences of intentionally and recklessly endangering life. No such offence as attempted manslaughter but many people survive corporate disasters.

Kingsley Napley LLP

1.339 Response provided by the Criminal and Regulatory department: well-placed to provide a useful insight with respect o the practical operation and implications of the current law in the area of criminal liability in regulatory contexts. The department has strong and long-standing reputation as a leader in the field of complex financial crime prosecuted by bodies such as the SFO, OFT and the FSA.

Criminal Bar Association and Bar Council

1.340 Broadly welcome the aims of introducing rationality and principle into the use of the criminal law in the regulatory context. As a general proposition, the desirability of a reduction in the volume of criminal provisions, particularly those that are seldom used, is uncontroversial. The real difficulty comes with the method by which such laudable aims are to be achieved. It is against that background that we advert to a number of practical difficulties which we consider, in our experience of practice in this area, are likely to arise from some of the proposals.

The Pensions Regulator

1.341 Concerned about the proposed approach to bring about a general reduction in criminal offences in the regulatory context, particularly in relation to the occupational pension regulatory framework if such proposals were implemented.

PROPOSAL 1

QEB Hollis Whiteman Chambers, Justices' Clerks' Society, Care Quality Commission (CQC), Food and Drink Federation

1.342 Agree / support

Clifford Chance

1.343 Only serious reprehensible conduct should be tried in criminal courts (intention or at least recklessness). Sceptical as to whether it is correct to say that all criminal convictions necessarily carry a greater degree of stigma than other forms of censure (quoting Macrory at p16: "criminal convictions for regulatory non-compliance have lost their stigma"). Stigma more likely to attach to particular conduct rather than criminal conviction – criminal law may already have been over-used and resulted in diminution of the stigma (eg Public Procurement Regulations 2006 only treat as ineligible for public contracts those who have committed certain criminal offences, not all criminal offences.) Criminal law should not be used as primary means to promote regulatory objectives. Penal measures are a blunt and old-fashioned instrument inappropriate for much of the mass of complex laws that can be categorised as regulatory. It shouldn't be the primary role of a regulator to impose penalties whether to appear strong, to court favourable publicity or to avoid unfavourable comparisons with overseas regulators. Role of regulators should be educate, encourage and warn. Penalties should be last resort for persistent offenders (although accept that regulators should generally seek to eliminate any financial gain made from unlawful conduct insofar as that gain is not required to be paid by way of compensation to those who have suffered loss.)

The Law Society

1.344 We agree with this as a general proposition. We have long been concerned with the creep of the criminal law as a method of promoting regulatory objectives. We agree that the criminal law should only deal with those wrong-doers who properly deserve the stigma associated with a criminal conviction and the consequences which flow from this, because they have engaged in seriously reprehensible conduct. We believe also that it is not always necessary to use criminal law as the sanction for failure to meet a requirement imposed by a European Directive or Regulation.

OFT

1.345 We note the preference in the consultation for the use of non criminal measures, specifically a civil penalties regime such as that introduced by the RESA. We support the introduction of civil penalties to be available alongside powers of prosecution. (It should be noted that the civil penalties regime, as it currently exists, is dependent on the existence of underlying criminal offences as is the availability of such sanctions). These powers are not a complete substitute for criminal sanctions and should not be introduced as such.

1.346 The civil sanctions regime for consumer protection offences is untested and is intended to be piloted from April 2011 (the pilot is expected to empower the OFT and around 10 Trading Standards Departments and the Consumer Protection from Unfair Trading Regulations [CPRs] will be included within he legislation to be tested). As a result, we think it is inappropriate to pre-judge the results of this pilot by, for example, assuming these powers can effectively remove the need for criminal sanctions altogether. In fact the pilot as it is framed relies upon the continued existence of criminal sanctions to be used appropriately to complement and enhance the operation of the civil sanctions regime. Removal of criminal penalties ahead of the pilot of civil sanctions would be premature and risky.

RSPCA

1.347 In certain commercial situations and in a regulatory context, it may be appropriate to take the civil sanctions route first and foremost, however in relation to offences relating to animals under the AWA (the statute mainly used for prosecutions by the RSPCA) the primary enforcement mechanism should remain the criminal justice system. Such offences are unacceptable in a civilised society and a criminal conviction carries a stigma and a deterrent effect, which a civil sanction would not.

HSE

1.348 Heath and Safety legislation aims to regulate the activities of those who create risks, either through goal setting legislation under the HSWA or by prescribing specific steps that must be taken, as within certain Regulations. Duties are placed on those who are in a position to control the risks – employers, those in control of business premises, suppliers of substance and equipment, the self employed and workers. The general duties under HSWA apply to all workplaces. Regulations may be sector specific such as the Control of Major Accident Hazards or address a hazard across several sectors of activity, for example, working at height. They include risk to the public, for example, from poor standards of domestic gas installation in domestic premises, or failure to ensure gas appliances in rented accommodation receive a regular inspection b a competent person.

1.349 In considering what may be criminal conduct, we would argue that Health and Safety law meets the ‘stigma’ test. As the sentencing guidelines for Corporate Manslaughter and Health and Safety Offences causing Death explain, health and Safety offences ‘embrace a very wide spread of culpability from the minimal to the very grave’. There are factors that affect the seriousness of the offence including how foreseeable was the injury and how far short of the applicable standard the defendant fell as well as factors that aggravate and mitigate any offence. The consequences of error may be severe, for example, where management of nuclear installations or onshore chemical plants are concerned. In our view, it is seriously reprehensible conduct to put lives at risk, or allow a situation to arise that may result in serious harm to people’s health or safety, whether those likely to be affected are the public or employees. This would apply where the consequences of wrongdoing may be potential or actual, and meets the test given at CP 4.25.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.350 Support. Harm done or risked should involve risk of really serious consciences for public at large.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.351 These two proposals are drafted in terms of "wrongdoers" and "individuals" in a way that suggests that they are aimed at natural persons, rather than businesses. In that context we agree with the proposals. However, more consideration should be given to the application of these provisions in relation to regulatory and business crime.

1.352 The worst of regulatory or other legal provisions are those that are complex, onerous and expensive as applied by honest and conscientious businesses, but are ignored with impunity by those which are not. Such provisions are ineffective in the regulatory protection that they are aimed at providing, while simultaneously giving an unfair competitive advantage to those who are prepared to ignore them. Nevertheless, regulatory provisions can be difficult and expensive to enforce and despite the improvements introduced since the publication of Professor Macrory's Report and the passing of the Regulatory Enforcement and Sanctions Act we do not anticipate a fast progression to universally logical, consistent and very firm non-criminal enforcement of regulatory requirements. For this reason, we would not support the wholesale removal of criminal offences, which have been put in place to back non-criminal enforcement mechanisms, nor necessarily as widespread a reduction of them as may be implied by this proposal.

1.353 We do not think that the deterrence effect of the criminal law can be stated in the simple economic terms of likelihood of conviction times the severity of the punishment. Rather, we would agree with the statement made in paragraph 3.8 and implied elsewhere that one of the important effects of a criminal conviction is to create significant stigma. This is certainly the approach we would take to the application of our own professional disciplinary oversight, with a criminal conviction in a professional context leading to an automatic assumption of professional ethical misconduct, with the ultimate sanction of the removal of professional status and livelihood. We believe that this effect should be reinforced by the courts, with fines set at a level which reinforces the stigma by ensuring that it is reflected by the severity of the punishment imposed. Professor Black's formulation set out in paragraph A59 of the consultation, of fines being set in terms of a function of the benefit to the regulated firm of non-compliance and the probability of detection should be an absolute floor to the assessment of fines, not just an average. We acknowledge that this can sometimes lead to an inability to pay, followed by the insolvency of an individual or a company, but this is one of the outcomes anticipated by insolvency law and is not inappropriate in the circumstances.

1.354 If persistent and material non-compliance with regulatory requirements is not considered serious, then the appropriate response is to remove the regulatory provisions in their entirety, not just to decriminalise them.

Trading Standards South East Ltd

1.355 TSSE disagrees with this proposal. It is subjective in nature, yet, does not define what is 'seriously reprehensible conduct'. It also, incorrectly in the view of TSSE, indicates that criminal prosecution is viewed as the primary means of promoting regulatory objectives. It is self evident from looking at published enforcement policies, that criminal prosecution is not the primary means of promoting regulatory compliance. To illustrate, the following is an extract from the published enforcement policy of Hampshire County Council Trading Standards Service:

> We always strive to use advice as the main method of ensuring that businesses comply with legal requirements. We will inspect business premises, test products, and make test purchases where appropriate; give talks to consumer and business groups, and publish a range of leaflets.

1.356 TSSE also notes that the consultation paper takes no account of any other type of enforcement action undertaken by local authority Trading Standards Services, such as undertakings and Enforcement Orders in the civil courts by virtue of the Enterprise Act 2002.

1.357 TSSE feels that the vast majority of the proposals in this consultation paper will serve no useful purpose in the field of consumer protection. TSSE feel that the proposals do not adequately consider the position of the consumer. Businesses exist to make money and they can only do that if they have a 'consumer' to which they sell goods or provide services. The interests of the consumer, therefore, must be preserved in any such consultation exercise.

1.358 TSSE, as a result, is not able to support the proposals as they currently stand. TSSE also maintains that should the criminal law in the regulatory context be amended as a result of this consultation exercise, then it must be done in such a way that affords the greatest possible consumer protection and provides local authority Trading Standards Services with the appropriate enforcement tools to do the job with which they are tasked.

Chamber of Shipping

1.359 As explained in detail in our introduction, we support the proposition that criminal law should be employed to deal with wrong doers who have engaged in seriously reprehensible conduct. It should not be a primary means of promoting regulatory objectives.

Local Government Regulation (LGR)

1.360 LG Regulation broadly welcomes proposals to provide regulators with a wider choice of means to achieve compliance with regulatory law through the addition of civil law sanctions. As local regulators we already persuaded that civil sanctions can be a very effective method to deliver regulatory objectives in many cases. This is certainly the case where, if there is a business involved, it is willing to comply, and often the case where the business is reluctant to comply but susceptible to persuasion in the form of public reprimand or by way of private financial or other penalties. Therefore superficially, this proposal appears attractive. However amongst other things, it does not elaborate on what would be considered to be "seriously reprehensible conduct". Without an indication of what is meant here, it is difficult to give a fully reasoned response to this proposal. It also does not address the issue of what sanctions would be available for those who refuse to comply with a notice or a fixed penalty request. This would we assume place them firmly back into the realms of criminal offences? Therefore there needs to be a clear and unequivocal link with this being a two stage process, the first civil and administrative, the second, criminal with the accordant sanctions.

1.361 It also ignores the place that prosecution has within the regulatory tool kit and the context in which offences may be committed. For example if minor offences were de-criminalised and hence the stigma of a criminal conviction removed, a person or business may consider that it would be more cost effective to continue to offend albeit in a minor way and pay the administrative penalties resulting rather than to change their conduct to avoid offending. This would then effectively become a cost of doing business. This may well have the effect of undermining consumer protection and lead to lower levels of compliance with regulatory law. How would a business's previous conduct in respect of this or other regulatory requirements be taken into account? How would wider societal impacts be considered when identifying 'seriously reprehensible conduct', for example the consequences of allowing illegal sales of cigarettes or alcohol?

1.362 It further fails to take account of the fact that some offending such as the sale of counterfeit goods can generate significant financial gain for the offender which Trading Standards Authorities would look to recover under the Proceeds of Crime Act 2002. If these types of offending were caught in the above definition and de-criminalised then recovery of these monies would no longer be possible. For example a market trader who was convicted of selling items of counterfeit clothing who received a sentence of 100 hours unpaid work in the community, yet in the associated proceedings under the Proceeds of Crime Act 2002, was given a confiscation order in excess of £600,000.

1.363 Perhaps even more critically, it should be recognised that not all traders operate from fixed base and / or are easy to trace. We have significant concerns that a number of "itinerant" businesses may well be engaged in commercial fraud. It is hard to see how legislation which is intended to address such activities, which should be in criminal terms, could be written to avoid creating similar offences for any trader that breached them. Whilst it can be argued (and indeed the consultation paper does so) that such activity can be caught by the Fraud Act, we have serious reservations about the sole use of this legislation. We consider that the sort of traders that we see on programmes like "Rogue Traders" – the here today and gone tomorrow traders – need specific criminal sanctions not only because they are appropriate to the "rip off" activities they undertake, but also because the whole infrastructure that supports practical investigative work, is geared to criminal offences. Data Protection Act exemptions, access to tracing telephone numbers (and incidentally controls on the potential excess of the investigation activities by local regulators in phone number tracing or surveillance operations, under RIPA) – none of these apply to "civil sanctions" investigations.

1.364 When considering whether to prosecute for offences there are already a number of checks and balances employed by Local Authorities. For example they will have regard to the Code for Crown Prosecutors and in particular apply the public interest test when considering prosecution. They will also have to have regard to their own published Enforcement Policies. We are not aware of any evidence that Local Authorities are misusing their ability to bring criminal proceedings for regulatory offences.

1.365 The regulatory framework in which Trading Standards enforcement staff operate has seen developments over the course of the past decade, with the introduction of the Enterprise Act 2002 and the more recent framework being proposed by the provisions contained within the Regulatory Enforcement and Sanctions Act 2008, or Consumer Protection From Unfair Trading Regulations (CPR's), which operate in conjunction with the Enterprise Act. These Regulations again provide a toolkit of sanctions, to deal with every trader from the small corner shop, to a large manufacturer or supermarket chain, and even those who use the business model as a means of conducting criminal activity which amounts to fraud. There is again a mix of criminal and civil sanctions so the regulator can select the appropriate action for the activity. Enforcement policies reflect these powers. These measures provide trading standards enforcers with a range of formal sanctions covering both criminal offences and civil remedies to address past, present and future conduct. From looking at even just a few enforcement policies of Local Authorities it can be seen that far from the impression given in the paper that criminal prosecution is regarded as the primary means of promoting regulatory objectives it is clearly evident that this is not the case.

1.366 To illustrate, the following is an extract from the published enforcement policy of one County Council Trading Standards Service: "We always strive to use advice as the main method of ensuring that businesses comply with legal requirements. We will inspect business premises, test products, and make test purchases where appropriate; give talks to consumer and business groups, and publish a range of leaflets."

1.367 The Environmental Protection Act is similar, in that the notice provisions, for instance for noise nuisance, provide a civil sanction, with a criminal offence in place for the breach. Release of information, for instance "scores on doors" for premises liable to inspection under the Food Safety Act is persuasive in bringing businesses to compliance as an alternative to traditional criminal sanctions. In "environmental permitting" risk ratings for the permit goes up and fees will then rise if there is non compliance, resulting in increased interventions from the regulator, such as more inspections.

1.368 In some of these cases, such as noise notices, the civil sanction would be ineffective without the criminal sanction for its breach. We believe that in many cases the criminal sanctions are effective in persuading businesses not only to comply with non criminal sanctions, but also in dealing with lower level breaches of criminal legislation – the fact that they are not used for every minor offence indicates that Local Authorities only use them in appropriate circumstances. The Regulators Compliance Code, as well as regulators' individual enforcement policies ensure that balanced decisions are made. Most legislation, quite rightly, contains appropriate "due diligence" defences which mean that the regulator must make find significant non-compliance issues before they can consider prosecuting. Added to this, LG Regulation's Home Authority Scheme means that businesses have access to advice on defences from local regulators. In addition the advent of Local Better Regulation Office (LBRO) and the Primary Authority Scheme means that businesses who want take advice have the legal right to receive it, to rely on it, and to challenge a regulator's decision to prosecute. Therefore we contend that the review has failed to appreciate the actual regulatory framework in which Local Authorities and trading standards in particular currently operate.

Judges of the Court of Session

1.369 We agree. The criminal law should be used in respect of those who flout regulation in such a way as to cause very serious harm. It may also be needed in respect of those who flout regulation persistently and it is needed for those involved in organised deception.

Financial Services and Markets Legislation City Liaison Group

1.370 We support this proposal; however, we recognise that deciding whether particular conduct is seriously reprehensible or not may sometimes be problematic.

1.371 We would note that where the FSA has the power either to commence a criminal prosecution for market abuse or impose a regulatory sanction, the factors that the FSA will consider in reaching its decision are set out in paragraph 12.8 of the FSA's Enforcement Guide. These factors include:

> (1) "the seriousness of the misconduct: if the misconduct is serious and prosecution is likely to result in a significant sentence, criminal prosecution may be more likely to be appropriate; […]
>
> (3) the extent and nature of the loss suffered: where the misconduct has resulted in substantial loss and/or loss has been suffered by a substantial number of victims, criminal prosecution may be more likely to be appropriate; […]

(6) whether there are grounds for believing that the misconduct is likely to be continued or repeated: if it appears that the misconduct may be continued or repeated and the imposition of a financial penalty is unlikely to deter further misconduct, a criminal prosecution may be more appropriate than a financial penalty; […]"

Leicester City Council

1.372 Agree. Prosecution is already last resort, Enforcement and prosecution policies are designed to ensure prosecution is only used in appropriate cases and in a consistent way.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.373 Broadly support subject to comments made below regarding the alternative mechanism of civil sanctions. However, detailed consideration would need to be given to individual strict liability offences which are often prosecuted in the absence of the conduct described above and whether it may be considered desirable for a criminal offence to exist in such circumstances.

City of London Law Society

1.374 We agree but we think there may be some difficulty in deciding, at least in some cases, whether conduct is seriously reprehensible or not. We agree criminal law should not be used as the primary means to promote regulatory objectives. We also believe that it is not always necessary to use criminal law as the sanction for failure to meet a requirement imposed by a European Directive or Regulation.

Nicky Padfield

1.375 Enormously welcome and overdue. Is it transparent that you are encouraging two categories of penalties and not three? Supports the idea of a separate system of administrative regulations, if these are what are already called civil penalties but would not support a threefold division: civil penalties, regulatory offences and criminal offences. Drawing the line between two categories is and will be difficult enough. We do not need more than civil regulatory penalties (already a quasi-criminal and punitive law?) and criminal offences.

The Institute of Employment Rights

1.376 We take issue with the characterisation of the relationship between 'stigma' and the criminalisation of corporate offending assumed by the Law Commission in this document. Corporate offending has *never* been treated in criminal law with the same degree of opprobrium as have offences by individuals (nor, in most cases, have the former attracted either social or political stigma). The reasons for this are entirely related to the historical development of the criminal law which has differentiated those offences.[1] We would therefore point out that it is the mode of the law in which those offences are placed (inchoate and strict forms of liability; differentiated enforcement mechanisms; and so on) that is significant in ensuring that they do not attract the stigma that other, 'mainstream' criminal offences attract. The question the Law Commission has raised, then, could be usefully reversed: *how might criminal law responses ensure that corporate offenders are properly stigmatized*? The importance of this question becomes clearer in the context of recent, empirical evidence on health and safety enforcement, below.

Kiron Reid, Liverpool Law School

1.377 Agree; this should be the starting presumption for both businesses and individuals. Some examples discussed in the paper about animal welfare, child safety, or trading with dictatorial regimes like Burma may pass this test initially.

Food Standards Agency

1.378 Criminal law isn't primary means of promoting regulatory reform in food sector although can be effective. Hierarchical approach to compliance and enforcement: enforcement officers normally start with informal advice; moving up the non-criminal sanctions; only serious cases are put before courts. There are other enforcement mechanisms and sentencing is properly a matter for the courts on a case-by-case basis. Because FSA focuses on risk rather than outcome, risk-taking (deliberate or through incompetence) can itself amount to seriously reprehensible conduct, even if no harm results. Persistent low-level risk-taking is also seriously reprehensible. Therefore proposals indicate a black-and-white certainty that gives the wrong picture.

Association of Chief Trading Standards Officers (ACTSO)

1.379 Strongly believe this proposal would undermine consumer protection and lead to lower levels of compliance with regulatory law. Any attempt to define conduct that would constitute "serious reprehensible conduct" would be complex to draft and would lead to greater uncertainty. How would businesses' previous conduct or other regulatory requirements be taken into account? How would wider societal impacts be considered eg consequences of allowing illegal sales of cigarettes or alcohol?

1 Wells, C. (2001) Corporations and Criminal Responsibility. Second Edition. Oxford: Clarendon; Norrie, A. (2001) Crime, Reason and History: a critical introduction to criminal law, 2nd ed. London: Butterworths.

1.380 Believes the aim of proposal is achieved through statutory Regulators Compliance Code and the application of openly available and binding enforcement policies adopted by local authorises. Trading Standards Services do not undertake criminal prosecution lightly. ACTSO concerned that currently what might be seen as prosecution for a minor infringement is actually part of activity to address wider and more significant harm (illustrated by example relating to Cancellation of Contracts Concluded at a Consumer's Home or Place or Work Regulations).

1.381 Use of civil sanctions creates difficulties for local Trading Standards Services which would need to be addressed to avoid aspects of regulatory law becoming irrelevant through lack of enforcement. ACTSO represents Heads of Trading Standards Services and is aware of challenges and difficulties faced by local Trading Standards Services when applying regulatory law to address issues that cause harm and loss to consumers and legitimate businesses.

1.382 Broadly welcomes proposals to provide regulators with wider choice of means to achieve compliance with regulatory law through addition of civil law sanctions but decision as to appropriate course of action to take in any particular circumstances should be left to regulatory body and should not be prescribed.

BBA

1.383 Particularly welcomes.

The Magistrates' Association

1.384 Agree but in case of repeated regulatory non-compliance (having due regard to the size of the business) it should be possible to impose criminal sanctions.

Legislative and Parliamentary Sub-Committee of the Association of Pension Lawyers (APL)

1.385 Agree. Under existing pension law, criminal sanctions can only be imposed in such circumstances (eg where employer sponsor fraudulently evades obligation to pay employee pension contributions) but not always the case.

MOJ

1.386 Criminal law should only be relied upon where conduct targeted is sufficiently serious to merit stigma of a criminal conviction.

Sheffield University LLB and Criminology Students

1.387 What behaviour should be seen as "seriously reprehensible" is highly subjective/ Given number and range of wrongdoings discusses, there is a genuine concern about consistency across contexts.

EEF: The Manufacturers' Organisation

1.388 The proposals are appropriate. At present the default positions adopted for all regulation appears to be a penalty in criminal law without consideration. Criminal sanctions are appropriate for some offences when the breach could result in serious harm and require a penalty to deter and punish. However, many technical offences, including failures to keep paperwork or to carry out administrative procedures are currently criminal matters. This is not the approach followed by many other EU member states when implementing EU directives and it can trivialise the criminal law.

Faculty of Advocates

1.389 Fundamental. At first reading, it is easy to agree. The proper scope of the criminal law is, however, a large subject about which there is no real consensus, either in academic analysis or in legislative practice. If it is a question which can be resolved at all, it seems unlikely that it can be done without running a risk of distortion in the regulator area. Ultimately in practice the use which is made of the criminal law is a matter of policy choice for Government and Parliament. (See comments to proposal 2).

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.390 The wording "seriously reprehensible conduct" deserves some consideration, and we will consider under proposal 2. It is difficult to argue against this proposal as a matter of aspiration, but practical experience and an understanding of what our local customers feel about the issues we deal with puts us in a position where we feel obliged to do so.

1.391 We are concerned with the assumption seemingly being made that there is little, if any, behaviour that could be deemed reprehensible falls within a regulatory framework. Surely society would think it reprehensible to endanger the lives of citizens by conduct that could lead to potentially life threatening food poisoning outbreaks, or to supply toys or electrical products that are so dangerous that they could endanger the lives of our children. We believe that people would find it reprehensible for businesses to mislead people about where their food comes from or about what is in it. If the writers had considered the public reaction to many of the cases brought by local authorities they would perhaps see that the public's view of what is "seriously reprehensible" can be very different from theirs.

1.392 As local regulators we are already persuaded that civil sanctions can be very effective for delivering regulatory objectives in many cases. This is certainly the case where the business involved is willing to comply and often the case where the business is reluctant but susceptible to persuasion, usually due to the risk of public reprimand, or private financial or other penalties.

1.393 Local regulators already (ie prior to the implementation of the RES Act provisions) have a range of tools available so that sanctions can be “stepped up” at each stage. They will advise businesses, warn businesses, require undertakings from businesses, etc. Where businesses resist, Trading Standards Services (TSS) have civil sanctions available via the Enterprise Act 2002, where orders in court can be obtained to require businesses to desist from particular forms of conduct: both civil and criminal. Because this is applied to community and specifically named domestic legislation, it allows criminal offences to be dealt with via the civil process in the civil courts with rights of appeal. This offers the regulator a range of options from which the most appropriate sanction can be selected, including eventually taking criminal proceedings whether for the original offence, or for contempt, or both. This process is wholly in line with the underlying suggestions in this consultation paper, albeit it retains the criminal stick where necessary.

1.394 The Consumer Protection from Unfair Trading Regulations 2008 (CPR’s) provide an excellent recent example of how criminal provisions dovetail with the civil processes found within the Enterprise Act. Regulators dealing with these provisions are provided with a toolkit of sanctions that are suitable for dealing with every type of trader from the small corner shop, to a large manufacturer or supermarket chain, and even those who use the business model as a means of conducting criminal activity amounting to fraud. The mix of criminal and civil sanctions allows the regulator to select the appropriate action for the activity targeted. The Environmental Protection Act 1990 is similar, in that the notice provisions, for instance for noise nuisance, provide a civil sanction for lesser non-compliance, with a criminal offence in place for the most persistent or serious breaches. The use of schemes like “Scores on Doors,” where premises liable to inspection under the Food Safety Act receive a published "star rating" for their performance in relation to food hygiene is persuasive in bringing businesses to compliance as an alternative to traditional criminal sanctions. In the environmental permitting regime under the Environmental Permitting (England and Wales) Regulations 2010, if the risk ratings for the permit go up due to non-compliance, the fees rise accordingly as does the frequency of intervention from the regulator, such as more inspections. This pushes permit holders to get things right, limiting the cost of the permit and the perceived inconvenience of inspection. Local authority enforcement policies reflect the opportunity that these powers offer.

1.395 In some of these cases, such as noise notices, the civil sanction would be ineffective without the criminal sanction for its breach. We believe that in many cases the criminal sanctions are effective in persuading businesses not only to comply with non-criminal sanctions, but also in dealing with lower level breaches of criminal legislation. The fact that criminal sanctions are not used for every minor offence indicates that local authorities only use them in appropriate circumstances. The Regulators Compliance Code, the Enforcement Concordat and regulators' individual enforcement policies ensure that balanced decisions are made. Where criminal proceedings are contemplated, the Code for Crown Prosecutors will also be used to help determine the most appropriate action. Most legislation, quite rightly, contains appropriate "due diligence" defences which means that the regulator must find significant non-compliance issues before they can consider prosecuting. Added to this, Local Government Regulation's (LGR's) Home Authority Scheme means that businesses have access to advice on defences from local authority regulators, and the advent of Local Better Regulation Office's (LBRO) Primary Authority Scheme means that businesses who want take advice have the legal right to receive it, to rely on it, and to challenge a regulator's decision to prosecute.

1.396 Perhaps even more critically, it should be recognised that not all traders operate from fixed base and / or are easy to trace. Some of these "itinerant" businesses are quite frankly engaged in commercial fraud. Others use the business model to distribute counterfeit goods from all over the world. It is hard to see how legislation addressing such activities, which must contain criminal sanctions, could be written to avoid creating similar offences for any more legitimate trader that breached them. Whilst it could be argued (and indeed the consultation paper does so) that much of this activity can be caught by the Fraud Act 2006, we have serious reservations about the possibility that this legislation could be the sole remedy (which we have raised in our response to proposal 5).

1.397 The sort of traders that we see on television programmes like "Rogue Traders," the here today and gone tomorrow builders, need specific criminal sanctions not only because they are appropriate to the "seriously reprehensible" activities they undertake, but also because the whole infrastructure that supports practical investigative work, is geared to criminal offences. The various Data Protection Act exemptions, access to telephone number traces and directed surveillance under Regulation of Investigatory Powers Act 2000, cannot be used where there is no crime and the issue is being dealt pursuant to a "civil sanction."

Ivan Krolick

1.398 When I was new to the Bar, my then head of chambers advised me that one should never use an adverb in a pleading. I find it difficult to understand "seriously" in the context used. When considering the expression "a serious risk of injustice" in sec 10 Proceeds of Crime Act, Lord Woolf CJ, in *Benjafield and others [2001] 2 Cr App R 87 (C A) said:*

> As to the weight that has to be given to the word "serious", any real as opposed to a fanciful risk of injustice can be appropriately described as serious. The court, at the end of the confiscation process, has therefore a responsibility not to make a confiscation which could create injustice.

1.399 At what stage does reprehensible conduct become *seriously* reprehensible? Is repeated infringement of a regulatory obligation reprehensible (and, if so, how many repetitions are to be permitted before it becomes seriously reprehensible? I agree with the principles behind the proposal but feel that it requires to be redrawn.

Food Law Group

1.400 Proposal reflects the expressed enforcement policy of local authorities in the UK. The Group supports the Proposal, although comments that this Proposal could address both the way the criminal law is formulated and the way that it is applied. Our view is that it is important to distinguish proposed changes in the criminal law from proposed changes in enforcement practice. Changing the latter is easier than changing the former. Furthermore, the notions of "seriousness" and "reprehensibility" are very subjective. In particular, they are sectoral in their application. Thus a person concerned with applying requirements of food labelling might regard the sale by a major supermarket of food after a use-by date as serious whereas a criminal lawyer might not.[2] Between those two positions are the spectrum of opinions of due diligence experts, microbiologists and defendants.

1.401 The Group's view was that taking criminal prosecutions should be linked to the harm done. Conduct or omissions should be criminalised only when there is actual serious physical or economic harm or an unacceptable risk of such harm. The Group's view is that in many cases breach of a regulatory requirement (including sale past a "use by date") results in economic rather than physical harm and at a very low level. This sort of offence could easily be dealt with by civil means but frequently it is not.

1.402 Overall, we considered that where food law offences involved the type of 'higher-level fault requirements such as dishonesty, intention, knowledge or recklessness' referred to at CP 4.61 it was difficult to envisage conduct in this context which would not fall under another provision of the criminal law.

CBI

1.403 Strongly agree. What is meant by "seriously reprehensible conduct" will require some further elaboration or definition, if that becomes the test. This should also require a test of knowledge, intent or recklessness in the conduct of the person complained of.

East of England Trading Standards Association

1.404 Superficially, this proposal appears attractive, however there it does not elaborate on what would be considered to be "seriously reprehensible conduct". Without an indication of what is meant here, it is not possible to give a fully reasoned response to this proposal.

2 It should be noted that there is a separate and more serious offence of selling unsafe food within the meaning of Article 14 of Regulation (EC) No. 178/2002 under section 8 of the Food Safety Act 1990.

1.405 It also ignores the place that prosecution has in the regulatory tool kit and also ignores the context in which offences may be committed. For example if minor offences were de-criminalised and hence the stigma of a criminal conviction removed, a person or business may consider that it would be more cost effective to continue to offend albeit in a minor way and pay administrative penalties than to change their conduct to avoid offending. This would then effectively become a cost of doing business.

1.406 This proposal also ignores the fact that some offending such as the sale of counterfeit goods can generate significant financial gain for the offender which we would look to recover under the Proceeds of Crime Act 2002. If these types of offending were caught in the above definition and de-criminalised then recovery of these monies would no longer be possible. For example a market trader who was convicted of selling items of counterfeit clothing received a sentence of 100 hours unpaid work in the community, yet in the associated proceedings under the Proceeds of Crime Act 2002, was given a confiscation order in excess of £600,000.

1.407 When considering whether to prosecute for offences there are already a number of checks and balances employed by Local Authorities. For example they will have regard to the Code for Crown Prosecutors and in particular the public interest test. They will also have to have regard to their own published Enforcement Policies. Also we are not aware of any evidence that Local Authorities are misusing their ability to bring criminal proceedings for regulatory offences.

1.408 Therefore for the reasons above, we would disagree with this proposal.

Residential Landlords Association

1.409 Fully endorse. There needs to be wholesale decriminalisation. The trend that we have had to endure for decade, particularly in the last few decades, needs to be reversed.

Trading Standards Institute (TSI)

1.410 The Trading Standards community feels that the majority of offences they deal with do have an effect on local businesses and residents – not all of these are likely to be considered as being “seriously reprehensible”. By way of example, misleading pricing, although appearing minor in each complaint, can in some cases lead to investigations of mass-scale fraud. Having an effective criminal deterrent in this case will keep trade fair and transparent and keep within the Government’s line of assisting businesses and stimulating the economy. TSI feels, therefore that the current regulatory system, using criminal law to maintain standards in trading is adequate and cost effective.

Trading Standards North West (TSNW)

1.411 TSNW do not disagree but recommend the need to define ‘seriously reprehensible’ and whether that would include Trading Standards offences and if so which offences e.g. one selling 200 DVD’s from home, another selling 200,000 DVD’s from home and not paying tax are neither or both ‘serious’?

1.412 There is a reference at 1.47 to 'process fairness'. Trading Standards have Enforcement Published Policies and Crown Prosecution and Public Interest tests and we therefore Trading Standards are sophisticated enough to follow those guidelines.

Kingsley Napley LLP

1.413 This proposal seems to us to be sensible but we consider that before making a decision to decriminalise any offence, regulators should be consulted in order to understand the standards they apply and their understanding of the utility of having a regulatory offence.

1.414 A criminal offence can be useful as a last resort for certain types of conduct. An example is the criminal offence associated with the protection of title of a physiotherapist, who should be registered to practice with the HPC. The primary objective of the offence is the reduction of risk of harm connected to being treated by an improperly trained or otherwise unfit person, it seems appropriate to maintain this as an offence on the statute book for situations where all attempts to stop a person masquerading as a physiotherapist have failed.

1.415 There mere fact that prosecution is available to regulators as a sanction does not mean that they resort to using that sanction lightly. Many follow the Enforcement Concordat and others have their own enforcement codes of practice. For example, the GOC's Criminal Prosecutions Protocol requires both the evidential and public interest test applicable to the CPS to be met, and will generally only prosecute where there has been a failure by the individual or business to cease and desist the relevant conduct. The SIA regards prosecution as a last resort and generally only prosecutes when it has sought to achieve compliance with the legislation by other means, but with no response or an unsatisfactory response.

1.416 The Commission makes the point that regulatory criminal prosecutions can be few and far between and as such, some regulatory offences may be redundant. Whilst we agree that there needs to be a full review of regulatory offences to ensure that those which are unused, unnecessary or duplicative are removed, we do not believe that this should lead to all offences being brought within the remit of central investigation authorities for investigation and prosecution. IN our experience, when dealing with notifiable occupations, the willingness of a particular Police Force to assist in prosecution of either regulatory or criminal offences can vary, dependent on the locality and resource available. When regulators are dependent upon police to undertake investigations, require the prosecution of documents, search premises or interview suspects, means of ensuring consistent assistance and cooperation between the police and regulators should be established.

1.417 We believe that regulators responsible for the regulating the relevant conduct are often best placed to investigate and prosecute regulatory offences, With respect to the SIOA, given their ongoing daily work in ensuring compliance with the licensing scheme, it is closely acquainted with the operation of the industry and has established relationships with key industry representatives. Its place within the industry means that not only can it undertake focussed and effective investigations, but it has necessary background knowledge to assist it in deciding ion whether prosecution is within the public interest, More importantly, by investigating and prosecuting criminal offences within its area of responsibility, these powers are able to be exercised as part of the continuum of enforcement measures available to the SIA, ensuring continuity and consistency.

Criminal Bar Association and Bar Council

1.418 The two sentences comprising proposal 1 will be separately considered.

> It should not be used as the primary means of promoting regulatory objectives: this appears uncontroversial but there is a powerful argument that, whilst not the primary means, nonetheless prosecution is an important means of promoting regulatory objectives, with conviction for a regulatory offence providing public recognition of breach, publicity and deterrent support of a regulatory regime (eg cartel offences in the Enterprise Act 2002).
>
> The number of prosecutions for regulatory offences in the Magistrates' Courts and Crown Court appear to have remained relatively constant since 1997, despite the marked increase in the number and breadth of regulatory offences created by statute over that same period. Statistics of such cases would be more useful if they were accompanied with analysis of:
>
> (a) Which offences were prosecuted: the anecdotal experience of the Bar involved in regulatory work is that there are some regulatory regimes that encompass frequent prosecution (eg health and safety and environmental); others that involve regular prosecution (trading standards, food/hygiene/consumer/fire safety/animal welfare/alcohol licensing); with other regimes rarely involving prosecution at all (areas coincide with the national enforcement priorities identified by the Rogers' Review).
>
> (b) The extent of press reporting of regulatory offences and the impact upon businesses of regulatory convictions in different regimes: the anecdotal experience of the Bar involved in regulatory work is that health and safety and environmental convictions often receive prominent reporting in local and trade press; that such convictions affect businesses involved in tendering for contractual work.

Both factors are relevant to a consideration of many of the proposals. In the context of the second part of proposal 1, they underpin the importance of criminal prosecution as a means of promoting the objectives of some regulatory regimes, particularly health and safety and environmental.

Only employing the criminal law to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct: *the response to the first part of proposal 1 depends upon what is encompassed by the term "seriously reprehensible conduct". If it is limited to what the CP describes as "higher-level fault requirements such as dishonesty, intention, knowledge or recklessness" then there is a powerful argument that this fails to have sufficient regard to the "stigma" associated with "wrongdoing" involving failure to comply with standards imposed by certain duties and by failure to comply with certain permissioning and licensing regimes (principally the duties and permissioning/licensing regimes relating to health and safety and environmental protection).*

PROPOSAL 2

Clifford Chance

1.419 Approach begs the question of what is serious enough. Circular: an individual can imprisoned for a first offence because his conduct is seriously reprehensible; because he can be sent to prison for a first offence, his conduct is seriously reprehensible. May also carry with it the risk of inflation in penalties – if it is desired that a particular offence should come before the criminal courts, the penalty will be increased to this level in order to meet the test. Harm done shouldn't be the only test. Significant harm can be caused by strict liability offences. For an offence to merit trial in criminal courts, it should involve intention or recklessness. If regulatory offence is one of strict liability, rarely, if ever, be appropriate for it to come before the traditional criminal courts no matter the harm caused.

HSE

1.420 Breaches of health and safety regulations are offences under s33 HSWA. The Health and Safety Offences Act 2008 amended the penalties for offences committed on or after 16 January 2009. Most contraventions are subject to a maximum penalty of £20,000 fine and/or up to 6 months imprisonment in the lower courts and in the higher courts, an unlimited fine and/or 2 years imprisonment.

1.421 The offences to which an individual could be susceptible under health and safety law are wide ranging because the hazards the law addresses are varied. Individuals may be subject to prosecution in their role as directors or senior managers of companies, persons who did not commit the offence but caused the offence, employees and the self employed. An individual could, justifiably, be sent to prison for a first offence but to set this as the requirement of whether an offence should be "criminal" is setting the hurdle too high in respect of all offences. The difficulty we see in applying this principle is that, in some cases, a prison sentence would be justified, whist in others it would not. That would depend upon the culpability of the defendant and harm caused or risk posed. It should also be borne in mind that health and safety cases are frequently taken against companies.

1.422 We are unclear why the level of the fine makes the conduct a criminal offence. Most health and safety offences are subject to an unlimited fine in the higher courts. At Magistrates court the limit is £20,000. So, whilst in principle, we accept that the seriousness with which an offence may be considered is reflected by the maximum sum set within the sentencing regime, dependent upon the circumstances of the case, a maximum of £20,000 may be sufficient in one case, and wholly inadequate in another. The fines imposed for health and safety breaches following the Buncefield fire and explosion totalled £4,. The fines imposed on another company following major chemical fire totalled £150,000. At Magistrates Court, a company was fined £1,000 plus costs for failing to carry out risk assessments to determine the likely presence of asbestos during an office refurbishment, thereby putting workers and contractors at risk. All three examples are subject to an unlimited fine in the higher court but there will be circumstances where the lower court has sufficient sentencing powers, and the Magistrates decide to retain jurisdiction for sentencing.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.423 These two proposals are drafted in terms of "wrongdoers" and "individuals" in a way that suggests that they are aimed at natural persons, rather than businesses. In that context we agree with the proposals. However, more consideration should be given to the application of these provisions in relation to regulatory and business crime.

1.424 The worst of regulatory or other legal provisions are those that are complex, onerous and expensive as applied by honest and conscientious businesses, but are ignored with impunity by those which are not. Such provisions are ineffective in the regulatory protection that they are aimed at providing, while simultaneously giving an unfair competitive advantage to those who are prepared to ignore them. Nevertheless, regulatory provisions can be difficult and expensive to enforce and despite the improvements introduced since the publication of Professor Macrory's Report and the passing of the Regulatory Enforcement and Sanctions Act we do not anticipate a fast progression to universally logical, consistent and very firm non-criminal enforcement of regulatory requirements. For this reason, we would not support the wholesale removal of criminal offences, which have been put in place to back non-criminal enforcement mechanisms, nor necessarily as widespread a reduction of them as may be implied by this proposal.

1.425 We do not think that the deterrence effect of the criminal law can be stated in the simple economic terms of likelihood of conviction times the severity of the punishment. Rather, we would agree with the statement made in paragraph 3.8 and implied elsewhere that one of the important effects of a criminal conviction is to create significant stigma. This is certainly the approach we would take to the application of our own professional disciplinary oversight, with a criminal conviction in a professional context leading to an automatic assumption of professional ethical misconduct, with the ultimate sanction of the removal of professional status and livelihood. We believe that this effect should be reinforced by the courts, with fines set at a level which reinforces the stigma by ensuring that it is reflected by the severity of the punishment imposed. Professor Black's formulation set out in paragraph A59 of the consultation, of fines being set in terms of a function of the benefit to the regulated firm of non-compliance and the probability of detection should be an absolute floor to the assessment of fines, not just an average. We acknowledge that this can sometimes lead to an inability to pay, followed by the insolvency of an individual or a company, but this is one of the outcomes anticipated by insolvency law and is not inappropriate in the circumstances.

1.426 If persistent and material non-compliance with regulatory requirements is not considered serious, then the appropriate response is to remove the regulatory provisions in their entirety, not just to decriminalise them.

Trading Standards Institute (TSI)

1.427 Trading Standards Professionals cannot pursue many of their investigations unless they believe that a criminal offence has actually been committed. This Proposal would mean that they would lose a lot of their information gathering powers. TSI is aware that businesses often have other pressing issues to deal with, such as health and safety, etc, but many of the businesses Trading Standards Professionals speak to are happy to see that criminal action is available for those who persistently break the law where others work hard to keep compliant.

Chamber of Shipping

1.428 It is overly simplistic to impute criminality by reference to the type or level of punishment. It might be correct to suggest that offences under sub-paragraph (a) should normally fall within the criminalisation category although even this may not be clear-cut. A generalisation would treat a recalcitrant council tax payer committed to gaol in the same way as a person convicted of robbery or violence. In similar vein, the imposition of an unlimited fine does not in itself infer morally reprehensible behaviour but may arise in respect of, for example, breach of a Tree Preservation Order. Further consideration should be given to the criteria for determining the nature and threshold of criminal behaviour.

Kiron Reid, Liverpool Law School

1.429 Agree as regard businesses (for non-regulatory criminal offences *mens rea* will be more important).

Criminal Sub-Committee of the Council of HM Circuit Judges

1.430 Support. Harm done or risked should involve risk of really serious consciences for public at large.

The Law Society

1.431 We do not agree with this proposal. We do not think the way to judge whether harm done or risked is sufficiently serious to warrant criminalisation is to look at the penalties to be imposed. In part, we think this is to be judged by whether the person knew or intended the harm caused and, in part, by the seriousness of the harm for the person who suffers it. This is easier to determine in cases of physical harm to individuals. However, it is harder to find an appropriate test where it is society more generally that is harmed – for example by bribery or market abuse. In some cases which are currently criminal offences e.g. financial assistance by companies, insider dealing and market abuse, it can be very difficult to determine in advance whether a particular action will or will not be a criminal offence. We do not think it is generally desirable for criminal liability to be imposed unless it is clear what action does or does not constitute a criminal offence.

1.432 However, the fact that conduct may give rise to a criminal prosecution does not mean that it will necessarily follow. We believe that the public interest test in the Code for Crown Prosecutors allows for the proper balancing of the competing factors which may weigh for or against a prosecution.

1.433 The proposal does not acknowledge the fact that the Crown Prosecution Service, for example, may apply a flexible Code criterion of the public interest test, which can be applied in the context of any particular example of criminality and in the context of the offender.

1.434 The Code for Crown Prosecutors additionally contains a criterion that a prosecution is of significant positive influence on community confidence. This may justify the decision to prosecute an individual or company, and may warrant the criminalisation of certain behaviour even where the person would not necessarily be sent to prison for a first offence, or where an unlimited fine is not necessary. Whether an individual is sent to prison also depends on their personal mitigating circumstances. Given the many different factors that influence sentencing it is hard to see how this test could be applied practically.

1.435 Further, it is considered that this proposal does not acknowledge that the criminal law, and criminal processes, can provide remedies other than sanctions and punishments; for example, compensation orders and confiscation of criminal property. It does not sufficiently recognise all of the consequences of criminal prosecution (and potentially conviction). There is also the potential for an effect on a convicted company in not being able to apply for public tenders or public procurement contracts in the future or finding it difficult to successfully do this. There is also the issue of adverse publicity and stigma attached to a conviction. Whilst it is true that in some cases these can be overcome or ameliorated by liquidating a company, changing its name or changing the country in which it is located, these are all costly and difficult exercises to undergo. It is also no different to the case of an individual who can change their name, change their location or change their occupation in order to try to distance themselves from any conviction but this does not minimise the affect of the conviction on their lives. We note the observations in this regard at Paragraph 4.12 - 4.13. This is another reason why it is not appropriate to focus only on the potential custodial sentence or fine when assessing whether conduct should be subject to criminal sanction.

1.436 Therefore, we think that there may be criminal offences which are appropriate which do not carry the potential sentences set out in (a) and (b) above but which would be prosecuted when the public interest required this. The ordinary operation of the Code for Crown Prosecutors would allow this although of course some of the specific factors set out would be inappropriate for corporate defendants.

1.437 We agree that the harm risked should also be taken into account.

North East Trading Standards Association (NETSA)

1.438 For some offenders, criminal sanctions carrying the possibility of custodial sentences remain the only true deterrent to address the wrongdoing.

1.439 Persistent offenders and those causing considerable detriment to the interests of consumers by means of widespread scams, calculated and targeted actions aimed against consumers may not be unduly concerned by the threat of a civil sanction.

1.440 Criminals engaged in doorstep crime activity specifically targeting old or vulnerable consumers will not be adequately dealt with solely by means of a civil sanctions regime. It is unlikely that such offenders would be adversely affected by or brought into compliance by means of a monetary penalty or restorative payment in favour of consumers. This would leave the regulatory body having to pursue civil debts, possibly against a person with little prospect of obtaining payment if they can in fact be identified and located.

1.441 Introduction into the criminal justice system provides a more robust mechanism for identifying and making persons accountable for their actions. In appropriate cases actions resulting in loss of liberty may be the only credible deterrent.

1.442 There are also issues that would arise with enforcement powers of investigation and forfeiture of assets gained from crime if the criminal penalty was removed. Such proposals may also affect the ability to conduct surveillance under Regulation of Investigatory Powers legislation.

QEB Hollis Whiteman Chambers

1.443 Disagree. The test is artificially high. There are offences that are sufficiently serious to warrant the stigma of being described as criminal and call for a reasonably serious sanction (eg community penalty) which is, in itself, a serious measure.

Financial Services and Markets Legislation City Liaison Group

1.444 We do not support this proposal as we do not believe that seriousness should be determined based on the penalties that could be imposed.

1.445 Instead, we believe that the test should consider knowledge and intention and the degree of seriousness of the harm caused (c.f. the factors in paragraph 12.8 of the FSA's Enforcement Guide, referred to above, re the use of criminal/regulatory powers in market abuse cases).

1.446 Certainly, where there is uncertainty, such that a company or individual is unable to determine whether or not a course of action would amount to an offence but is seeking in good faith to comply with the law, we do not believe that criminalisation is appropriate.

Trading Standards South East Ltd

1.447 TSSE disagrees with this proposal. Clear enforcement policies, the Statutory Code of Practice for Regulators, the Crown Prosecution Service Guidelines and Sentencing Guidelines all serve as indications as to when criminal prosecution is an appropriate sanction. To remove categories of offences from the criminal prosecution regime, simply based upon the penalty that could be attracted, does not in our view address the issue of determining which sanction is appropriate for any particular offender.

OFT

1.448 We note the preference in the consultation for the use of non criminal measures, specifically a civil penalties regime such as that introduced by the RESA. We support the introduction of civil penalties to be available alongside powers of prosecution. (It should be noted that the civil penalties regime, as it currently exists, is dependent on the existence of underlying criminal offences as is the availability of such sanctions). These powers are not a complete substitute for criminal sanctions and should not be introduced as such.

1.449 The civil sanctions regime for consumer protection offences is untested and is intended to be piloted from April 2011 (the pilot is expected to empower the OFT and around 10 Trading Standards Departments and the Consumer Protection from Unfair Trading Regulations [CPRs] will be included within he legislation to be tested). As a result, we think it is inappropriate to pre-judge the results of this pilot by, for example, assuming these powers can effectively remove the need for criminal sanctions altogether. In fact the pilot as it is framed relies upon the continued existence of criminal sanctions to be used appropriately to complement and enhance the operation of the civil sanctions regime. Removal of criminal penalties ahead of the pilot of civil sanctions would be premature and risky.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.450 Broadly support subject to comments made below regarding the alternative mechanism of civil sanctions. However, detailed consideration would need to be given to individual strict liability offences which are often prosecuted in the absence of the conduct described above and whether it may be considered desirable for a criminal offence to exist in such circumstances.

City of London Law Society

1.451 We do not agree with this proposal. We do not think the way to judge whether harm done or risked is sufficiently serious to warrant criminalisation is to look at the penalties to be imposed. In part, we think this is to be judged by whether the person knew or intended the harm caused and, in part, by the seriousness of the harm for the person who suffers it. This is easier to determine in cases of physical harm to individuals. However, it is harder to find an appropriate test where it is society more generally that is harmed – for example by bribery or market abuse. In some cases which are currently criminal offences e.g. financial assistance by companies, insider dealing and market abuse, it can be very difficult to determine in advance whether a particular action will or will not be a criminal offence. We do not think it is generally desirable for criminal liability to be imposed unless it is clear what action does or does not constitute a criminal offence.

Professor Colin Reid, University of Dundee

1.452 If the appropriateness of imprisonment for a first offence is to be the test of criminality, then experience suggests that very many "real" crimes (theft, fraud, assault, criminal damage) would escape this label, unless advantage of taken of the fact that these crimes are defined in such a way that they cover a very broad range of circumstances rather than being divided into a series of separate narrower offences of increasing seriousness.

RSPCA

1.453 The Society is particularly concerned about the creation of a dual system of both civil and criminal sanctions with the latter being reserved for the most serious types of wrongdoing for the following reasons:-

1.454 Prosecutions by the RSPCA for the most serious offences against animals often result in lengthy custodial sentences. However should the likelihood of a custodial sentence be a criterion when considering whether to take a prosecution, a large number of prosecutions which relate to very serious offences against animals would not be brought before the criminal courts. The introduction of this additional criteria cannot be in the public interest and would be a backward step for the enforcement of animal welfare offences and the protection of vulnerable animals.

1.455 In deciding whether to bring a prosecution, the RSPCA in each case considers the CPS Code for Crown Prosecutors in order to assess (a) whether there was sufficient evidence to provide a realistic prospect of conviction and (b) whether a prosecution was in the public interest. How does the above test – that a custodial sentence is likely, fit with the Code?

1.456 Upon securing a conviction under the AWA the courts are entitled to make orders depriving the defendant of the animal - the subject of the prosecution as well as disqualifying him/her from owning or keeping particular species of animals. An administrative court would not be able to make such orders which are essential where an offence has been proven under the AWA.

1.457 If a criminal prosecution cannot be commenced or will be stayed pending conclusion of the civil sanctions route (including any appeals) this could lead to delay which could in turn impact upon the welfare of animals involved in the case who may continue to not have their welfare needs met.

1.458 The RSPCA is not a “regulator” and would not be able to perform this function in respect of animal welfare work, this begs the question as to which body would enforce a civil penalty regime in respect of animal welfare offences - where would the resources come from and where would such appeals lie, given the need for independence and expertise?

Simon Phillips QC

1.459 This proposal follows from the Commission’s analysis of the current use of criminal law in regulatory contexts. The Commission’s rationale for this proposal is that one 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 Commission takes a hard-nosed approach & proposes that the stakes must be higher, if the criminal law is to be invoked, on grounds of fairness to accused persons and on grounds of economy, efficiency and effectiveness from the prosecution’s perspective.

1.460 For my part, I struggle to see how either the imposition of a prison sentence or the availability of an unlimited fine for a first offence could, in the current climate, be considered to be an appropriate or helpful determining criteria. Drink driving is an offence that would most likely fall within this bracket if it was deemed to be a regulatory offence: an individual is only likely to be sent to prison for a first offence in extreme circumstances; an unlimited fine is not available; the public interest nevertheless dictates not only that is a criminal offence, but also that is an offence that is always pursued to prosecution where there is sufficient evidence. Furthermore, it is an offence where the ancillary orders (e.g. disqualification, drink-driving rehabilitation courses), and the ability of the criminal courts to enforce compliance with those orders are seen as an essential element of the regime for controlling and deterring unlawful behaviour of this type.

1.461 The new Home Secretary has very publicly directed magistrates & judges to look to **community sentences** as appropriate alternatives to custody, and with the announcement on 20th October 2010 that the jail population is to be reduced by 3,000 over the next 4 years, the emphasis for the courts will increasingly be that serious offences do not necessarily call for custodial sentences.

1.462 The Sentencing Guidelines Council has published definitive guidelines for a multitude of offences, including serious offences, where the starting point after a trial, is a community order – these (non-regulatory) offences include offences that are unquestionably serious and in the public interest to be prosecuted, for example: theft in breach of trust of sums up to £2000, or theft in a dwelling house, or theft from the person, or theft from a shop accompanied by some intimidation or threats or an element of pre-planning or damage, or burglary of commercial premises. An unlimited fine for any of these offences does not, in a practical sense, seem to me to be much of a guiding benchmark.

1.463 The availability of an unlimited fine, as opposed to a determinate maximum fine is an artificial distinction without a meaningful rationale.

1.464 If one looks to the Code for Crown Prosecutors, it is readily apparent that the interests of justice are the ultimate criteria to be applied. Decisions are made in accordance with the Code and the DPP's Guidance on Charging. Similarly, the police apply the same principles in deciding whether to charge or summons a person in those cases for which the police are responsible. The Full Code test has two stages: (i) the evidential stage; followed by (ii) the public interest stage. The potential sentencing outcome is one possible consideration, however the Code does not advocate an inflexible approach: Code 4.16(a) *A prosecution is **more likely** to be required if a conviction is **likely** to result in a significant sentence* [emphasis added]. Similarly, and conversely, code 4.17(a) provides that *A prosecution is **less likely** to be required if a court is **likely** to impose a nominal penalty.*

1.465 The fact that a criminal sanction is available may of itself be a significant deterrent. It may also serve as a useful means of facilitating agreement between the parties that compliance with regulatory proceedings, and/or discharging a civil penalty, are measures that merit serious consideration. If there is no potential for criminal proceedings in the background, then there may be less incentive to engage with the regulatory process or to discharge a civil penalty.

1.466 In every criminal case, the Code requires the Crown Prosecutor to apply the public interest test. If there is a sufficient regulatory disposal, the situation already in place is that that will tend to militate against the need for a prosecution – code 4.17(c) provides that *A prosecution is less likely to be required if the suspect has been subject to any appropriate regulatory proceedings, or any punitive or relevant civil penalty which remains in place or which has been satisfactorily discharged, which adequately addresses the seriousness of the offending and any breach of trust involved.*

1.467 In instances involving offences that are routinely committed by organisations, as opposed to by individuals, the justification of an individual being sent to prison for a first offence (in some non-extreme circumstances) is, as a test, of little use as a means of determining whether criminalisation is appropriate.

1.468 The availability of an unlimited fine, as opposed to a (maximum) determinate fine, is very often a matter of drafting technique. If an offence provides for a fine of up to £20,000 or more, is that offence less serious than an offence where there is a notional possibility of an unlimited fine but where in reality the offence in question is invariably tried summarily and where the fines imposed are in practice significantly less than £20,000?

1.469 There are many offences that will not justify imprisonment for a first offence in non-extreme circumstances, but will warrant imprisonment for repeated offences. Are those offences to be ignored for the purposes of determining whether harm done or risked is serious enough to warrant criminalisation?

1.470 There are many offences that will not justify imprisonment for a first offence in non-extreme circumstances, but will warrant a court order. Indeed, one of the requirements of the Code for Crown Prosecutors is (code 6.1(b)) that *Prosecutors should select charges which give the court adequate powers to sentence and impose appropriate post-conviction orders*. For this reason, the code provides (code 6.2) that *This means that prosecutors may not always choose or continue with the most serious charge where there is a choice.*

1.471 One consideration that may be relevant is the question of Proceeds of Crime. Convictions may be important for this issue. POCA proceedings may involve very substantial sums of money. They may involve questions of compensation for victims. These considerations may be lost if an arbitrary test of the availability of an "unlimited fine" is imposed. In addition to confiscation and compensation orders, the Prosecutor is required (code 11.4) to consider applying for ancillary orders in all appropriate cases.

1.472 Very often an either-way offence will be tried summarily, alternatively a Prosecutor will decide to proceed with summary offences (as opposed to either-way offences) for reasons of ensuring that a case is not unnecessarily delayed. Such considerations mean that cases which might otherwise have resulted in the availability of an unlimited fine are, in practice, limited to fines available at summary jurisdiction. Considerations of speed of due process is *one* of the factors that a Prosecutor should have in mind: code 9.1 *Speed must never be the only reason for asking for a case to stay in the magistrates' court. But prosecutors should consider the effect of any likely delay if a case is committed or sent to the Crown Court, and the possible effect on any victim or witness if the case is delayed.*

1.473 Evidence of repetition of wrongdoing is an important feature of criminal proceedings. Bad character applications are routinely made in respect of offenders who have been convicted of relevant offences. Bad character applications may relate to non-criminal proceedings, however such applications are hampered by the understandable reluctance of the criminal courts to be involved in satellite litigation when deciding whether or not to allow evidence of bad character to be adduced.

1.474 The difficulties presented by an inflexible approach are not difficult to imagine:

> Offender A commits a regulatory offence; it is the sort of offence whereby an offender could possibly expect to be imprisoned for a second offence, and certainly expect it for a third offence. He is prosecuted, and sentenced to a non-custodial penalty. He later repeats the offending behaviour. This time he is not prosecuted for the reasons adumbrated in Proposal 2, namely because the offence does not merit custody for a first offence in non-extreme circumstances (or because an unlimited fine is not available). He is made the subject of a civil regulatory penalty. He later repeats the offending behaviour for a third time. In criminal proceedings, he could have expected to be imprisoned for a third offence. There is no criminal offence available on account of Proposal 2.

1.475 Consider another scenario:

> Offender A is convicted of the first offence, as described above, and then is subject to a civil penalty in respect of repeat behaviour. If Offender A is then prosecuted for a criminal offence in respect of a third incident of like unlawful behaviour, the prosecutor may find him/herself in the invidious position of being able to adduce evidence of bad character in relation to the first conviction, but unable to adduce evidence in relation to the second incident of wrongdoing on account of the fact that the evidence relating to that second incident had never been subjected to the criminal standard of proof.

1.476 Criminal proceedings can be lengthy, uncertain of outcome, and involve delay. They can also be swift, definite, and expeditious. In some instances, a caution will resolve the need for protracted proceedings. A caution will, however, only be available in circumstances where the potential exists for criminal proceedings. A formal warning or police caution is an important tool in the armoury of the police and the Crown prosecutor: see code 7.1, Prosecutors will offer a conditional caution where it is a proportionate response to the seriousness and the consequences of the offending and where the conditions offered meet the aims of rehabilitation, reparation or punishment within the terms of the Criminal Justice Act 2003.

1.477 It is important for a variety of reasons – see code 7.2, A conditional caution is not a criminal conviction but it forms part of the offender's criminal record and may be cited in court in any subsequent proceedings. It may also be taken into consideration by prosecutors if the offender re-offends. Prosecutors may offer a conditional caution where, having taken into account the views of the victim, they consider that it is in the interests of the suspect, victim or community to do so.

1.478 See also code 7.4, The offer of a conditional caution which is accepted and complied with takes the place of a prosecution. If the offer of a conditional caution is refused or the suspect does not make the required admission of guilt to the person who seeks to administer the conditional caution, a prosecution must follow for the original offence. If the terms of the conditional caution are not complied with, the prosecutor will reconsider the public interest and decide whether to charge the offender. Usually, a prosecution should be brought for the original offence.

1.479 Prosecutors have a Code to assist them with determining the public interest test. They should be allowed to apply that code to the circumstances of each case. They should not have their hands tied by an arbitrary formula that removes multifarious offences from the statute-book simply because those offences do not attract an unlimited fine or do not currently justify a custodial sentence in non-extreme first offence instances. Sentencing Guidelines issued by the Sentencing Guidelines Council are *guidelines*, not inflexible rules. In some cases it is appropriate for judges to move outside the guidelines, and to give reasons for so doing. If Proposal 2 is implemented, guidelines would have to be formulated for a whole raft of regulatory offences in order to determine whether or not the offences fell within the Proposal 2 definition. The assessments incorporated within those guidelines would have the effect of giving a statutory force or ramification to those guidelines to an extent that was never intended to be the purpose of publishing sentencing guidelines. It would serve to remove many offences from the criminal statute book. Guidelines themselves do not currently remove the option of flexibility. If, however, guidelines were to be used as the means by which certain offences are deemed to fall short of *necessitating* the availability of a criminal offence and sanction, in other words as the means of implementing Proposal 2, then the outcome would provide for no flexibility of approach: the wrongdoing would either be capable of being prosecuted or it would not. That inflexibility would be a retrograde development, and not in the public interest.

Local Government Regulation (LGR)

1.480 The intention of this proposal is to de-criminalise much of current regulatory law. If this proposal were to be accepted then a significant number of regulatory infringements would be de-criminalised. We consider that this is unworkable within these definitions. Members of the public would lose faith with the Criminal Justice System, as this would result in taking justice out of the Courts and into prosecutor's hands. Members of the public firmly believe in the idea that 'justice has to be done and seen to be done'. We consider that any 'public interest test' would be nullified if it is penalty driven.

1.481 For example where there is an under age sales related contravention, if trading standards issue a notice then there is an associated fine. If they do not pay then it becomes a civil matter to chase the debt, but then if there are additional offences then presumably the non payment would not be mentionable in Criminal Courts as it was a civil debt? Therefore on what objective grounds would an authority justify the prosecution? We are supportive of the principle of fixed penalty notices, but Authorities need to have discretion to make decisions and to apply well established principles of reasonableness. Likewise for food hygiene cases where food has been produced on a large scale it has been necessary to use conspiracy to defraud powers and enforcement by the Crown Prosecution Service as food hygiene sanctions have been inadequate for the seriousness of the crime and the resultant harm to human health. It may also be disproportionately unfair on individuals as opposed to companies where the breach of law is not in doubt, but the resulting fine to be paid as a consequence is related to ability to pay and size of the enterprise.

1.482 Equally it is unclear whether this proposal also applies to either way matters for which the penalty in the Magistrates Court only attracts a limited fine yet attracts an unlimited fine in the Crown Court. The Law Commission needs to consider the impact of de-criminalisation of legislation on the ability of Local Authorities to function within the law enforcement community. Information exchange, and information gathering for the purposes of investigations of breaches of legislation, frequently relies on gateways which exist for the purpose of the 'investigation or detection of crime' or similar. Therefore, de-criminalisation of some legislation may make the investigation of that breach harder, resulting in breaches remaining unaddressed. The effect on consumer confidence in the market place is hard to determine but is unlikely to be positive.

1.483 It is unlikely that civil sanctions alone would provide a sufficient incentive for large businesses to prioritise compliance with regulatory law. This coupled with the difficulty and cost of pursuing civil claims could result in many breaches of consumer protection legislation remaining unaddressed as a consequence. Clear enforcement policies, the Statutory Code of Practice for Regulators, the Crown Prosecution Service Guidelines and Sentencing Guidelines all serve as indications as to when criminal prosecution is an appropriate sanction. To remove categories of offences from the criminal prosecution regime, simply based upon the penalty that could be attracted, does not in our view address the issue of determining which sanction is appropriate for any particular offender

1.484 The difficulty with this proposal is that is again ignores the place that prosecution has in the regulatory tool kit. It fails to understand the context in which offences may be committed. It would also remove the deterrent effect of a potential criminal conviction. For example a haulier who regularly allows his HGV's to be overloaded would on the criteria suggested no longer face criminal prosecution. Yet taking strong enforcement action against those who would either overload or permit overloading of HGV's would, by most, be seen as an important road safety issue warranting the stigma of a criminal conviction.

1.485 As stated above, there are frequently wider societal benefits to pursuing a criminal prosecution for infringements of what might otherwise appear to be technical requirements. LG Regulation believes that this proposal would significantly undermine the consumer protection regime in place in the UK at a time when the Government has stated the importance of an effective regulatory network to the economy and is considering the role of local Trading Standards services in particular.

1.486 We consider that for some types of offenders, criminal sanctions carrying the possibility of custodial sentences remain the only true deterrent to address the wrongdoing. Persistent offenders and those causing considerable detriment to the interests of consumers by means of widespread scams, calculated and targeted actions aimed against consumers may not be unduly concerned by the threat of a civil sanction. Criminals engaged in doorstep crime activity specifically targeting old or vulnerable consumers will not be adequately dealt with solely by means of a civil sanctions regime. It is unlikely that such offenders would be adversely affected by or brought into compliance by means of a monetary penalty or restorative payment in favour of consumers. This would leave the regulatory body having to pursue civil debts, possibly against a person with little prospect of obtaining payment if they can in fact be identified and located. Introducing sanctions for these types of criminal activity into the criminal justice system provides a more robust mechanism for identifying and making persons accountable for their actions. In appropriate cases actions resulting in loss of liberty may be the only credible deterrent.

1.487 There are also issues that would arise with enforcement powers of investigation and forfeiture of assets gained from crime if the criminal penalty was removed. Such proposals may also affect the ability to conduct surveillance under Regulation of Investigatory Powers legislation.

MOJ

1.488 Does not propose to restrict criminal offences to behaviour that merits imprisonment or an unlimited fine.

Institute of Employment Rights

1.489 The issue of the mode of liability is significant in relation to proposal 2 since it implies that criminalization should largely apply to results-based offences which involve individual liability for offences carrying the most severe penalties. Following the comment we make above, we would argue that the fact that corporate offences are differentiated in law is not a function of their innate 'seriousness', but a result of their historical construction. It therefore makes little sense for corporate offences to be tied to a standard of seriousness that could only ever apply to individuals. Of course, this raises the issue of the appropriate sanctions that might attach to criminal offences on the part of corporations and their senior officers respectively, and we will return to this issue below.

1.490 Proposal 2(b) implies that only offences that warrant unlimited fines should warrant criminalization. In recent years, the courts have sizably increased the level of fines for health and safety offences. However, it remains the case that some very serious offences continue to generate rather paltry fines. We are therefore concerned that a standard of criminal liability might be linked to the chances of receiving a maximum fine. The average fine for an offence that caused the death of a worker remains little more that £40,000. Were proposal 2 (b) to be introduced, some very serious offences would never reach the courts. We urge a more thorough approach to the issue of reforming the system of fines. The problems with fines have been recently widely discussed, not least in the context of the Macrory review, but we would also wish to highlight the key fallacy that has permeated the debate. There appears to be a taken for granted belief that because the current system of fines is regarded as inadequate, then this supports an argument for more administrative and civil penalties. We would argue that criminal penalties could be made more effective if a system of unit fines was introduced, one which accounts for both the gravity of the offence *and* the ability to pay on the part of the defendant. Such a system could reform the system of fines to take account of many of the problems in iniquity and ineffectiveness that currently exist, without weakening the binding force of criminal sanction on corporate offenders. A workable and detailed proposal for such a system was made recently by the Centre for Corporate Accountability.[3]

Food Standards Agency

1.491 Thresholds would be too high for food and feed. Conviction at court has a part to play in deterrence of non-compliance. No evidence that civil sanctions would have same effect. Lots of criminal activity in food and feed sector would not meet criteria in proposal 2.

Ivan Krolick

1.492 This proposal appears to be limited only to criminalisation on the basis of harm done or risk (and not other circumstances such as deterrence). It seems to me that the argument is circulatory. A person should be sent to prison for a first offence only if the conduct is regarded as serious enough to warrant criminalisation. The proposal does not provide sufficient clarity to be of use.

3 See Tombs, S and Whyte, D (2007) Safety Crimes, Collumpton: Willan.

Association of Chief Trading Standards Officers (ACTSO)

1.493 Frequently wider societal benefits to pursuing criminal prosecution of what otherwise appear to be technical requirements. Proposal would significantly undermine consumer protection in the UK at a time when Gov has stated the importance of effective Trading Standards Services to economy and is intending to increase the role of local Trading Standards Services. Commission should consider impact of de-criminalisation of legislation on ability of Trading Standards Services to function within law enforcement community. Information exchange and gathering for investigating breaches of legislation frequently relies on gateways which exist for purpose of investigation or detection of crime or similar. De-criminalisation some legislation may make investigation of that breach harder, resulting in breaches remaining unaddressed. Effect on consumer confidence is hard to determine but unlikely to be positive.

1.494 Unlikely that civil sanctions alone would provide sufficient incentive for large businesses to prioritise compliance with regulatory law. This coupled with difficulty and cost of pursuing civil claims could result in breaches of consumer protection legislation remaining unaddressed.

Justices' Clerks' Society

1.495 Agree but some summary offences exist with fine only penalties (eg s5 POA 1986).

Leicester City Council

1.496 Disagree: many ways in which to measure harm done. Proposal is too narrow and criteria do not apply to many summary only cases. Criteria do not allow for individual features of cases.

The Magistrates' Association

1.497 Agree but with criminal sanctions possible for repeated non-compliance.

Care Quality Commission (CQC)

1.498 Problems with some aspects of proposal. People who use most services regulated by CQC are typically very dependent on people who own, manage and work in them. They can be extremely vulnerable to the outcomes of badly run services, poor care and neglect. Outcomes can include avoidable unnecessary harm and death. Where a vulnerable person has suffered sever, unnecessary harm or even lost their live, it can be appropriate to hold people to account through criminal proceedings *as well as* civil proceedings to prevent recurrence, especially where the service provider was capable of preventing the harm but did not. The possibility of criminal prosecution is itself a valuable deterrent. Providers are aware of the risk of prosecution if they fail to comply with the law (including through hearing of other prosecutions). They are aware of the reputation risks involved. Prosecution is only sanction where a provider carrier on regulated activity without being registered.

1.499 2008 Act limits the maximum fine for all offences under it. It only includes the possibility of imprisonment in relation to failure to register and disclosure of confidential personal information. It is appropriate to be able to hold people to account for avoidable failure to protect vulnerable people in their care from harm by using the criminal process.

Sheffield University LLB and Criminology Students

1.500 Proposal sets the bar very high – arguably too high. There are plenty of criminal offences in the non-regulatory context that would not meet these criteria yet are considered criminal. Also, it is unclear how serious an offence must be to warrant an unlimited fine. The Corporate Manslaughter and Corporate Homicide Act has resulted in few prosecutions to date and it is not yet clear how the power to issue unlimited fines is to be used.

1.501 Surely civil penalties also have a stigma? To suggest that a criminal sanction is needed to perform the function of shaming is rather short-sighted; it sends a message that low-level or civil offences are not important.

Faculty of Advocates

1.502 The criminal law should not be used as the primary means of promoting regulatory objectives and proposal 2 seems to identify appropriately the circumstances in which a criminal law remedy is proper. If the law is to be reformed along those lines, then the repeal of low level criminal offences contemplated by proposal 3 seems obviously sensible (assuming that suitable replacement sanctions are put in place where those are truly required).

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.503 Strongly disagree. Again we feel that this position is established through a failed understanding of what the public feel would be "reprehensible activity." The public, and compliant businesses, want businesses that commit serious or persistent breaches of legislation to be dealt with adequately. Whilst we have accepted, and indeed given further examples of where, civil sanctions can be effective at bringing businesses to compliance, we state again that criminal sanctions are necessary for some practices and have to form part of the toolkit to ensure all businesses comply with statutory requirements.

1.504 There are very few sentencing guidelines for regulatory offences, hence there are few objective guidelines for when an individual can *justifiably* be sent to prison for a first offence. There are aggravating circumstances where criminal offences are necessary as a long stop and the consultation paper supports this. We cannot see that this sits comfortably with proposal 2. Moreover, since proposal 7 would give the Courts power to stay proceedings where they have been brought inappropriately, surely that would be sufficient.

1.505 Even before this, local regulators follow enforcement policies that comply with the Regulator's Compliance Code and therefore should only prosecute in demonstrably appropriate circumstances. The court has the option to dismiss a case brought before it where a local authority has failed to follow its own enforcement policy. Even for fraud, sentencing guidelines indicate that only limited imprisonment levels (6-26 weeks) may be an appropriate starting point for the types of fraud likely to be encountered, and a community punishment seems to be a more likely outcome once mitigating factors have been considered.

1.506 Civil sanctions may work in cases where traders can be identified. Even in this scenario, consideration needs to be given to those prepared to comply and those that simply are not. Those that are not will fail to pay fines. Difficulties and costs of recovery will mean that non-payment will be a real issue for regulators. This is likely to bring the civil sanctions themselves into disrepute and reduce public confidence in the ability to regulate. Non-payment itself would need to be backed by criminal sanction if such a regime was to have any chance of being effective.

Food Law Group

1.507 Agreed. The Bar Council's draft response suggests that the words "potential consequences" should be used instead of "consequences" in this Proposal. We respectfully agree.

CBI

1.508 We see this Proposal as linked to Proposal 1 in that seriously reprehensible conduct involves, at the least, knowledge, intent or recklessness, and should not be dependent on the punishment.

1.509 Whilst these principles would, broadly speaking, work as regards the creation of future criminal offences, if it is proposed to apply them to existing statutes, so as to provide for the imposition of appropriate civil/administrative sanctions in the place of current low-level criminal penalties, then this may be difficult.

East of England Trading Standards Association

1.510 If this proposal were to be accepted then a significant number of regulatory infringements would be de-criminalised. Equally it is unclear whether this proposal also applies to either way matters for which the penalty in the Magistrates Court only attracts a limited fine yet attracts an unlimited fine in the Crown Court.

1.511 The problem here is that once again it ignores the place that prosecution has in the regulatory tool kit. It also ignores the context in which offences may be committed. It would also remove the deterrent effect of a potential criminal conviction.

1.512 For example a haulier who regularly allows his HGV's to be overloaded would on the criteria suggested no longer face criminal prosecution. Yet taking strong enforcement action against those who would either overload or permit overloading of HGV's would, by most, be seen as an important road safety issue warranting the stigma of a criminal conviction.

1.513 We would therefore disagree with this proposal.

Residential Landlords Association

1.514 Agree.

Trading Standards North West (TSNW)

1.515 TSNW believe that this is unworkable within these definitions. The public would lose faith with the Criminal Justice System as it could be seen as taking justice out of the Courts and into the prosecutors' hands. The Public Interest test could be nullified if it is penalty driven. e.g. Cancer Act / Business names Act

1.516 Local Authorities are bound by CPS guidance and their own enforcement policies.

1.517 If there is an under age sales related contravention, and a notice is issued then there is an associated fine. If this is not paid then it becomes a civil matter to chase the debt. If there are additional criminal offences then presumably the non payment would not be mentionable in the Criminal Courts as it was a civil debt which could make it more difficult to justify the prosecution. TSNW appreciate the purposes of fixed penalty notices and recommend that professional officers should have discretion to make decisions. We would refer to the Wednesbury principles of reasonableness.

Food and Drink Federation and Judges of the Court of Session

1.518 Support / agree

Kingsley Napley LLP

1.519 There are few regulatory offences that would meet this test. In our experience dealing with offences within healthcare regulation, although short custodial sentences are available, this penalty is never used.

1.520 However, we believe that having a criminal sanction as a last resort, to deal with severe cases or repeated or widespread non-compliance for what would otherwise be deemed trivial offences, can assist in ensuring more wide-ranging compliance across industry as a whole. In our experience, when prosecuting for a regulator, the threat of a criminal sanction can often be sufficient to put a stop to the actions complained of. This proposal would also mean that all regulatory "summary only" offences would be abolished. We think that would be a mistake – offences do act as a deterrent. A civil sanction involving payment of a civil fine carries no stigma and the fine may well be regarded as no more than an overhead by the offender.

1.521 There is an issue also concerning consistency across criminal justice legislation. Why apply a higher threshold test for regulatory offences than others, for example, various driving offences, or offences against local authority bylaws?

Criminal Bar Association and Bar Council

1.522 It provides the foundation for a general principle in relation to regulatory offences involving conduct and causation of, or responsibility for, a state of affairs where there is the resultant potential for harm (maybe change drafting). We would invite consideration of an amendment to (b) so that it reads: "an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and/or its potential consequences".

PROPOSAL 3

Clifford Chance

1.523 Agree but it should not be confused with seeking to make it less burdensome for a regulator to impose fines (suggested in CP A.39 and D.3) or because penalties imposed by criminal courts are disappointing to the regulator (CP 3.75). If the regulatory objective is best achieved by a procedure involving "civil" penalties, with recourse to specialist tribunals, it is most appropriate route to take, subject to protections for those accused of regulator infractions (see Clifford Chance general comments).

Criminal Sub-Committee of the Council of HM Circuit Judges

1.524 Support. Harm done or risked should involve risk of really serious consciences for public at large.

Chamber of Shipping

1.525 The principle is supported. The Consultation Paper notes the exponential increase in the number of criminal offences over recent years with more than 3,000 added since 1997. It is inconceivable that moral standards in society have dropped to such a level that so many "new" crimes have, of necessity, been created. The reality is that, in many cases, offences have been established to enable regulatory bodies to conduct their activities but at considerable cost to commerce and industry striving to avoid falling foul of a technicality or the inadvertent commission of an offence due to an administrative failing or oversight.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.526 We agree with the principle of this proposal. However, in cases where there is no appropriate regulatory body in place, with the right and duty to impose appropriate civil penalties or other regulatory sanctions, it may be necessary to retain the criminal sanctions. We understand this to have been the case with some animal welfare requirements.

North East Trading Standards Association (NETSA)

1.527 NETSA is mindful of the current civil sanctions being piloted by Local Authority Trading Standards Services in conjunction with LBRO (Local Better Regulation Office) . These sanctions provide for fixed and variable penalties, discretionary requirements – compliance notices, restoration notices, stop notices and enforcement undertakings.

1.528 Whilst these sanctions provide additional options to Trading Standards regulators, they will not be suitable in all cases to address the wrongdoing or be effective in bringing persons back into compliance with the law.

1.529 It is hoped that the outcome of this consultation and implementation of any new regulatory regime does not pre-empt the conclusions and recommendations of this pilot process, being conducted over a two year period, looking to commence from April 2011.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.530 The proposal is based upon the premise that civil penalties are the more appropriate mechanism for low level crime. For this to be the case the proposal should be supported by a clear hierarchy regarding the conduct that may lead to a civil penalty as opposed to a criminal offence and in the level of sanction that may be imposed. In all circumstances the process leading to the imposition of a penalty should be independent of the regulator.

Kiron Reid, Liverpool Law School

1.531 Agree for businesses. This is appropriate in relation to regulatory measures, where an alternative method could be used, such as a fixed penalty notice but with breach or repeat conduct leading to a criminal offence. What the paper describes as two-step are similar to the much overused, but not inherently objectionable, harassment, ASBO or penalty notice for disorder model (Commentators on their development including Geoff Pearson, 'Hybrid Law and Human Rights - Banning and Behaviour Orders in the Appeal Courts' (2006) 27 Liverpool L.R. 125.)

1.532 Paras 1.35 – 1.36 highlight the flexibility of measures available under the Regulatory Enforcement and Sanctions Act 2008. These include fixed monetary penalties (s. 39); stop notices (s. 46) and 'enforcement undertakings' (s. 50). This is welcome but a key concern is that there should be adequate safeguards for recipients if these regulatory measures are used. In addition, the possible relationship to the point made about the decline of enforcement, above, is self-evident. There may also be a concern that fixed penalties would not adequately take account of the greatly varying size and resources of businesses.

Judges of the Court of Session

1.533 We agree that civil penalties should be used where appropriate even if criminal penalties remain on the statute book.

City of London Law Society

1.534 We agree. However, we suggest that if this proposal is taken forward, there should be consultation on the list of criminal offences proposed to be repealed and the civil penalty (or equivalent measure) proposed to replace them.

The Law Society

1.535 While we agree that low level criminal offences should be repealed in these circumstances, and that Proposal 3 sets out a common sense test, we would sound a note of caution. There will be a need for great care when considering the repeal of each particular low level criminal offence, to ensure that repealing it will not have the effect of removing the desirable and warranted deterrent effect obtained by that particular activity remaining criminal.

1.536 Our only concern is that in order to apply this principle there will need to be an element of judgement applied as to what is a low level offence and whether a civil penalty will do as much to secure appropriate levels of punishment and deterrence. Therefore, we suggest that if this proposal is taken forward then there is consultation on the list of criminal offences which it is proposed will be repealed.

1.537 However, as a matter of principle we agree that many low level criminal offences are unnecessary and their repeal would result in the law becoming more certain and more clear.

Financial Services and Markets Legislation City Liaison Group

1.538 We support this proposal as it recognises the concept of proportionality. However, it is important that the safeguards which exist in criminal prosecutions are also available in respect of civil or regulatory action eg rights of appeal, procedural fairness (see our response to Proposal 7 below).

HSE

1.539 Within the current health and safety regulatory regime, HSE is not restricted to considering prosecution as the only response to a breach of the law. Our aim is to secure compliance with the law so that risks are properly controlled and our Enforcement Policy Statement sets out our approach. The range of tools we have include improvement and prohibition notices, withdrawal of approvals, varying licence conditions or exemptions, and issuing simple cautions. These may be used separately from or in addition to commencing legal proceedings. We prosecute where it is warranted because the circumstances of the particular breach meet the Code for Crown Prosecutors tests and the circumstances outlined in our Enforcement Policy Statement.

1.540 In 2009/10 HSE served 9734 enforcement notices and prosecuted 1026 offences. To date, we have identified no gaps in our enforcement options that would support the adoption of civil sanctions under the Regulatory Enforcement and Sanctions Act 2008. As Such HSE does not have access to a civil penalty regime currently.

1.541 Any test of what is the correct enforcement response, should include the aim of achieving sustained compliance.

1.542 What is meant by “low level”? The figures for notices served and prosecutions taken illustrate the point. An enforcement notice may be served for the same breach of law that could lead to prosecution. Offences are context driven and may not be considered as “low level” in all circumstances. In it the circumstances of each case that decide when it is appropriate to provide written advice or serve a notice as the method of achieving compliance, and when the duty holder should be held to account through legal proceedings. The same breach that gave rise to the serving of a notice in one business, may lead to prosecution in another case if there was evidence of reckless disregard of health and safety requirements, or, if the duty holder’s standard of managing health and safety is found to be far below what is required. In other words, health and safety legislation is not generally constructed in such a way that makes identifying offences that are *always* low level possible.

1.543 During the passage of the Bill that led to the Health and Safety (Offences) Act 2008, only four offences were identified that did not warrant increased sentencing provision, namely: see ss9, 14, 27 HSWA and falsely pretending to be an inspector.

OFT

1.544 We note the preference in the consultation for the use of non criminal measures, specifically a civil penalties regime such as that introduced by the RESA. We support the introduction of civil penalties to be available alongside powers of prosecution. (It should be noted that the civil penalties regime, as it currently exists, is dependent on the existence of underlying criminal offences as is the availability of such sanctions). These powers are not a complete substitute for criminal sanctions and should not be introduced as such.

1.545 The civil sanctions regime for consumer protection offences is untested and is intended to be piloted from April 2011 (the pilot is expected to empower the OFT and around 10 Trading Standards Departments and the Consumer Protection from Unfair Trading Regulations [CPRs] will be included within he legislation to be tested). As a result, we think it is inappropriate to pre-judge the results of this pilot by, for example, assuming these powers can effectively remove the need for criminal sanctions altogether. In fact the pilot as it is framed relies upon the continued existence of criminal sanctions to be used appropriately to complement and enhance the operation of the civil sanctions regime. Removal of criminal penalties ahead of the pilot of civil sanctions would be premature and risky.

Michelle Welsh, Monash University

1.546 In situations where a civil penalty order is able to secure appropriate levels of punishment and deterrence low-level criminal offences should be repealed. This proposal should be supported for two reasons:

> Criminal sanctions are not always appropriate, especially for minor regulatory offences, and;
>
> There are difficulties associated with obtaining criminal convictions for some types of regulatory offences. In these cases civil penalties may be able to do more than traditional criminal sanctions to secure appropriate levels of punishment and deterrence.

1.547 Many commentators argue that criminal sanctions are not always appropriate for minor regulatory offences and that the criminal law should be reserved for the most blatant cases. For example, the Australian Law Reform Commission ('ALRC') argues that 'if too many contraventions are called 'criminal,' the special nature of the criminal law as being reserved for behaviour deserving of moral opprobrium is lost.'[4] Coffee argues that 'the criminal law should be reserved to prohibiting conduct that society believes lacks any social utility.'[5]

1.548 If civil penalty regimes are introduced for minor regulatory offences this will allow some criminal provisions to be repealed, resulting in a reduction of the use of criminal sanctions for regulatory offences. This proposal is attractive in situations where a civil penalty order is able to provide a sufficient level of punishment and deterrence. 'Punishments' under a civil penalty regime can be severe. For example, in recent years a number of permanent disqualification orders have been imposed on directors in Australia following successful civil penalty applications.[6]

1.549 As part of the author's empirical study of ASIC's use of the civil penalty regime interviews were conducted with a senior enforcement officer from ASIC.[7] It is evident from the interview conducted with ASIC's senior enforcement officer that ASIC believes civil penalties are attractive enforcement options because of the wide range of orders available. ASIC believes that disqualification orders are extremely important and useful remedies because they provide a mechanism whereby people who should not be managing corporations are removed from those positions.[8] Disqualification orders provide value from a deterrence perspective. For many reasons, persons acting as directors see great value in being able to continue to do so. Directors may be deterred from contravening the law if they believe that there is a likelihood that the contravention may lead to an order disqualifying them from acting as a company director.

4 Australian Law Reform Commission (ALRC), Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report No 95 (2003), [3.37].

5 John Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It' (1992) 101 Yale Law Journal 1875, 1876.

6 See for example the permanent disqualification orders imposed on Dennis Terracini, former director of Elm Financial Services Group, Shaun Oliver White and Nicole Elaine White both former directors of PFS Groups and Donald Maxwell, former director of Procorp Investments. ASIC v Elm Financial Services Pty Ltd (2005) 55 ACSR 544, ASIC v White (2006) 58 ACSR 261, and ASIC v Maxwell (2006) 24 ACLC 1308.

7 Interview with a Senior Enforcement Officer from ASIC, (Melbourne, 8 December 2006). The senior enforcement officer from ASIC requested anonymity and that no direct quotations be attributed.

8 Ibid.

1.550 In addition ASIC sees value in pecuniary penalty orders, which can also act as effective deterrents. Pecuniary penalties allow the courts to classify the offending behaviour by setting different ranges of penalties. ASIC believes that the civil penalty regime is useful because it allows ASIC and others to apply for compensation orders. The company, or other third parties in certain circumstances, can be compensated for the losses they have suffered.[9]

1.551 Apart from providing significant punitive and deterrent effects, the introduction of civil penalties may overcome some of the difficulties that arise when regulators are required to rely on criminal sanctions as the sole enforcement option. In areas such as white-collar crime, the criminal law will not always be able to provide an adequate control mechanism. It has long been argued that the detection and conviction rates of corporate crime are too low. It is believed that corporations who contravene the law face a small risk of being caught and prosecuted.[10] The recent global financial crisis had heightened this belief. Corporate crime or fraud can be extremely difficult to detect. Often these types of offences are complex, involving multiple actors and multiple events over extended periods of time.[11] In situations where corporate crime is detected, prosecution of the crime can be problematic. There are a variety of reasons for this including the fact that often corporate offenders are powerful and well resourced and are able to take advantage of the vagaries of the law. The cases can be very complex and the need to prove the elements beyond reasonable doubt can make the prosecution of them difficult.[12]

1.552 The perceived inadequacies of the criminal justice system in relation to contraventions of corporate law can reduce the deterrent effect of the law.[13] While not perfect, the introduction of civil penalty regimes may overcome some of the problems associated with obtaining convictions for corporate crimes. Civil penalties may provide a more effective deterrent than criminal sanction. The certainty of a sanction being imposed is potentially greater under a civil penalty regime than it is under the criminal regime because of the differences between the civil and criminal rules of evidence and procedure.[14]

9 Ibid.

10 Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal And Civil Law' (1992) 101 Yale Law Journal 1795, 1798. This belief persists despite the fact that obtaining an accurate estimate of the probability of detection is difficult because few if any self reported cases of non-compliance exist, see Sally Simpson, Corporate Crime, Law and Social Control (2nd ed, 2002) 46.

11 Simpson, above n 14, 46. See also Roman Tomasic, 'Corporate Crime' in Duncan Chappell and Paul Wilson (eds) The Australian Criminal Justice System The Mid l990s, (1994) 253.

12 Tomasic, above n 14, 263.

13 See Michelle Welsh, The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' above n 1.

14 Simpson, above n 13, 78.

1.553 Civil penalties can be introduced in order to reduce the use of criminal law for regulatory contraventions and to provide an enforcement regime in situations where the criminal law is an inadequate enforcement mechanism. However, it would be a mistake to assume that the lower evidentiary standards and burden of proof mean that civil penalty orders will be able to be obtained easily in every case. The data collected by the author indicates that in relation to the civil penalty regime contained in the Australian *Corporations Act 2001* (Cth) this is often not the case. When this civil penalty regime was introduced it was intended that it would provide ASIC with a timely and cost effective alternative to criminal prosecutions. However, in recent years civil penalty applications have proven to be anything but timely and cost effective. Very few procedural requirements were imposed by the Australian courts in the early cases however increasingly, the courts have ruled that many procedural requirements apply. This has extended the time that civil penalty applications sit in the courts.[15] Many of these procedural requirements have been introduced in recognition of the fact that the civil penalty regime allows significant orders to be imposed without the protection of the criminal rules of evidence and standard of proof. (Examples of civil penalty applications that have taken lengthy periods of time are provided in Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company and Securities Law Journal* 370, 380.)

1.554 In summary, criminal sanctions are not appropriate for all minor regulatory offences and should be repealed in situations where civil penalty orders can secure appropriate levels of punishment and deterrence. In some cases civil penalties have a greater chance of securing punishment and deterrence than do criminal sanctions because of the civil rules of evidence and the standard of proof that applies. Consideration needs to be given to the development of the rules of evidence and procedure for civil penalty applications so that these applications do not become quasi criminal. At the same time care must be taken to ensure that adequate safeguards are put in place to protect defendants.

RSPCA

1.555 Please see concerns cited above in relation to animal welfare offences being punished as civil measures. It is essential that the AWA is maintained in its current form as the introduction of a regulatory regime could potentially undermine the work currently undertaken by the RSPCA and would signify a U-turn on an important issue of public policy.

1.556 The Society considers the AWA has a wide deterrent effect which would be emasculated if this regime were to change, where the risk of non-compliance was the imposition of a civil sanction. It very unlikely that the advice, education and guidance given by RSPCA Inspectorate would be as effective in preventing or stopping unnecessary animal suffering if the relevant legislation were de-criminalised.

15 See Peta Spender, "Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation" (2008) 26 Company and Securities Law Journal 249 for a discussion of the procedural requirements which have been imposed by the courts in civil penalty cases.

1.557 Further, the RSPCA undertakes multi-agency work, for example with Social Services, and agencies working in the fields of mental health and youth in relation to animal welfare concerns because there can be a correlation between the two issues. Thus the benefit to the general public from the work the RSPCA undertakes is wide ranging.

Trading Standards Institute (TSI)

1.558 As discussed above, it's very difficult to define what a low-level criminal offence is usually what appears to be a trivial matter can lead to greater harm. TSI would welcome these measures only after detailed consultation is carried out into what the effects would be of de-criminalising defined Trading Standards offences and that information-gathering powers are retained.

QEB Hollis Whiteman Chambers

1.559 Agree.

Trading Standards South East Ltd

1.560 TSSE believes that whilst such a proposal is laudable, it is difficult to envisage how it can be practically introduced. Consequently TSSE is not able to support the proposal as drafted. This proposal is based upon the presumption that alternative civil penalties are available which would always be capable of securing compliance with the law. Whilst TSSE has no doubt that some offenders can be dealt with appropriately by the use of civil penalties, TSSE is also equally sure that there will be offenders for whom civil penalties are not appropriate. As such, it is vital that the option of criminal prosecution should remain, even for low level offending.

Institute of Employment Rights

1.561 In relation to proposals 3 and 10, it is not clear from the Law Commission document how we could differentiate clearly between low-level and high-level criminal offences. More careful analysis is needed to inform these proposals, particularly if we recognise the scale of the potential harms to the public and the environment that corporate offending - even at 'low levels' - engenders. Given their ubiquity and the scale of operations of some of the largest corporations, the unique potential for economic, physical and environmental harms on the part of corporations cannot be ignored. Together the proposals may undermine the use of the criminal law against offending which engenders major risks. Already in the case of health and safety offences, there are an increasing number of offences that go unpunished in criminal law.[16]

16 The figures cited in the following paragraphs are taken from Tombs, S and Whyte, D (2007) Regulatory Surrender: death, injury and the non-enforcement of law, Liverpool: Institute of Employment Rights.

1.562 Due to a series of budgetary and political pressures, Health and Safety Executive (HSE) inspectors are increasingly likely to use penalty notices (improvement notices and prohibition notices) as forms of enforcement in place of prosecution. Between 1999/2000 and 2008/09, the absolute number of HSE prosecutions fell by 48%. This decline also applies to those incidents which we might expect are most likely to result in prosecution – fatal injures to workers. Between 1999/00 and 2006/07, the number of worker deaths that resulted in prosecution by HSE fell by 39% (from 129 to 79). This collapse is most dramatically illustrated in the rate of prosecutions following deaths at work – falling from 46% to 28% in six years. An instructive context in which to place such low and declining levels of prosecution is HSE's own longstanding research-based finding, to the effect that in the majority of cases of occupational injury, the primary cause is located within management; thus, for example, the HSE's Accident Prevention Advisory Unit has shown that 70% of safety incidents could have been prevented by management action.[17]

Local Government Regulation (LGR)

1.563 In responding to this proposal, it would have been helpful if it had defined what was meant by the term 'low level'. Without this it is difficult to envisage what is meant by this term. Whilst the proposal may therefore have some merit, it is difficult to envisage how it can be practically introduced. The proposal is based upon the presumption that alternative civil penalties are available which would always be capable of securing compliance with the law. Whilst we agree that some offenders can be dealt with appropriately by the use of civil penalties, we are also equally sure that there will be offenders for whom civil penalties are not appropriate. As such, it is vital that the option of criminal prosecution should remain, even for low level offending given the importance that prosecution is considered to have within the regulatory toolkit and the context in which offences may be committed. Once it becomes administrable as a civil contravention then it would decriminalise our current criminal offences – how would authorities be expected to deal with repeat offenders and/or non payers? This would also be regarded as a 'soft option' by some companies, with the cost of paying a fine being outweighed by the fact that proportionately it is a justifiable risk. Therefore it sends an inappropriate message to offenders as to the seriousness of breaching legislation.

17 Health and Safety Executive (1995) Improving compliance with safety procedures: reducing industrial violations. Human Factors Research Group, Sudbury: HSE Books.

1.564 Civil remedies under the Enterprise Act for low-level offences are only possible because there are offences. In the UK in general it is still too early to conclude that civil sanctions would be effective in either securing appropriate levels of punishment or deterrence. Some civil penalties, such as fixed penalty notices for parking offences, have been around for a long time, but these have clearly been no more effective than criminal sanctions, as the level of offending has not come down. We believe that the jurisdictions that are held as ones where civil penalties are effective (Germany and France) may be ones that require all businesses to be "registered". The major obstacle of identifying the correct business is clearly overcome in such a market place. In the UK there are very few sectors that are "registered" in this way. Ideally this would be a prerequisite to the introduction of civil only sanctions, with criminal offences for failing to register and an option to refuse registration. We recognise this would be administratively burdensome and potentially expensive.

1.565 As indicated, Local Authorities do have civil sanctions available under other legislation. As Professor Julia Black has said in Appendix A, "Regulators have to be prepared to use criminal sanctions in order give credibility to their overall enforcement strategy." However we still maintain that we need criminal sanctions to be available and usable. If we decriminalise the low level offences there are no criminal sanctions available.

1.566 Moreover, it is common for one offender to commit several offences; some may be considered low-level and some not. We would be concerned about the practicality and cost of there being two routes for dealing with a range of activities. We believe that high levels of commission of what may be perceived as low-level criminal offences should retain an ultimate criminal sanction, albeit with intervening civil actions such as we have explained as are available under the Enterprise Act, ante. One person's low-level crime is a serious issue for others.

1.567 For instance: fly-tipping can be seen as low-level, but is probably not to the person on whose doorstep rubbish is deposited, or the land-owner who has to pay for the contaminated waste to be cleared. Dog fouling is seen as low-level but can have serious impact, including health concerns, on communities, as well as costing Local Authorities a great deal of money to clear up. Sometimes, for failing to give cancellation rights when providing services at peoples' homes is likely to be the only offence that can be quickly established, to prevent serious consumer detriment and enable rogue traders to be arrested and/ or interviewed whilst the shoddy and even dangerous work they have done to the property is assessed. To establish fraud in these cases a pattern of activity has to be shown and driving an elderly person to the bank to withdraw £30,000 to pay for building work is not in itself a crime. It may be proven to be so when it is established the work was not needed and was vastly overpriced, but unless the trader can be contained, retrospective enforcement is too late.

1.568 Selling alcohol to children can be seen as low level, but its effect is serious to the Local community that has to cope with the resultant anti-social behaviour. Breaches of the business names provisions of the Companies Act are commonly seen as low-level crimes, but their effect is that consumers and regulators cannot identify the legal entity. Therefore they can neither sue nor enforce. Prosecution for low-level offences may be rare, but the offences are useful and they have a deterrent effect. For instance, for statutory noise nuisance there are very few prosecutions, but the civil notice regime is effective simply because there is an offence that ensures the notice procedure

1.569 We are also aware of the current civil sanctions initiative being piloted by Local Authority Trading Standards Services in conjunction with LBRO (Local Better Regulation Office) under the Regulatory Enforcement and Sanctions Act 2008. These sanctions provide for fixed and variable penalties, discretionary requirements – compliance notices, restoration notices, stop notices and enforcement undertakings. Whilst these sanctions provide additional options to Trading Standards regulators, they will not be suitable in all cases to address the wrongdoing or be effective in bringing persons back into compliance with the law. It is hoped that the outcome of this consultation and implementation of any new regulatory regime does not pre-empt the conclusions and recommendations of this pilot process, being conducted over a two year period, looking to commence from April 2011.

Food Standards Agency

1.570 Agreement depends on circumstances. Need evidence of the equivalence effectiveness of civil sanction before agreeing to repeal the criminal sanction, including its deterrent effect.

1.571 FSA has hierarchical approach to securing compliance starting with civil sanctions for low-level/risk non-compliance. Want to retain criminal sanctions as an option to deal with cases of persistent non-compliance with lower- and medium-level risk and higher-risk activities. Civil sanctions within the hierarchy should lead to less recourse to criminal sanctions without need to repeal the criminal sanctions which can be kept as ultimate deterrent.

1.572 Unlike in approved premises, in most local authority enforced premises, there is no withdrawal or action (other than a Hygiene Emergency Prohibition Notice) to stop a business. Reg 7 of Food Hygiene Regulations 2006 allows for a prohibition order of an individual carrying on a food business on conviction of a relevant offence. This is the only food statutory measure available to prevent the worst offenders carrying on in business putting people at risk. Want to ensure prohibitions remain available under civil sanctions, even if this required amendment to legislation.

1.573 FSA currently consulting publically on proposal to extend the use of Remedial Action Notices to all food business establishments. Currently enforcement officers can use notices only in establishments approached under EC Regulation 853/2004. Extension to all would allow officers tackle non-compliance in circumstances where imminent risk to public health would be difficult to demonstrate but immediate action is necessary o regain compliance and reduce or delay. Notices provide simple and effective sanction that can be applied and removed without need for enforcing authority or food business operator to attend court.

1.574 Can be 'strategic' use to securing conviction as means to protect consumers where a low fine is less important. Very rare, but important option for enforcement community.

1.575 Infer that the Commission would expect the stock of legislation to be assessed. Suggest it would make sense to do this in the review.

Association of Chief Trading Standards Officers (ACTSO)

1.576 Frequently wider societal benefits to pursuing criminal prosecution of what otherwise appear to be technical requirements. Proposal would significantly undermine consumer protection in the UK at a time when Gov has stated the importance of effective Trading Standards Services to economy and is intending to increase the role of local Trading Standards Services. Commission should consider impact of de-criminalisation of legislation on ability of Trading Standards Services to function within law enforcement community. Information exchange and gathering for investigating breaches of legislation frequently relies on gateways which exist for purpose of investigation or detection of crime or similar. De-criminalisation some legislation may make investigation of that breach harder, resulting in breaches remaining unaddressed. Effect on consumer confidence is hard to determine but unlikely to be positive.

1.577 Unlikely that civil sanctions alone would provide sufficient incentive for large businesses to prioritise compliance with regulatory law. This coupled with difficulty and cost of pursuing civil claims could result in breaches of consumer protection legislation remaining unaddressed.

1.578 Important to note that some "regulatory" offences (eg Consumer Protection from Unfair Trading Regs 2008) apply to a wide range of issues including aggressive sales techniques targeted at vulnerable consumers. Apparently technical offences such as requirement to issue a notice of cancellation rights under the Cancellation of Contracts Concluded at a Consumer's Home or Place of Work Regs often are effective at preventing more serious harm, such as doorstep crime. ACTSO asks to be involved in further consideration of what offences should be de-criminalised so that the implications can be fully understood.

Justices' Clerks' Society

1.579 Agree.

Leicester City Council

1.580 Agreed providing there remains a route for non-compliance with any proposed alternative to a criminal offence.

The Magistrates' Association

1.581 Agree in general but note that civil penalties are not necessarily at a lower level than criminal sentences and may be inflexible (eg introduction of regulations to enforce continuous licensing for motor vehicles – registration keeper who fails to conform to requirement to renew annual license sent a reminder with £80 penalty, reduced to £40 if paid promptly; next stage is fixed excise penalty of £1000, enforced by courts if not paid, who have no power to reduce according to keeper's means. Disproportionate in relation to other offences and draconian to the extent that DVLA do not enforce it after protests from all sides when first attempted. This became law in s31C Vehicle Excise and Regulation Act 1994) and DCA failed to spot the flaw.)

Care Quality Commission (CQC)

1.582 Attractive in principle but this proposal could have unintended adverse consequences for the regulation of health and social care under current legislation.

1.583 Assume that "civil penalties" include fixed penalties. CQC are able to serve fixed penalties in relation to a number of offences but see this as a criminal process rather than civil because they are essentially punishments and failure to pay the penalty logically leads to prosecution.

1.584 First, Checks and balances on CQC's enforcement powers under the Health and Social Care Act mean that fixed penalties are of limited value in acting as deterrent and holding people to account. CQC are required to serve a warning notice that is not subsequently complied with before they can prosecute in relation to most offences, even after having served a fixed penalty notice that was not paid. Second, service notice providers served with a fixed penalty can refuse to pay and comply with subsequent warning notice and therefore avoid being held to account. Third, CQC are not allowed to include evidence in a warning notice that has been complied with in any subsequent proceedings, civil or criminal. Fourth, some providers are very large but more are small or medium-sized businesses and the fixed penalties may have some deterrent effect on the latter but not the former. If level of penalties could include variable rates for proportionate and deterrent effects on different providers, the proposition may have merit.

1.585 Additionally, no example in the Health and Social Care Act or similar legislation of a fixed penalty being able to be imposed without there being an offence. Where a penalty is not paid, the next step is prosecution.

Sheffield University LLB and Criminology Students

1.586 Very broad proposal. Raises questions. Is it practical and justifiable to repeal criminal offences in this way? What evidence will be needed to support these decisions (how does one measure whether a civil penalty is likely to result in the desired level of punishment and deterrence)?

EEF: The Manufacturers' Association

1.587 Regulators should follow a common hierarchy, with minor breaches being civil matters and the criminal law reserved for serious breaches. The tests set out in proposal 3 for determining the threshold appear correct, matters that do not warrant an unlimited fine or imprisonment should not be criminal matters. This would also reduce the resources expended by regulators in pursing minor breaches. In determining this, the regulator should consider what penalties are justified, not what penalties are currently provided for the breach. In some instances, notably offences under the Health and Safety at Work Etc Act 1974, imprisonment has been provided for almost all breaches, ranging from technical failures to keep and display documents to actions that put lives directly at risk. This lacks a hierarchy of seriousness.

Faculty of Advocates

1.588 The criminal law should not be used as the primary means of promoting regulatory objectives and proposal 2 seems to identify appropriately the circumstances in which a criminal law remedy is proper. If the law is to be reformed along those lines, then the repeal of low level criminal offences contemplated by proposal 3 seems obviously sensible (assuming that suitable replacement sanctions are put in place where those are truly required).

1.589 The CP refers by way of example to money laundering in a number of places. It appears that the approach taken to that subject offers a useful model. In particular it seems to illustrate the proper role of the regulator under general regulatory regimes. (Example given of Reg 42 Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002, showing a good model of a regulatory scheme which makes appropriate and incremental use of ordinary regulatory practice, administrative penalties, regulatory offences and "true" criminal offences).

1.590 There is a theoretical risk that, for reasons of political or bureaucratic expediency, conduct which ought to be regarded as truly criminal will be classified as worthy merely of administrative sanctions (CP 3.34). However, our experience suggests that there is a rather higher risk that political and regulatory pressures will result in the criminalisation of conduct which ought really to be dealt with administratively. In our view, such pressure should be restricted. The establishment of a coherent scheme designed to ensure proportionality in the creation and use of regulatory offences seems a worthy goal. Understanding that money laundering is criminal (has not been merely an administrative issue since 1992 when Germany introduced Art 261 Penal Code).

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.591 In the UK in general it is still too early to conclude that civil sanctions would be effective in either securing appropriate levels of punishment or deterrence. [Some civil penalties, such as fixed penalty notices for parking offences, have been around for a long time, but these have clearly been no more effective than criminal sanctions, as the level of offending has not come down.] The RES Act has not yet given local authorities the civil sanctions powers, although pilots have been arranged. We believe that the jurisdictions that are held by the consultation paper as ones where civil penalties are effective (Germany and France) may be ones that require all businesses to be "registered". The major obstacle of identifying the correct business is clearly overcome in such a market place. In the UK there are very few sectors that are "registered" in this way. Ideally this would be a prerequisite to the introduction of civil only sanctions, with criminal offences for failing to register and an option to refuse registration. We recognise this would be administratively burdensome and potentially expensive.

1.592 As indicated, local authorities do have civil sanctions available under other legislation. As Professor Julia Black has said in Appendix A, "Regulators have to be prepared to use criminal sanctions in order give credibility to their overall enforcement strategy." As we have said, we must have criminal sanctions available and usable. If we decriminalise the low level offences there are no criminal sanctions available.

1.593 Moreover, it is common for one offender to commit several offences, some of which may be considered low-level and some not. We would be concerned about the practicality and cost of there being two routes for dealing with a range of activities. We believe that high levels of commission of what may be perceived as low-level criminal offences should retain a criminal sanction, albeit with civil actions such as those under the Enterprise Act 2002 being available. One person's low-level crime is a serious issue for others.

1.594 For instance: fly-tipping can be seen as low-level, but it is probably not viewed in this way by the person on whose doorstep rubbish is deposited, or the land-owner who has to pay for the contaminated waste to be cleared. Dog fouling is seen as low-level but can have serious impact, including health concerns, on communities, as well as costing local authorities a great deal of money to clear up. Failing to give cancellation rights (when providing services at peoples' homes,) is often the *only* offence that officers can quickly established when dealing with rogue traders at an elderly person's home. To prevent serious consumer detriment, rogue traders have to be arrested and / or interviewed whilst the shoddy and even dangerous work they have done to the property is assessed. Making this a "civil sanction" matter would remove this possibility. To establish fraud in these cases, a pattern of activity has to be shown and driving an elderly person to the bank to withdraw £30,000 to pay for building work is not in itself a crime. It may be proven to be so when it is established the work was not needed and was vastly overpriced, but unless the trader can be contained, retrospective enforcement is too late.

1.595 Selling alcohol to children can be seen as low level, but its effect is serious to the local community that has to cope with the resultant anti-social behaviour. Breaches of the business names provisions of the Companies Act are commonly seen as low-level crimes, but their effect is that consumers and regulators cannot identify the legal entity, and they can neither sue nor enforce against the offender. Prosecution for low-level offences may be rare, but the offences are useful and they have a deterrent effect. For instance, for statutory noise nuisance there are very few prosecutions, but the civil notice regime is effective simply because there is an offence that ensures the notice procedure works. Whilst civil remedies under the Enterprise Act apply to civil breaches, they also work as effective remedies for low-level offences because of the criminal nature of the offences.

Ivan Krolick

1.596 I agree, although I wonder whether repeated regulatory infringement may require criminal deterrence.

Food Law Group

1.597 It is agreed in principle that civil penalties should be applied to low level crime, although repeal may be expensive in time and resources so we queried whether simply an enforceable prosecution policy would be better. We were also concerned that the civil penalties under the Regulatory Enforcement and Sanctions Act 2008 that are most likely to be applied to low-level "crime" are dependent on recognition under the Act that offences have been or are likely to be committed. See, for example, s39 (1) and (2), 42(1), 46(4) (c), 50(1) (a). Simply repealing criminal offences would preclude the application of the Act. This problem could be circumvented by other descriptions of unlawful conduct but these would need to be very carefully drafted and to involve no element of discretion on the part of the enforcement body. We were not clear how this could or should be achieved.

CBI

1.598 Broadly agree. See answer to Proposal 2.

East of England Trading Standards Association

1.599 What "low level"? In the absence of a definition again it is difficult to provide a reasoned response.

1.600 However we consider that once again this proposal ignores the place that prosecution has in the regulatory tool kit and ignores the context in which offences may be committed. Equally, with the sanctioning toolkit that will be made available to regulators under the Regulatory Enforcement And Sanctions Act 2008 it strikes us that Government have already gone a long way to addressing the perceived concerns. Therefore in our view this proposal has little or no merit.

Food and Drink Federation

1.601 Support.

Residential Landlords Association

1.602 Agreed. There needs to be a programme of wholesale repeal. We would be very concerned if a proposal was made but side lined by Government. We are, however, concerned about the impact of EU directives because much of the recent legislation which ought to be repealed has emerged from Brussels; some times gold plated in the UK. A very significant part of new regulatory imposts results from EU activity.

Trading Standards North West (TSNW)

1.603 Once it becomes administrable as a civil contravention then it would decriminalise our current criminal offences – how do we deal with repeat offenders and/or non payers? A recent Audit Commission report found that only 50% of fixed penalties issued by the police were ever paid. Given the contempt such notices are held by 50% of the recipients can one justify moving to a system that is ignored by half the miscreants. The possibility of fines and imprisonment in the criminal justice system would not be treated with the same disdain.

Kingsley Napley LLP

1.604 Professor MacCrory's report "Improving Compliance among Businesses" and the legislation born of it, the Regulatory and Enforcement Sanctions Act 2008 (RESA), has been effective in making available a broader range of sanctions for regulatory bodies – although the extent to which bodies have been able to adopt these sanctions has been varied. Prior to the enactment of RESA, it was often the case that the only enforcement option open to regulators was prosecution, meaning there was no satisfactory means by which to punish small infractions; the regulator had to choose between prosecution or taking no action. This was obviously not a satisfactory situation. The introduction of RESA has vastly improved the situation, opening up a range of sanctions to regulators, including fines and remedial orders. This has enabled regulators that have powers under the Act to punish wrongdoing and the creation of risk within their sectors according to the severity of the offence, as well as providing appropriate levels of deterrence. The existence of RESA would therefore seem to already have addressed some of the criticisms made by the Paper and thus the Commission seems really to be looking to refine what has already been put in place.

1.605 The main difficulty arising in the abolition of low-level criminal offences is that the regulator may lack bite where there is a repeated history of non-compliance in spite of the application of the RESA sanction. The SIA, for example, has three sanctions available to it: warnings, improvement notices and prosecution. Although a first offence may be disposed of using the first two, a second offence will likely attract the third. Therefore, whilst RESA sanctions are not available to those regulators who wish to avail themselves of them, it would not be appropriate for those low level criminal-regulatory offences to be repealed in the interim. It is important therefore to retain criminal offences as an option in this situation.

1.606 It should also be noted that not all regulators have access to RESA powers due to the unwillingness of sponsor departments to engage in the lengthy consultation process that is required before order making powers are given or because of the costs involved in setting up the new regime; or because of the uncertainty facing many regulators.

Criminal Bar Association and Bar Council

1.607 Subject to the important caveats set out in relation to proposals 1 and 2, which affect the meaning of "low-level criminal offences" we respectfully agree that proposal 3 represents a sound general principle.

PROPOSAL 4

Criminal Sub-Committee of the Council of HM Circuit Judges, QEB Hollis Whiteman Chambers, HSE, Trading Standards South East Ltd, Justices' Clerks' Society, The Magistrates' Association, East of England Trading Standards Association, Food and Drink Federation, Financial Services and Markets Legislation City Liaison Group

1.608 Agree / support

Judges of the Court of Session

1.609 Agree and believe that this proposal may be of less significance to Scottish procedure than to that of England.

Chris Williamson MP

1.610 This is already an overlap in the law regarding inchoate liability offences with the well settled law of incitement having a huge overlap with the Serious Crime Act 2007. This is just one of a number of examples which demonstrate this point. The more that can be done to alleviate the duplication of criminal offences the better.

RSPCA

1.611 The example given in the overview document to the Consultation cites section 8 of the AWA as an example of such an offence. However S8 – causing an animal fight to take place or attempting to cause such a fight to take place is a summary only offence and not an indictable offence as indicated at paragraph 1.41. S1 of the Criminal Attempts Act 1981 relates to indictable offences only. Thus the section 8 offence of attempt is necessary and is not a duplication of the 1981 Act.

Residential Landlords Association

1.612 Agreed. Unfortunately, there is a great tendency for Parliamentary council and lawyers drafting regulations within Departments simply to repeat themselves forgetting that the necessary offences exist already. There seems to be a "belt and braces" approach which is quite unnecessary, as the consultation paper rightly points out.

Trading Standards Institute (TSI)

1.613 TSI would like to see a clarification and consolidation of the laws relating to the above. At the moment TSSs have a number of options open to them to assist in preventing inchoate offences. Trading Standards criminal offences should still be retained, however, as this can prevent the commission of offences when they are at the planning stage – therefore saving the costs of investigations, prosecutions, etc.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.614 We agree with these two proposals, which deal with two specific areas of pointless overlap between offences. However, there should also be a general duty on the drafters of legislation, and Parliament itself, to avoid and remove any other areas of pointless overlap. Besides the unnecessary complexity introduced by such separately drafted provisions, they also inevitably tend to result in unintended consequences, inconsistent outcomes and penalties and doubtful justice, as noted in a number of instances in the consultation document.

1.615 This should also apply to the inappropriate placement of offences, identified in paragraphs 3.129 to 3.135 of the Consultation Document.

1.616 However, please see our comment in paragraph 6 above, on the desirability of criminal offences to back up and reinforce regulatory provisions. This could be done, perhaps, by specifically providing in Statute that certain offences committed in a regulatory or business context should be treated in accordance with the provisions of the Fraud Act.

City of London Law Society

1.617 In principle we agree that pointless overlaps between offences should be avoided. However, we can see the benefits of trying to clarify what actions amount to "attempt", "assisting" and "encouraging" in some cases particularly where offences may be committed by companies or bodies other than individuals. Where clarity is provided perhaps the more general law should be excluded.

Chamber of Shipping

1.618 The point made appears to have merit.

The Law Society

1.619 It is eminently sensible, in our view, that the criminal law should not be used to deal with inchoate offending when the behaviour is covered by existing law, and agree in principle that pointless overlaps between offences should be avoided. This would go some way to avoid the undesirable duplication of offences, as the consultation paper so graphically illustrates. There are too many situations where there are many possible offences in relation to the same behaviour, which is unnecessary and creates confusion and lack of clarity.

1.620 However, we can see also the benefits of trying to clarify what actions amount to "attempt", "assisting" and "encouraging" in some cases particularly where offences may be committed by companies or bodies other than individuals. Where clarity is provided perhaps the more general law should be excluded.

Food Standards Agency

1.621 Strongly support. Not always easy to get police to investigate cases involving food or CPS to take on food cases.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.622 We agree. In principle we agree that pointless overlaps between offences should be avoided. However, we can see the benefits of trying to clarify what actions amount to “attempt”, “assisting” and “encouraging” in some cases particularly where offences may be committed by companies or bodies other than individuals. Where clarity is provided perhaps the more general law should be excluded.

Kiron Reid, Liverpool Law School

1.623 Agree. New specific inchoate offences should not be created when these are already covered by existing general legislation. That is not to deny that the law of conspiracy itself in England is greatly confusing and could do with being rewritten to modern standards.

North East Trading Standards Association (NETSA)

1.624 The majority of experience of trading standards based offences involves commission of the *actus reus*. Whilst inchoate offending may be considered in certain preparatory acts to an offence being committed, as many investigations are instigated as a result of complaints, the offence has already been committed.

1.625 As identified in the consultation paper, existing law addresses inchoate matters and consideration should be given to identifying and reducing duplication where replicated in regulatory legislation.

Association of Chief Trading Standards Officers (ACTSO)

1.626 Difficult to address in general terms. ACTSO wants to be involved in any further consideration of what offences to amend/repeal so that implications are fully understood. Concerned that conspiracy offences are indictable only and therefore more costly and difficult to pursue for local authorities. Any change meaning offences pursued by indictment to Crown Court will result in increased demands on Crown Court time and fewer protections due to cost and complexity of brining prosecution increasing.

Local Government Regulation (LGR)

1.627 We would be supportive of a consistent way of dealing with inchoate offences. However, when written directly into specific statutes a simpler test is often applied. The Mens Rea elements of the inchoate offences can be difficult with extensive case law to consider, for instance on what amounts to "an act that is more than merely preparatory" The majority of experience of trading standards based offences involves commission of the Actus Reus. Whilst inchoate offending may be considered in certain preparatory acts to an offence being committed, as many investigations are instigated as a result of complaints, the offence has already been committed. As identified in the consultation paper, existing law addresses inchoate matters and consideration should be given to identifying and reducing duplication where replicated in regulatory legislation. We remain concerned that conspiracy offences are indictable only, and therefore more costly and difficult to pursue for Local Authorities. Any change that would necessitate offences being pursued by indictment to Crown Court will result in increased demands on Crown Court time and fewer prosecutions due to the cost and complexity of bringing the prosecution increasing

1.628 The advantage of having attempts, in particular, in specific legislation is that it promotes "ownership" of the offences by a specific regulator, who is likely to be under a duty to enforce. Whilst can see the issue with Parliament's practice of writing offences into new legislation that are already covered by the inchoate offences, we believe they may have done so deliberately, in order to promote certainty where using the inchoate offences would not do so. If we are to cease having such offences in the primary legislation we would ideally like a review, and simplification, of the requirements required to establish inchoate offences. Using other legislation introduces another layer of complexity. Costs increase when legislative issues become complex. If there is less certainty, issues are less likely to go to court. Experience leads us to suggest that local lawyers are likely to be less supportive and more reluctant to prosecute under, for example, the 1981 Criminal Attempts Act.

1.629 There is a considerable amount of comment in the paper about the Consumer Protection Regulations 2008 and the implication seems to be that these Regulations only had criminal offences incorporated into them as this was the easiest way of implementing the Directive. In fact the opposite is true. The original Regulations contained entirely civil remedies with no criminal offences. The offences were introduced after a long period of consultation between BIS, regulators and businesses. This consultation was afterwards held up by BIS as a model as to how future regulation of this type should ideally be conducted and resulted in workable, proportionate regulation of business that included criminal offences.

Leicester City Council

1.630 Not agreed: proposal would be too restrictive.

Faculty of Advocates

1.631 It would make for a more coherent legal system is duplication was avoided, leaving inchoate offences, attempts and fraud to be dealt with by existing general rules. In Scots law these matters are largely regulated by common law and the law is, therefore less codified. For the most part, this should not cause any difficulties but there might be a potential problem at the margins because it cannot be assumed that the coverage by the Scots common law rules and that of the legislation in England and Wales is necessarily coextensive. As the Scottish Law Commission has recognised, many of the regulatory regimes relate to reserved matters. It is, in any event, incumbent on Westminster Departments making policy in reserved matters to approach their task in a way which treats Scots law as an integral part of their task and not as an "add on". Proposal 4 can be understood as having reference to both legal systems but proposal should be amended so as to refer also to the law of fraud in Scotland as well.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.632 In principle this is difficult to argue against. We would be supportive of a consistent way of dealing with inchoate offences. However, when written directly into specific statutes a simpler test is often applied. The mens rea elements of the inchoate offences can be difficult with extensive case law to consider, for instance on what amounts to "an act that is more than merely preparatory".

1.633 The advantage of having attempts, in particular, in specific legislation is that it promotes "ownership" of the offences by a specific regulator, who is likely to be under a duty to enforce. Whilst we can see the issue with Parliament's practice of writing offences into new legislation that are already covered by the inchoate offences, we believe they may have done so deliberately, in order to promote certainty where using the inchoate offences would not do so. If we are to cease having such offences in the primary legislation we would ideally like a review, and simplification, of the requirements necessary to establish inchoate offences.

1.634 Using other legislation also introduces another layer of complexity. Costs increase when legislative issues become complex. If there is less certainty, issues are less likely to go to court. Experience leads us to suggest that local lawyers are likely to be less supportive and more reluctant to prosecute under, for example, the 1981 Criminal Attempts Act.

1.635 There is a considerable amount of comment in the consultation paper about the CPR's and the implication seems to be that these regulations only have criminal offences incorporated into them as this was the easiest way of implementing the directive. In fact the opposite is true, which the authors of the paper could have established had they asked either BIS or the Trading Standards profession. The original regulations contained entirely civil remedies with no criminal offences. The offences were introduced after a long period of consultation between BIS, regulators and businesses. This consultation was afterwards held up by BIS as a model as to how future regulation of this type should ideally be conducted as it resulted in workable, proportionate regulation of business that included criminal offences.

Ivan Krolick

1.636 I agree in principle, but the existing law will need to be cleaned up to give effect to the principle. This not merely a regulatory/criminal issue. There is an increasing number of indictments charging statutory conspiracy (Criminal Law Act 1977) to commit fraud (i.e. fraud under the Fraud Act 2006) in circumstances where other indictments have charged conspiracy to defraud. Moreover the various provisions of POCA 2002 referring to a defendant entering into an arrangement to money launder, could also be charged as statutory conspiracy.

Food Law Group

1.637 Agreed. We noted that there was no inclusion in the Law Commission's proposals as to a potential overlap with the "by-pass" offence which usually takes the following form: "Where the commission by any person of an offence under any of the preceding provisions of this Part is due to an act or default of some other person, that other person shall be guilty of the offence; and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first-mentioned person."[18]

1.638 Although this is not an inchoate offence, it tends to be used in regulatory cases in place of an "aiding and abetting" offence. It is commonly used where a manufacturer supplies unlawful goods to a retailer which the retailer then sells[19] but this is not the only instance of its use. We note that, like the "consenting and conniving" doctrine it results in the conviction of the secondary offender of the primary offence. We raise the question of whether this needs also to be considered as part of the Law Commission's review.

CBI

1.639 Broadly agree the sentiments, although it may also be necessary to review how these principles are currently applied to particular offences, and experience in practice.

Trading Standards North West (TSNW)

1.640 The law governing conspiracy can be useful but can significantly complicate matters for prosecution. Officers do use The Criminal Attempts Act and aiding and abetting offences – there only has to be knowledge that the act is occurring not that it is criminal in its nature. We feel conspiracy can be a sledge hammer to crack a nut.

1.641 For example the Addaway case – the Court play an important role, the Court therefore provides the checks and balances and whilst consistency is important (hence the application of an Enforcement Policy and the Code for Crown Prosecutors). TSNW recommend that we should not be paralysed by applying checks and balances before we get to Court.

18 Food Safety Act 1990, s.21

19 The structure of the legislation is often that the retailer is liable for the "supply" but the manufacturer has caused the commission of the offence.

Criminal Bar Association and Bar Council

1.642 Agree.

PROPOSAL 5

Clifford Chance

1.643 Agree. Possibly the problem could be reduced by improved training at, and greater specialism within, the office of Parliament Counsel.

Trading Standards Institute (TSI)

1.644 Trading Standards Professionals do not have any powers under this legislation and would usually only consider investigations where there are elements of our existing legislation – e.g. Consumer Protection from Unfair Trading Regulations 2008.

Criminal Sub-Committee of the Council of HM Circuit Judges, GC100 (association for general counsel and company secretaries for the FTSE 100), Justices' Clerks' Society, Leicester City Council, City of London Law Society, The Magistrates' Association, Food Law Group, CBI, QEB Hollis Whiteman Chambers, Financial Services and Markets Legislation City Liaison Group

1.645 Agree / support.

Chamber of Shipping

1.646 The point made appears to have merit.

HSE

1.647 There are a number of offences under HSWA which may also amount to offences under the Fraud Act 2006. We agree that such duplication is undesirable. However, consideration also needs to be given as to "vires" to prosecute. Whilst the Fraud Act does not contain any restriction as to who can prosecute, such offences are normally prosecuted by the police and CPS. A regulator would have to demonstrate that prosecution of an offence under the Fraud Act came within its powers.

Kiron Reid, Liverpool Law School

1.648 Agree. The wide recent Fraud Act 2006 provisions should both cover both pre-existing offences and any conceivable areas where new specific offences might be thought to be needed. The explanation in para. 1.43 is entirely logical.

Association of Chief Trading Standards Officers (ACTSO)

1.649 See general comments. Also, Trading Standards Services have no powers under Fraud Act (cf consumer protection legislation giving local Trading Standards authorise power to enter businesses premises etc) and therefore change would seriously restrict investigation capability of local Trading Standards Services.

Food Standards Agency

1.650 Agree in principle but foresee difficulties in persuading police/CPS to act if adopted. FSA experience has shown that not always easy to get police to investigate fraud cases involving food. Fraud covers many different activities that would still have to be dealt with by specific food legislation (eg operating premises without approval). May be appropriate to try some cases under Fraud act but because so wide-ranging, risk that such action might be seen as disproportionate and action under more specific food or feed legislation would be better.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.651 We agree with these two proposals, which deal with two specific areas of pointless overlap between offences. However, there should also be a general duty on the drafters of legislation, and Parliament itself, to avoid and remove any other areas of pointless overlap. Besides the unnecessary complexity introduced by such separately drafted provisions, they also inevitably tend to result in unintended consequences, inconsistent outcomes and penalties and doubtful justice, as noted in a number of instances in the consultation document.

1.652 This should also apply to the inappropriate placement of offences, identified in paragraphs 3.129 to 3.135 of the Consultation Document.

1.653 However, please see our comment in paragraph 6 above, on the desirability of criminal offences to back up and reinforce regulatory provisions. This could be done, perhaps, by specifically providing in Statute that certain offences committed in a regulatory or business context should be treated in accordance with the provisions of the Fraud Act.

North East Trading Standards Association (NETSA)

1.654 In a regulatory context such as Trading Standards, many offences deal with matters which may be considered to fall under the umbrella of constituting fraud against consumers. Matters falling within the scope of the Consumer Protection from Unfair Trading Regulations 2008, (CPR's), Trade Marks Act 1994 for example. These examples of legislation provide business with a detailed structure of proscribed matters when conducting a business.

1.655 To replace such regulatory measures with the more general offences under fraud may result in greater uncertainty for business. Detailed guidance would need to be provided to cover a variety of circumstances and differing trade sectors.

1.656 Additional considerations would need to be given to the mens rea element as opposed to strict liability offences under certain statutes and a current absence of enforcement powers available to Local Authority officers.

NHS Counter Fraud an Security Management Service

1.657 Remit concerned primarily with offences that are included in either Fraud Act or Theft Act 1968 or 1978 (offence also created through Health act 1999 to provide a more serious sanction for repeated evasion of charges and persistent fraud.) Other primary offences (eg under Identity Card Act 2006 and Counterfeiting Act 2001) are often charged in NHS fraud-related cases. If individual has committed a criminal offence, there should be little or no distinction based on whether offence was committed in regulatory setting or otherwise. There is potential for fraud related to healthcare (eg fraudulent report against waiting time targets) we do not support special treatment of these offences compared with finaland and other types of fraud. Treating an individual differently because of setting of offence would be counter-productive to aims of crating an anti-fraud culture and deterring fraud.

Faculty of Advocates

1.658 See under proposal 4.

The Law Society

1.659 We agree with this proposal in principle. We agree that the Fraud Act 2006 works well in practice, is flexible and covers the variety of different situations in which fraud may be committed. It is also 'future proof', in that it can be adapted to frauds committed by using new technology. Where there is a generic Fraud Act offence the prosecution should, as a rule, rely on that rather than any other discrete example of a dishonesty offence.

1.660 The only drawback that using a generic Fraud Act offence could cause is that specific offences (for example, making a false declaration in an firearms application) may not show up in a future Criminal Record Bureau check, where it may be useful that more specific information concerning what the offence actually was about was apparent. Again, we agree that the proposal is a good principle, but there may be some situations where it is more appropriate to rely upon a specific offence directed towards a particular type of harm, or modus operandi, so that it is flagged up in the future. This is particularly important when looking at areas that require tight regulation and the firearm offence is a good example. In this jurisdiction firearms are very tightly regulated, for good reason, and it could be argued that engaging in fraudulent activity in this area should be properly dealt with under the firearms legislation to reflect the overall gravity of the situation.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.661 We have already made mention of our concerns in relation to this proposal. There are no powers sections in the Fraud Act 2006. Whilst the police have general powers given to them under the Police and Criminal Evidence Act, local regulators have no such parallel powers. If we are to investigate commercial fraud under the Act, and other local authority-specific legislation were to be removed, we would need appropriate powers. [Also, but incidentally, from the point of view of businesses, lack of specific regulation could make it difficult for businesses to obtain advice that gives them certainty of outcomes were we to be wholly reliant on fraud provisions.]

1.662 Currently local authority regulators do sometimes use the Fraud Act as an adjunct to the work that is done under core legislation, where appropriate, widening the sentencing options available to the Courts. It is highly unusual for us to investigate cases that are pure fraud. Local authority regulators have no duty to enforce the Fraud Act, so it is unlikely that there will be any funding for such enforcement activity. Police are unlikely to have the resources or the will to pick up what amounts to regulatory crime under their Fraud Act activities. In our experience most police commercial fraud units are unlikely to put resources into investigations where the financial losses involved are less than around £100,000, unless there is a link with organised crime groups or some other priority policing area. If local authorities were given powers, duties and funding, it would be possible to overcome some of these issues (although lack of arrest powers and the resultant use of interview in custody would still necessitate police support,) and we would welcome such an opportunity to deal robustly with commercial fraud. Without this, local authority lawyers and sometimes courts question whether the Fraud Act should be used by local authorities at all.

Ivan Krolick

1.663 Agreed (but see above on conspiracy).

Trading Standards South East Ltd

1.664 TSSE does not agree with this proposal. Firstly, the proposal does not define what constitutes 'fraud'. As there is no statutory definition of fraud, this proposal is unhelpful and could in turn lead to confusion. Furthermore, the Fraud Act 2006 contains no statutory powers of enforcement such as entry, inspection, ability to seize evidence, etc. The Police are not hampered by this lack of enforcement powers as they have general powers of enforcement by virtue of the Police and Criminal Evidence Act 1984.

East of England Trading Standards Association

1.665 We would agree in principle with this proposal. However unlike the specific enactments they enforce, Regulators do not have any enforcement powers under the Fraud Act. Unless this is addressed then the proposal, if implemented, will result in lower levels of protection for the public and allow those who truly warrant prosecution to possibly escape punishment.

Local Government Regulation (LGR)

1.666 In a regulatory context many offences deal with matters which may be considered to fall under the umbrella of constituting fraud against consumers. Matters falling within the scope of the Consumer Protection from Unfair Trading Regulations 2008, (CPR's) or Trade Marks Act 1994 for example. These examples of legislation provide business with a detailed structure of proscribed matters when conducting a business.

1.667 However unlike the specific enactments they enforce, Local Authority regulators do not have any enforcement powers under the Fraud Act, unlike the Police as they have general powers of enforcement by virtue of the Police and Criminal Evidence Act 1984. Police are unlikely to have the resource, or the will, to pick up what amounts to regulatory crime under their Fraud Act activities. In our experience most police commercial fraud units are unlikely to put resources into investigations where the financial losses involved are less than around £250,000, unless there is a link with organised crime groups or some other priority policing area. If Local Authorities were given powers, duties and funding, it would be possible to overcome these issues, and we would welcome such an opportunity to deal robustly with commercial fraud. Without this, Local authority lawyers and sometimes courts question whether the Fraud Act should be used by Local Authorities at all.

1.668 Unless this is addressed then the proposal, (including the absence of a statutory definition of the term 'fraud') we consider that it will result in lower levels of protection for the public and allow those who truly warrant prosecution to possibly escape punishment. Furthermore to replace such regulatory measures with the more general offences under fraud may result in greater uncertainty for business. Detailed guidance would need to be provided to cover a variety of circumstances and differing trade sectors. Lack of specific regulation could make it difficult for businesses to obtain advice that gives them certainty of outcomes. Currently Local Authority regulators do sometimes use the Fraud Act as an adjunct to the work that is done under core legislation, where appropriate.

1.669 The consultation appears to us to have been written from a business perspective, with good reason to do so. What becomes apparent from this perspective is that it is considered that these issues could be resolved if the regulation of businesses were based on a sector approach, with a regulator responsible for all regulation of a single industry, rather than a legislation based approach.

1.670 From a regulator's point of view, however, this could be difficult to achieve as it would require regulators to become generic enforcers of wide ranging legislation. We know government will be aware of regulators' attempts to work towards such solutions and the levels of success of some projects in this area.

Residential Landlords Association

1.671 Agreed. As a general principle if there is a general law dealing with the matter why should it be repeated as a criminal offence in the regulatory context?

Trading Standards North West (TSNW)

1.672 Much of what Trading Standards do could fall under fraud offences. However Trading Standards Officers have no powers under the Fraud Act, or indeed no powers of arrest. Is it reasonable pursuing a high level offence when we could use CPR's and previous proposals are pushing us towards proportionate action? Trading Standards Officers need discretion to decide, bearing in mind the offence and the situation at the time. The Fraud Act is useful in our arsenal but not routine or a direct replacement simply because it's not strict liability. In some cases it is appropriate to put alternative offences in the indictment to allow the jury to decide the issue of intent and therefore the level of criminality.

Criminal Bar Association and Bar Council

1.673 Agree.

Kingsley Napley LLP

1.674 Whether the Fraud Act does cover regulatory offences will depend on the specific facts of each particular case. The Commission has noted overlaps, when recourse to the Fraud Act 2006 would have satisfied the regulatory objectives. Against this proposal, however, we offer the following points for consideration:

1.675 The proposal may result in unnecessarily ratcheting up the seriousness of the prosecution. We have for instance in the past advised the SIA to prosecute offences under section 22 of the Private Security Industry Act 2001 which could equally have been prosecuted under the Fraud Act or the Forgery act. Prosecuting under those Acts seemed to us to be a disproportionate response;

1.676 The regulator may not have power to prosecute for offences under the Fraud Act, depending on the statement of its functions. It may in any event lack the necessary expertise.

1.677 There is benefit in having all the offences for which a regulator will prosecute contained in one statute. Regulated persons will know where to look in order to ensure compliance with the provisions which affect their particular profession or area of business.

PROPOSAL 6

Clifford Chance

1.678 Agree. Civil penalties should not in the main exceed the penalties given by criminal courts, at least by the Crown Court.

QEB Hollis Whiteman Chambers, Justices' Clerks' Society, The Magistrates' Association, Ivan Krolick, Trading Standards North West (TSNW), Judges of the Court of Session

1.679 Agree.

Trading Standards Institute (TSI)

1.680 TSSs already work on a system of proportionality where due consideration is given to looking at the best way of dealing with offences based on seriousness, harm and resources. TSI can, therefore, see no problem with the above, providing that the outcomes from the civil measures remain the same as with the criminal offences. TSI would not like to see Trading Standards being viewed as a 'soft touch' by potential offenders. The damage from this would be damage to consumer confidence, unfair competition, and a disregard for consumer protection.

Financial Services and Markets Legislation City Liaison Group

1.681 Agree and refer to response to proposal 1.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.682 We agree with this proposal. This should be backed by the assumption that criminal fines or confiscations will always be levied at a higher rate than would be the case with the equivalent civil penalties.

Chamber of Shipping

1.683 It is not entirely clear whether this refers to criminal measures to be applied to offences which cross the moral boundary and are truly criminal or whether it includes offences which breach rules and requirements to fulfil or comply with statutory obligations but are not morally reprehensible. In the context of business and commerce, the starting point should be to determine whether the act or breach involves criminal intent and behaviour. If it does not, civil sanctions are appropriate. Even if there is some form of criminal behaviour, civil sanctions might still be appropriate and could be set to reflect the seriousness of the event. As stated in the Consultation Paper, criminal status should be reserved for conduct crossing moral boundaries.

HSE

1.684 We have referred to HSE's Enforcement Policy Statement and our enforcement options previously. HSE has a number of measures that may be employed that do not include civil sanctions. We would not agree that criminal offences applicable to health and safety regulation must for a hierarchy of seriousness along with civil measures. We would agree that there should be sufficient effective enforcement options in order to ensure that risks to peoples' lives are properly controlled and that those enforcement measures should be applied appropriately and proportionately. We feel that the aim of a hierarchy here is mixing the criminal breach and the penalty for that breach without considering what may be the individual circumstances of each case. As most health and safety offences do not involve issues of dishonesty, intention, knowledge or recklessness, it will not assist for these concepts to be used to create the hierarchy of seriousness.

1.685 HSE decides what response to a breach is appropriate having regard to the circumstances of each case, by applying the principles of the Enforcement Management Model as a framework for decision making and whether the tests within the Code for Crown Prosecutors and HSE's Enforcement Policy Statement are met. Should this process indicate that prosecution is an appropriate response, and where the defendant is found guilty, the hierarchy of seriousness is contained within the form of sentencing guidelines referred to previously. We are doubtful this proposal would lead to greater transparency.

The Law Society

1.686 We agree that criminal offences, and accompanying civil measures, should generally form a hierarchy of seriousness.

1.687 We think that it may be quite difficult to apply this proposal in practice. As stated above, we think it is generally undesirable for the same actions to be subject to both a civil penalty and criminal prosecution.

1.688 The proposal raises a practical issue concerning the need for regulatory organisations to maintain proper records of findings and convictions against their regulatory 'targets'. If one element of the hierarchy of seriousness is the number of previous breaches that an individual or company has committed, the regulatory organisation will need to maintain appropriate records so that this may be determined. If there is to be a hierarchy of seriousness it will be necessary to know what the individual or company may have done in the past.

1.689 It is noted that there are a number different prosecuting services, and over 60 national regulators, as well as local authority and other local organisations which may prosecute or regulate. We do not think there is a central database of regulatory sanctions and this could be problematic in allowing for a proper consideration of past conduct when deciding where a particular case falls on the hierarchy of seriousness.

1.690 At a minimum, it is important that there is a record kept of the civil penalties that are imposed. The appropriate regulatory body must be able to keep a record of the civil penalties as this will allow the regulator to make sensible decisions to prosecute.

OFT

1.691 We have some concerns about the proposition that in the area of consumer protection enforcement a two step approach, rather than the ability to choose the appropriate targeted remedy, should be used. There are circumstances and cases where civil action is clearly unlikely to achieve the desired result, for example:

(1) the trader is itinerant and a civil sanctions first approach would fail to stop them moving to another area and working under a different name

(2) the trader is aggressive towards consumers

(3) the first offence is so serious that a custodial sentence is required in order to punish and stop further harm

(4) prosecution in relation to new practices may prevent the spread of such undesirable and harmful practices within an industry. The deterrent element of prosecution is often forgotten

(5) the trader is targeting and exploiting vulnerable consumers

(6) the nature of the case is such that intrusive investigation (such as test purchases) is needed in order to get the relevant information to decide what action is appropriate. An offence is needed to justify access to the more intrusive powers

(7) the trader commits a string of similar, but different, offences such that each one is a 'first' offence.

1.692 For many traders, especially at local level, only the threat of arrest and imprisonment is an effective deterrent. Fines/penalties may not be paid or may be seen as a price worth paying as the profit from the activity outweighs the fine. Scams are a particular example of where the only real deterrence for professional scammers is the threat of prison. Civil sanctions would be unlikely to affect the economic viability of the scam (OFT research estimates that UK consumers lose approximately £3.5 billion to scams each year).

1.693 The OFT fully supports the introduction of civil sanctions as an alternative to criminal penalties, and notes there are areas where currently the only recourse is prosecution. For instance, no civil sanctions currently exist for failure to comply with the investigation of competition cases, although in certain circumstances it is a criminal offence not to comply with the OFT's information-gathering powers. The OFT believes that the ability to impose civil sanctions in these circumstances (similar to European Commission's ability to impose daily fines in EU competition cases under Article 24 of Regulation 1/2003) would allow the OFT to take action in cases where the seriousness of the conduct ought not to warrant criminal sanction, and encourage parties to provide information more fully and in a more timely fashion. Criminal sanctions might nevertheless be appropriate in the most serious cases, such as where a party physically prevents an investigation team from entering a building.

Kiron Reid, Liverpool Law School

1.694 One of the three key principles that should be adopted from this report. (The others being proposals 1 and 3). "Criminal offences should, along with the civil measures that accompany them, form a hierarchy of seriousness." (Para. 1.44).

1.695 This should be adopted by the Law Commission as a principle in its criminal law work for both businesses and individuals. Preferably this hierarchy should be set out in a Code (or as this writer would prefer separate but related Codes). However if not in a coherent planned Code, the Law Commission and Parliamentary draughtsmen could implement the principles in new legislation as the opportunities arise.[20]

City of London Law Society

1.696 We agree with this in principle but think that it may be quite difficult to apply in practice. As stated above, we think it is undesirable for the same actions to be subject to both a civil penalty and criminal prosecution and we think it is important that civil penalties should only be imposed where there is fault and knowledge, intent or recklessness.

RSPCA

1.697 In relation to animal welfare offences (under the AWA), such a hierarchy would not be appropriate or necessary as offences under the Act can not be divided and assessed against the criteria set out in proposal 2 – that an individual could justifiably be sent to prison for a first offence. As stated in our answer to this proposal, there are other considerations when deciding whether to bring a prosecution including the public interest.

1.698 Generally, the seriousness of an offence is not for the regulator to determine, it is a matter for the courts when determining sentence and thus a hierarchy could already be said to exist.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.699 We support this proposal. In the absence of dishonest, intentional or reckless conduct, civil penalties may be appropriate. However, where the conduct in question involves one of these elements it would be appropriate to escalate the severity of the sanction. A hierarchy reflecting this would allow for such an escalation.

1.700 Where no such hierarchy exists, criminal offences can cover widely varying standards of conduct and the relationship between the gravity of the breach and the penalty may not be clear.

1.701 By way of example, this hierarchy is not reflected in the powers to impose civil sanctions to be granted to the Environment Agency. In this case, the power to impose civil sanctions will only exist if a criminal offence has been committed. In addition complicated rules to determine the level of civil penalties make it far from clear that civil penalties will typically be less than fines imposed on criminal conviction.

20 I will not rehearse the arguments in favour of a criminal code here. Suffice to say I could construct a whole lecture series from elegant arguments on this topic, from Lord Bingham downwards, and would be fairly rich if I had a pound for every good quote from an eminent jurist or scholar in favour.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.702 May conflict with proposals 1 – 3. If creation of offence is not justified by application of criteria set out in proposals 1 to 3 repetition of that conduct cannot satisfy the criteria. Eg unlawful parking: no longer criminal offence simpliciter and does not because so no matter how many times or for how long the motorist unlawfully parks vehicle. Addition of a civil penalty upon another encourages compliance, particularly if a variable Monetary Administrative Penalty scheme is introduced. Reference to fraud (CP 1.45) likely to be inconsistent with the approach to offences of fraud in CP 1.43.

1.703 Therefore do not support 6. If threshold in proposals 1 – 3 is crossed a previous warning is likely to be otiose. Such warning might have a place in a scheme for variable Monetary Administrative Penalties outside criminal law in cases where threshold for creation of criminal offences is not crossed.

Trading Standards South East Ltd

1.704 TSSE supports the view that criminal sanctions should be part and parcel of a range of sanctioning penalties, however, TSSE does not support the view that criminal proceedings are only available once all other avenues have been exhausted. TSSE believes it is sufficient for local authorities to publish a robust enforcement policy, which indicates all available sanctions and clearly indicates the circumstances under which they may be used.

North East Trading Standards Association (NETSA)

1.705 We are conscious of the large volume of criminal legislation and the potential cost in court time for trial of technical offences. We would in fact welcome the establishment of a specialist court to deal with regulatory offences, however this reflects our view that the investigation of such offences requires specialist investigators and take the view that that the situation outlined in 3.26 is preferable.

1.706 We agree that criminal offences should, along with civil measures that accompany them, form a hierarchy of seriousness. We are however concerned over the analysis of the compliance argument in relation to European Law, and specifically the suggestion made that it would have been a simpler response to grant power to a Trading Standards Officer (TSO) to issue a monetary penalty, stop notice or similar.

1.707 We feel that it is a fundamental omission in the analysis that no consideration has been given to the provisions of the Enterprise Act 2002 (EA). For the purposes of EA the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) are a specified Community infringement (Reg. 26). This allows TSO's to consider formal undertakings and injunctive proceedings to achieve compliance, therefore in relation to consumer protection the answer to the proposal is that the current regime already gives the flexibility of both a hierarchal approach to sanctioning and the non-hierarchal processes brought about by the regulations as discussed and commended at 3.109.

1.708 The EA applies similar provisions to a wide range of consumer protection offences and TSO's would generally consider this route to achieving compliance before a criminal prosecution, dependent upon local guidelines.

Food Standards Agency

1.709 Strongly agree. Reflect situation in food and feed law. Hierarchy of enforcement and prosecution is usually last resort. Small number of prosecutions in relation to number of notices and other sanctions is evidence of effective use of existing hierarchy. Structure of existing hierarchy does not dictate where sanctions should start (ie first level does not have to be completed before the second).

Association of Chief Trading Standards Officers (ACTSO)

1.710 Broadly welcome civil penalties to options available to Trading Standards Services when deciding most appropriate course of action to address infringements. But sanctions should only apply in addition to option of starting criminal proceedings. Rigidly applying hierarchy will create gaps that unscrupulous businesses will seek to exploit and prevent local authorities from exercising judgment about the most appropriate course of action considering all circumstances and relevant local issues.

Leicester City Council

1.711 Agree. Reflected in our enforcement policies.

EEF: The Manufacturers' Association

1.712 A mix of civil and criminal penalties should be used to create a hierarchy of seriousness. Criminal sanctions and the stigma they bear should be reserved for more serious offences that could reasonably warrant imprisonment or an unlimited fine.

Care Quality Commission (CQC)

1.713 Consistent with approach described in CQC's enforcement policy.

Faculty of Advocates

1.714 Seems uncontroversial.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.715 We do not disagree with this as a policy statement. The fact that our enforcement policies are written with a hierarchy of responses to breaches and our enforcement activities reflect this hierarchy principle is evidence of this. Following the Regulators' Compliance Code ensures this principle is complied with in all but the most exceptional circumstances, where it is necessary to go direct to criminal sanction and, even then the Code for Crown Prosecutors would be applied. For these cases, criminal sanctions should remain as available. We reiterate that, at the moment, the civil sanctions in the RES Act are not available to local authority regulators.

Food Law Group

1.716 We found it difficult to understand what this would mean in practice but broadly agreed with the principle.

CBI

1.717 Yes in principle, but see our earlier comments, in particular our comments in response to Proposal 2. Another example where the development of a set of Principles would be useful and helpful.

East of England Trading Standards Association

1.718 We consider that this proposal merely re-states the position that is intended with the introduction of Regulatory Enforcement And Sanctions Act 2008.

Local Government Regulation (LGR)

1.719 LG Regulation would welcome the establishment of a specialist court to deal with regulatory offences; however this reflects our view that the investigation of such offences requires specialist investigators and take the view that that the situation outlined in 3.26 is preferable. We agree that criminal offences should, along with civil measures that accompany them, form a hierarchy of seriousness. We are however concerned over the analysis of the compliance argument in relation to European Law, and specifically the suggestion made that it would have been a simpler response to grant power to a Trading Standards Officer to issue a monetary penalty, stop notice or similar.

1.720 We feel that it is a fundamental omission in the analysis that no consideration has been given to the provisions of the Enterprise Act 2002 (EA). For the purposes of EA the Consumer Protection from Unfair Trading Regulations 2008 are a specified Community infringement (Reg. 26). This allows Trading Standards Officers to consider formal undertakings and injunctive proceedings to achieve compliance. Therefore in relation to consumer protection the answer to the proposal is that the current regime already gives the flexibility of both a hierarchal approach to sanctioning and the non-hierarchal processes brought about by the Regulations as discussed and commended at 3.109. The Enterprise Act applies similar provisions to a wide range of consumer protection offences and Trading Standards Officers would generally consider this route to achieving compliance before a criminal prosecution, dependent upon local guidelines.

Residential Landlords Association

1.721 Agreed. This is commonsense.

Kingsley Napley LLP

1.722 As detailed at proposal 3, it seems sensible to have a criminal sanction at the apex of the hierarchy of seriousness when civil sanctions have been exhausted. Indeed were this to happen when it comes to the sentencing exercise, the conduct complained of in relation to previous instances of non-compliance is likely to lead to more meaningful sentencing decisions that better fit with the suggestions outlined at Proposal 2 – ie immediate custody or unlimited fines. Technically this would require the sentencing judge to take into account previous regulatory offences, as opposed to criminal convictions, which will require some thought in terms of how that information is made available to the Court and what status is has as a matter of law.

1.723 However, the reality of the situation on the ground, perhaps does not mirror this common sense assumption. The firm has extensive experience defending FSA work, both in the criminal and regulatory spheres. Some interesting points can be taken from this. The FSA does not tell a person how they will deal with them when the prosecute; they simply start a criminal investigation and, ultimately, will decide at the end of the investigation whether to proceed towards a criminal or regulatory sanction. There are several reasons why, if your conduct is criminal, a regulator might decide to deal with the case using its regulator rather than criminal powers; regulatory proceedings are often concluded more quickly than those within the criminal courts, sometimes regulatory prosecutions are harder for a defendant to defend and weightier sanctions can be imposed. In one case we found that whilst the client could have been prosecuted, sentenced and ordered to pay a confiscation order of £100,000 if criminal proceedings had been instituted, in fact because he was proceeded against before a tribunal, he was given a £1.2million fine. It does not necessarily follow, therefore in all the circumstances, that the criminal conviction will be the most serious outcome in terms of punishment or deterrent effect.

1.724 It is also worth noting that for many individuals and organisations, the imposition of regulatory sanction may have far greater impact than a criminal sanction. As has been noted, many regulatory offences dealt with in the criminal courts result in fines, which although designed to be punitive, are often proportionate to the wealth of the individual or organisation. Meanwhile, the withdrawal of an individual's licence to work, removing their ability to practice within their chosen profession or in the case of company directors, their disqualification, will have more serious consequences.

Criminal Bar Association and Bar Council

1.725 Broadly agree with the general principle of a hierarchy of seriousness. Seriousness, in the context of regulatory offences can be a measure not just involving "deliberate" non–compliance but encompassing extent of potential harm, extent of risk, how far below a standard conduct or a state of affairs falls (in all these regards the consideration of "seriousness" in the Definitive Guideline on Corporate Manslaughter and Health and Safety Offences Causing Death issued by the Sentencing Guidelines Council) and, particularly in respect of permissioning and licensing regimes, the importance of compliance with the requirement.

PROPOSAL 7

Clifford Chance

1.726 Procedural fairness is critical not because it might increase confidence in the CJS by because those accused (whether criminal or "civil") are entitled to proper protection. Applied to imposition of a penalty and also to the issue of regulatory notices if breach of the notice is an offence. Courts should not only have power to stay criminal proceedings until non-criminal regulatory steps have been taken, but rather that if a regulator fails to observe due process, the normal outcome should be that any prosecution should be permanently halted. Anything less runs the risk of prosecutors neglecting the rights of those accused of wrongdoings or of seeking to take shortcuts.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.727 We support this proposal. With the large number of agencies (over 60) with the power to make or enforce the criminal law, there is a necessity to imbue process fairness into all regulatory steps. This should lead to more effective regulation and less reliance on the criminal justice system to support regulatory enforcement. Granting the Courts power to stay proceedings until non-criminal regulatory steps have been taken first should assist in achieving greater process fairness and more effective regulation. We think it is important that process fairness applies both to a civil penalty regime and criminal offences. As far as possible we think the approach should be to avoid overlap between matters covered by civil penalties and matters covered by criminal offences. This is important where the same facts or actions could give rise to both civil penalties and criminal prosecution. We are concerned about the interplay of the two and the effect on rules of evidence and the presumption of innocence if there is a requirement that non-criminal regulatory steps must be taken before a criminal prosecution. We agree that regulators should have duties to warn potential offenders that they may be subject to prosecution, where that is the case. We also think that where a matter is more appropriately dealt with by way of a civil procedure, the courts should have power to stay proceedings – subject to what we say above about evidence and the presumption of innocence.

OFT

1.728 Regulators need to be able to respond to particular circumstances where they assess the danger of harm to be high. Rigid procedural requirements which have the potential to allow the worst offenders to seek to escape liability on technicalities or raise disproportionately onerous legal barriers would be detrimental to the regime. Responsibilities for Crown Prosecutors ensure already that only appropriate cases go forward under the Code for Crown Prosecutors (The Code for Crown Prosecutors Section 5 – the public interest stage).

1.729 The OFT has various processes in place for decision making leading to civil penalties, for example, in the areas of credit licensing, Competition Act infringements and Money Laundering Regulations. The OFT is bound to ensure that such processes meet legal requirements in particular in the areas of better regulation (where it applies), administrative law and human rights. Appropriate appeals procedures are already in place for the legislation we deal with and processes are being designed to implement the civil sanctions pilot in accordance with legal requirements.

1.730 Part 8 of the Enterprise Act requires a period of consultation prior to action except in the most urgent of cases.

The Law Society

1.731 Particular conduct can give rise to different legal outcomes that may be characterised as criminal or regulatory. There is perhaps an implicit assumption in Proposal 7 that regulatory and criminal outcomes are mutually exclusive for the same conduct.

1.732 We think it is important that process fairness applies both to a civil penalty regime and criminal offences. If it is possible to avoid overlap between matters covered by civil penalties and matters covered by criminal offences this should help. However, where the same actions could give rise to both civil penalties and criminal prosecution, we are concerned about the interplay of the two and the effect on rules of evidence and the presumption of innocence if there is a requirement that non-criminal regulatory steps must be taken before a criminal prosecution. We agree that regulators should have duties to warn potential offenders that they may be subject to prosecution, where that is the case. If there is an overlap between a civil penalty and a criminal offence it would be helpful for there to be guidance as to the sorts of factors that should be taken into account in deciding which approach to pursue.

1.733 However, where a set of facts can give rise either to regulatory action or a criminal prosecution, the decision to prosecute has been made by a regulatory body or prosecutor, on the basis that the matter under consideration is so serious that it warrants a prosecution, and there is evidence that will satisfy each element of the offence to the required standard of proof, we are not convinced that courts should have the power to take the view that other regulatory action should occur, and then as a result stay the proceedings. To allow a court this discretion would undermine the prosecutor's discretion to institute the prosecution and may build unnecessary delay into the process. If it has been decided that certain conduct warrants the case proceeding down the criminal track, then, in our view courts, should accept that decision rather than stay proceedings to allow non-criminal regulatory steps to be taken.

1.734 Heath and safety prosecutions are a good example. Currently the process is that the case is viewed in order to see whether the criminal standard is met; if not, then the HSE can consider whether there are offences which they would wish to prosecute. It is difficult to see how this proposal would have worked in the recent Potters Bar rail crash HSE prosecution. It could also be argued that it is unfair on defendants as the threat of the more serious criminal sanction remains for longer.

HSE

1.735 This proposal confuses taking action to ensure a contravention is remedied and brining the offender to account. Whilst in some regimes it may be procedurally unfair for the regulator to commence criminal proceedings without warning a potential offender, in others it may not. HSE may, dependent upon circumstances, take action to secure standards that comply with the law and decide to prosecute as well. Examples of enforcement may be seen at http://www.hse.gov.uk/enforce/examples.htm.

1.736 Procedural fairness is already a feature in this process. Whether a letter is sent advising of the action we are taking, we provide details of who to contact in HSE If the receiver wishes to make representations about the action taken. When an enforcement notice is served, there is the right of appeal to an independent employment tribunal and in a case in which there has been a fatal accident and an investigation by the HSE, procedural fairness is provided for the existing rules which govern criminal investigations. In such cases, it may be equally important that any decision on prosecution is seen to have been taken independently. There is already a system to safeguard procedural fairness in that a decision to persecute could be challenged as an abuse of process if established and published policies are not followed.

1.737 A second example in respect of permissioning regimes where there are mechanisms for an appeal against refusal to give permission to undertake activities.

1.738 Our view is that these procedures and process exist already and meet the aims of this proposal. We would query why further legislation is necessary to achieve an objective, when other non-legislative means are equally effective.

Judges of the Court of Session

1.739 We are not in agreement with this. We take the view that if the Crown has decided to prosecute then the court should not become involved in requiring civil proceedings to be taken. There may be differences in Scottish procedure in that most, though not al, regulatory prosecutions are taken by the Crown Office and Procurator Fiscal Service (COPFS) rather than by a regulator. Thus the court would not wish to be involved in discussions of the Crown's decisions to bring proceedings.

Financial Services and Markets Legislation City Liaison Group

1.740 We support this proposal.

1.741 The FSA has a Regulatory Decisions Committee, which, although not independent from the FSA, is independent from the decision makers involved in the cases that come before it. The FSA is required under the FSMA to issue statutory notices – commencing with a "warning notice" – to firms or individuals when it is minded to take enforcement action.

1.742 However, whilst a right of appeal, taking the form of a hearing de novo, is available to the independent Upper Tribunal (Tax and Chancery) (formerly to the Financial Services and Markets Tribunal), in practice firms can be reluctant to challenge FSA in regard to its enforcement powers, as they may be anxious to maintain an open and co-operative relationship with FSA in the future.

1.743 We also consider that process fairness requires that the protections available to those charged within criminal offences should not be removed because the offence is categorised, or re-categorised, as leading only to a civil penalty. These protections (eg against self-incrimination) remain important for anyone who may be subject to a penalty of any sort; this is particularly relevant as the boundary between criminal and civil offences in English law may not be coterminous with the ECHR human rights boundary under Article 6 of the European Convention on Human Rights .

RSPCA

1.744 There already exists a mechanism for the administrative enforcement of Section 9 (duty of care) under Section 10 of the AWA without first resorting to criminal proceedings.

1.745 A Section 10 Improvement Notice can be issued where an inspector (as defined by the Act) is of the opinion that a person is failing to comply with his/her duty to ensure that an animal's welfare needs are being met (under S9). The notice must state the respects in which the inspector considers the person is failing to comply with his/her duty under S9, the steps to taken and period of time in which to carry these out. No proceedings can be commenced before the end of the period specified in the Improvement Notice. The RSPCA mirrors these arrangements within its own enforcement policy with regard to the duty to ensure welfare under S9.

Institute of Employment Rights

1.746 In relation to proposals 7, 9 and 11 we do not agree that corporate offences and individual offences should be further differentiated in this exercise. The Law Commission's argument about fairness simply does not hold water, particularly when we consider that corporate offenders already are likely to have access to more resources to support them through court proceedings than individuals. If the effect of the measures being proposed in the document is indeed more likely to boost business confidence in the justice system, this boost can only be achieved at the expense of a further undermining of public confidence in the criminal justice system.

Kiron Reid, Liverpool Law School

1.747 Proposal 7 appears to miss the point. (My apologies if the supporting arguments and evidence are rehearsed in the full paper). What is needed is a clear and simple process rather than a recourse to court actions. For example that needs to guard against frequent changes of staff, lack of proper handover when staff change, sometimes lack of direction from management, the need for training and the need for the procedures (on enforcement, including the safeguards for subjects) to be cost effective.

Trading Standards South East Ltd

1.748 TSSE completely disagrees with this proposal. Case law has indicated time and time again that the decision to institute criminal proceedings is a matter for the prosecutor.[21] The role of the Courts is not to interfere with that decision unless such action is tantamount to an abuse of process, and, inconsistent with a published enforcement policy.[22] It is the submission of TSSE that there is already sufficient protection within the existing regulatory framework to ensure that sanctioning is proportionate and targets those who deserve the attention of the enforcement authorities.

Trading Standards Institute (TSI)

1.749 Most TSSs already follow this procedure in some way. Once they have identified infringements, they seek, where appropriate, to warn the offenders by way of advice notices and leaflets detailing how to comply and what future steps Trading Standards may take to ensure compliance. Assuming this is the case, then the above is unlikely to be a problem. There could, however, be exceptions for fastmoving LA-hopping crimes such as bogus doorstep callers who are always trying to keep ahead of the law. In this case, delaying justice could lead to an increase in the number of victims (who tend to be elderly and vulnerable). As long as provisions are made for cases of this nature, TSI would consider proceeding with the above Proposal.

City of London Law Society

1.750 We think it is important that process fairness applies both to a civil penalty regime and criminal offences. If it is possible to avoid overlap between matters covered by civil penalties and matters covered by criminal offences this should help. However, where the same actions could give rise to both civil penalties and criminal prosecution, we are concerned about the interplay of the two and the effect on rules of evidence and the presumption of innocence if there is a requirement that non criminal regulatory steps must be taken before a criminal prosecution. We agree that regulators should have duties to warn potential offenders that they may be subject to prosecution, where that is the case. We also think that where a matter is more appropriately dealt with by way of a civil procedure, the courts should have power to stay proceedings – subject to what we say above about evidence and the presumption of innocence.

21 L.B. Wandsworth v Rashid [2009] EWHC 1844 (Admin).

22 R v Adaway [2004] EWCA Crim 2831.

North East Trading Standards Association (NETSA)

1.751 We agree that more use should be made of process fairness to increase confidence in the criminal justice system. As outlined above the EA prescribes specific mechanisms for consultation with offenders before legal proceedings are instituted. This reflects common practice in Trading Standards services when considering many offences and investigating complaints. This is also generally reflected in local enforcement policies and it is unlikely that a formal procedure to stay proceedings would present a difficulty. We feel that there will be some circumstances where it would not be appropriate to warn offenders (e.g. prolific counterfeit sales via online auction sites) as this would serve to drive the criminal to take additional steps to avoid discovery.

QEB Hollis Whiteman Chambers

1.752 Agree in principle that there should be greater use of non-criminal regulatory steps before resorting to criminal action. We support eh view that warnings, published guidance and clear criteria for prosecution are important tools in ensuring clarity of when action would be taken. We suggest that the prosecution should have the power to defer a prosecution pending non-criminal resolution and, in some cases, the court could require that the prosecution defer prosecuting a case pending non-criminal resolution. We do not agree that warnings should have been provided in all cases.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.753 Approach to questions posed by CP does not result in support for 7. If threshold in proposals 1 – 3 is crossed a previous warning is likely to be otiose. Such warning might have a place in a scheme for variable Monetary Administrative Penalties outside criminal law in cases where threshold for creation of criminal offences is not crossed.

Food Standards Agency

1.754 Concerns the proposal potentially confuses where the duty to comply lies (ie with food business operator). Experience is that there are very few cases which proceed directly to court. Where they do, these are serious and grave concerns about the court having the right to stay because of not taking non-criminal regulator steps. Never comes as a surprise to a food business operator to find himself facing criminal proceedings – start only after full investigation and issue of a court summons. Always offer food business operator and an interview under caution when lawyer can be present.

Association of Chief Trading Standards Officers (ACTSO)

1.755 Defining appropriate cases could be extremely complex. Appropriate should not be defined by reference to legislation itself, since circumstances surrounding a regulatory breach can vary significantly (eg previous compliance history of business, whether business has otherwise acted in open and professional manner, whether it is willing to correct behaviour). Thus important to consider Code for Crown Prosecutors which although not binding most regulatory enforcement agencies will have regard to. Code, Enforcement Concordate, Regulators Compliance Code and local enforcement policies should ensure process fairness that proposal seeks to create. Therefore, unclear why existing regime requires change from practical perspective.

Justices' Clerks' Society, The Magistrates' Association, Chamber of Shipping, Institute of Chartered Accountants of England and Wales (ICAEW)

1.756 Agree.

Leicester City Council

1.757 Requirements already exist in our enforcement politics which dictate that prosecution is last resort. If policy identifies an appropriate alternative to prosecution, must be exhausted prior to commencement of any prosecution.

Care Quality Commission (CQC)

1.758 CQC's enforcement policy describes an approach that differentiates between how and when civil and criminal enforcement powers will be used: civil enforcement powers are used to ensure regulated services meet essential standards of quality and safety and where necessary, this is done by limiting how they operate, suspending operations and if absolutely necessary, closing services down altogether; criminal proceedings are used where a provider was capable of meeting these essential standards of quality and safety but did not.

1.759 CQC's basic purpose is to make sure regulated persons understand what they are required to do; check they are doing so and where they are not, take the least restrictive, most proportionate steps to ensure compliance. CQC believes it is appropriate to hold providers to account where they were capable of providing proper, safe care but do not. Feedback to public consultation on CQC's enforcement policy indicates support for this approach.

Faculty of Advocates

1.760 In a Scottish context, the role of Procurator Fiscal is of importance. We understand the reasoning behind this proposal but in Scotland, however, the question whether the public interest requires a prosecution will have been considered independently of the regulator before criminal proceedings are commenced. Whether it would be appropriate for non-criminal regulatory steps to be taken instead of prosecution ought to be part of that consideration and not then subject to review by the court (the court can, of course, reflect in the disposal selected any disapproval of the decision taken).

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.761 A system of requirements to warn offenders before taking issues to courts is generally reflected in all local authority regulators' enforcement policies. However, there are businesses where their activity and / or responses are likely to render this approach counter-productive. With some itinerant or mobile traders identity is an issue. Therefore adequate recording of advice / warnings is not possible. For example, car boot trader selling counterfeit goods should not need to be warned before goods are seized. This would only add to the issues created by such requirements under current legislation. For example, under the Housing Act, landlords and tenants must be given 24 hours "prior notification of inspection", even where the inspection is as a result of a complaint from a tenant that, for example, they have no heating in winter or no water supply. For rogue landlords this is enough time to illegally evict tenants so that there is nothing to inspect. Catching fly-tippers in action is very difficult. Having to warn them in advance, then having to catch them again, would add to the already obvious difficulties in bringing the guilty to justice. The courts can intervene where an authority's failure to follow its own enforcement policy amounts to a plain abuse of process.

Ivan Krolick

1.762 I agree with the sentiment. However I am not sure what cases are to be regarded as "appropriate". Should not the principle be extended to enable the courts to stay proceedings generally where a defendant has not been warned that he is about to unwittingly commit an absolute offence? See *R --v- Liverpool Stipendiary Magistrate ex p Slade [1998] 1 WLR 531 (QBD)* where the police allowed a person to take an unmuzzled pit bull terrier away from a police station, and then prosecuted him for it.

Food Law Group

1.763 The Group endorses this proposal. We do not agree with the position of the Bar Council that because there are at present no criteria by which criminal courts should stay proceedings in the regulatory field unless those proceedings are an abuse of process and therefore exceptional, criteria which limit the circumstances in which proceedings may be commenced should not be introduced. The idea that proceedings may not be commenced unless certain preliminary steps have been taken is not new. For example, mechanisms restraining prosecutors from commencing proceedings until after regulatory steps have concluded already exist in the Regulatory Enforcement and Sanctions Act 2008. See sections 28 and 29 of the Regulatory Enforcement and Sanctions Act 2008 currently applicable where a primary authority has given advice. A requirement that regulatory steps such as warnings, notices, cautions or other occurrence should happen before a resort to prosecution does not involve an abandonment of the principle in *Environment Agency v Stanford* [1998] C.O.D. 373 DC.

CBI

1.764 Strongly agree. This would be consistent with the Civil Procedure Rules' attempts to discourage unnecessary civil litigation, and to increase confidence in the civil justice system, by requiring parties to civil litigation to consider non-litigious methods of resolving their dispute before a claim is brought.

1.765 It is also important that process fairness exists and operates in all proceedings, not just for criminal prosecutions. See also our earlier comments.

1.766 Consideration should also be given to imposing a duty to stay proceedings in appropriate cases if there has not been substantial compliance with appropriate processes and, rather than this just being a power within the court's discretion.

East of England Trading Standards Association

1.767 Local Authorities are already experienced in operating such a regime through the provisions of the Enterprise Act.

1.768 However this proposal does give rise to a number of additional considerations. For example would it apply to those offences for which mens rea is an essential ingredient? How would it address those matters which require immediate action, e.g. significant safety issues, those which have an adverse impact upon the economic well being of consumers or those which target the most vulnerable members of society?

1.769 If introduced we believe that such a measure will only result in uncertainty for both regulators and those who are regulated. We also believe that the current checks and balances which already exist within Local Authorities in the form of published Enforcement Policies and adherence to the Code of Practice for Crown Prosecutors provides ample opportunity for regulators to engage with those businesses who wish to comply with the law, whilst at the same time allows prompt action to be taken against those who do not.

Local Government Regulation (LGR)

1.770 We agree that more use should be made of process fairness to increase confidence in the criminal justice system. As outlined above the Enterprise Act prescribes specific mechanisms for consultation with offenders before legal proceedings are instituted. This reflects common practice in Trading Standards services when considering many offences and investigating complaints. This is also generally reflected in local enforcement policies and it is unlikely that a formal procedure to stay proceedings would present a difficulty. We feel that there will be some circumstances where it would not be appropriate to warn offenders (e.g. prolific counterfeit sales via online auction sites) as this would serve to drive the criminal to take additional steps to avoid discovery.

1.771 However this proposal does give rise to a number of additional considerations. For example would it apply to those offences for which Mens Rea is an essential ingredient? How would it address those matters which require immediate action, e.g. significant safety issues, those which have an adverse impact upon the economic well being of consumers or those which target the most vulnerable members of society?

1.772 If introduced we believe that such a measure will result in greater uncertainty and undue complexity for both regulators and those who are regulated. We also believe that the current checks and balances which already exist within Local Authorities in the form of published Enforcement Policies and adherence to the Code of Practice for Crown Prosecutors provides ample opportunity for regulators to engage with those businesses who wish to comply with the law, whilst at the same time allows prompt action to be taken against those who do not and should ensure the process fairness that this proposal seeks to create.. Defining the 'appropriate cases' referred to in this proposal could be extremely complex. 'Appropriate' should not be defined by reference to the legislation itself, since the circumstances surrounding a regulatory breach can vary significantly (e.g. the previous compliance history of the business concerned, whether the business has otherwise acted in an open and professional manner in the circumstances, whether the business is willing to correct their behaviour in the future). Therefore, it is unclear why the existing regime requires change from a practical perspective.

Residential Landlords Association

1.773 We agree with this proposition in principle but would want to link it back to what we have already said above in relation to informal enforcement of the use of co-regulation. It comes back to the previous point about a hierarchy of seriousness. Clearly, Courts should be given power to intervene if criminal proceedings are contemplated when there are appropriate non criminal procedures in place.

Trading Standards North West (TSNW)

1.774 What is 'an appropriate case'? TSNW propose a process fairness that has latitude and the ability to apply discretion and the need to judge each case on its own merits. It would promote consistency but it's unnecessary for deliberate acts, for example

(1) Trader who has a clocked car that he's clocked – serious

(2) Trader who has bought a car that has been clocked but he's not checked – not serious

(3) Trader who has bought 20 cars that have been clocked and not checked – serious.

(4) There will be a need to ensure that the 'rules' allow for this flexibility.

Kingsley Napley LLP

1.775 In our experience, advising on prosecutions for both with the SIA and the GOC, criminal prosecutions rarely, if ever, are commenced by regulators without some form of warning having been issued to the accused. Therefore, we consider that imposing duties on regulators to formally warn potential individuals that they are likely to be subject to liability, will simply enshrine best practice as currently observed by these regulators. Clearly if a duty is to be imposed then the power to stay a case pending the taking of non-criminal regulator steps will be an important measure to enforce what already exists within many regulators. There will be cases, however, which are so serious or urgent that a criminal prosecution will be required, irrespective of any warning having been given. Generally speaking, we believe that regulators behave in a responsible manner and where they follow the principles of better regulation, such a requirement is unnecessary. Should it be introduced, we believe that there should be some scope for the regulator to ask the Court to exercise its discretion to waive the requirement to follow those steps in appropriate circumstances.

1.776 It is our view generally that the above proposal should be consistent over all regulator prosecutions. Those solicitors in our department dealing with health and safety work report that there are occasions when a person can be prosecuted, despite having complied with an enforcement order. We envisage that the proposal as outlined above will prevent such prosecutions, which in many cases that we have seen, do not achieve any regulatory aim and are costly for both the regulator and the individual concerned.

1.777 Similarly we have also found that regulator steps can result in unfairness against an accused. For example, after investigating a director and deciding that he or she should be disqualified as a director, the Department for Trade and industry will send a letter to the subject to the investigation and say that he or she should agree to be disqualified. If the accused chooses to fight it they are informed that they will have to pay the costs of that investigation. This raises the important issue of the role that the provisions of a regulator's costs regime play in enforcement, in many cases, the prospect of liability of bearing a regulator's costs can result in regulator process being more financially burdensome for the individual than criminal proceedings, where financial contribution towards prosecution costs may be less significant.

1.778 Disqualification as a director in some ways is a more benign sanction than a criminal conviction. However, there are also fewer safeguards in place during this process than there would be in the criminal process. If criminal proceedings were taken then the subject might be entitled to legal aid and the prosecutor would be held to a high standard of proof. The Consequences of disqualification can be significant, but the costs involved make it likely that many who would otherwise contest the finding, do not.

1.779 We strongly believe that enforcement guides should be clear and helpful. Those that are vague in terms of prosecution policy may not meet process fairness requirements. For example the enforcement guide for the FSA is non-specific about prosecution of offences and indeed refers the reader to ask for further information. Whether operating in the regulatory or criminal sphere, guidance needs to be clear and easily available. We have assisted in the drafting of practice notes for the HPC for their fitness to practice regime. We find that the registrants, who may well be litigants-in-person, find this guidance helpful in terms of understanding the process. We find that clear information and guidance allows for fairness to those subject to liability, who will have a better understanding of what their responsibilities are and how the process works. This is clearly desirable.

Criminal Bar Association and Bar Council

1.780 Would appear to invite a significant extension to the power of a court to stay proceedings as an abuse of the process. Arguably, it would require an effective abandonment of the principle set out by the then Lord Chief Justice, Lord Woolf in *Environment Agency v. Stanford* [1998] COD 373 DC, to the effect that the jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with the greatest caution; the fact that a prosecution is ill-advised or unwise is no basis for its exercise; the question whether to prosecute or not is for the prosecutor; if a conviction is obtained in circumstances where the court, on reasonable grounds, feels that a prosecution should not have been brought, this can be reflected in the penalty.

1.781 As a result, courts may be faced with deciding frequent challenges to regulatory prosecutions argued on the basis that the prosecutor's view of the facts was wrong, that the proper view of the facts discloses no offence of such seriousness as to warrant prosecution and requiring the court to make preliminary findings of fact prior to a consideration by a tribunal of fact.

1.782 There is an argument that all enforcing authorities should be required to not only publish but adhere to the terms of an enforcement policy that sets out the criteria for prosecution. There is thus argument also for formalising that requirement as a statutory responsibility. If this were done then the existing powers of the court in relation to abuse of the process would be sufficient to meet the demands of process fairness.

PROPOSAL 8

Clifford Chance

1.783 Agree, except that we consider all amendments should be made through primary legislation. It is not practicable to define what minor means for these purposes.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.784 Wholeheartedly support.

Food Standards Agency

1.785 Strongly oppose. Disproportionate response to concerns that not enough challenge is given to regulators creating criminal offences. More proportionate would be to produce improved guidance for ministers and MOK on proving greater challenge.

Chamber of Shipping

1.786 This is strongly supported as it would ensure greater public and Parliamentary scrutiny. Proposals in secondary legislation are often put forward and subsequently passed subject only to consultation, with consultees at a disadvantage and rarely able to influence substantive change. The reference to "minor details" requires clarification.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.787 We support this proposal. Given the impact of a criminal conviction on companies and individuals it is important the creation of new offences is subject to full Parliamentary scrutiny. Offences created through secondary legislation are sometimes poorly drafted and the secondary legislation route is largely responsible for the large increase in the number of offences created in recent year as highlighted in the consultation paper.

North East Trading Standards Association (NETSA)

1.788 We appreciate the concerns over the constitutional significance of criminalisation, particularly where the offence would lead to imprisonment or unlimited fines, however we would refer to our general response to proposals 1 & 2. In view of this it may be appropriate in some circumstances to continue to introduce criminal offences via Statutory Instrument. We are also concerned about the delay that may be brought about if enactment was solely via primary legislation.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.789 We agree that criminal offences should only be created or made more onerous through primary legislation.

1.790 We are concerned that the Law Commission, in paragraph 3.146 and footnote 106, state that they do not think it appropriate for them to consider what the interpretation of the phrase "other than in relation to minor details" may turn out to mean in practice. The Commission have been asked to introduce rationality and principle into this element of the law, and regulatory authorities and agencies may take as partial and inconsistent an approach to the interpretation of this phrase as they currently do to the interpretation of the words "necessary" or "desirable".

1.791 However, the drafting of legislation is difficult and we have come across frequent cases where the introduction of regulatory provisions has had serious, onerous and wholly undesirable unintended consequences, especially given the complexity of many regulatory provisions and the speed at which they are frequently introduced. Such counter-productive provisions should be able to be removed quickly and simply (after the appropriate due process) by secondary legislation.

1.792 Rather than formulating the exemption in terms of “minor details”, we suggest it is formulated in terms of:

(1) changes which reduce or avoid inappropriate or unnecessary regulatory burdens; or

(2) correct unintended consequences not anticipated by Parliament.

1.793 The inappropriate or unnecessary regulatory burdens would, implicitly or explicitly, include those costs and other burdens introduced through unclear or obscure wording.

The Law Society

1.794 We agree that criminal offences should be created and amended only through primary legislation. This principle respects the constitutional power of Parliament to make law, and would ensure that there be can proper debate by both Houses of Parliament in relation to the creation of any criminal offence. Limiting criminal law creation to primary legislation would, hopefully, reserve the use of criminal law for serious offences and would help to create a more orderly, accessible and clear criminal statute book.

1.795 We think it may be difficult to determine what is a minor detail which can be amended in some other way. We also have doubts as to whether this exception is appropriate. Many European Directives are implemented by statutory instruments under the European Communities Act. We do not believe it is always necessary to impose criminal offences to ensure Directives are properly implemented and we think a requirement that criminal offences can only be created by primary legislation would help to reduce the number of criminal offences created. We think also it would be worth considering something like the German and French approach to administrative offences

1.796 It is observed that where people work in a particular regulatory field (or are involved in prosecuting a particular type of crime) there is a tendency for the person involved to think that any behaviour that offends that regulatory regime (or type of offence) is necessarily very serious and deserving of criminalisation (or prosecution). This is perhaps an understandable and natural tendency, but one that should be resisted in the interests of a rational and effective regulatory regime.

1.797 We agree that what is required is centrally created, necessary and clear criminal law, made on the basis that the behaviour in question really does warrant the full force and associated opprobrium of the criminal law.

Trading Standards South East Ltd

1.798 TSSE does not believe that this proposal is necessary or appropriate. Offences within statutes do inevitably play their part within the legislative framework, however, TSSE feels that to rely upon this methodology for creating criminal offences leads to an inflexible and unresponsive system. The nature of the legislative process means that primary legislation can take too long to reach the statute books. Parliament has, on occasion, introduced statutes fairly quickly such as the Video Recordings Act 2010 to repeal and replace the Video Recordings Act 1984. It is the view of TSSE that this would need to become the norm, rather than the exception, in order to maintain a truly flexible legislative framework. Such flexibility must be maintained in order to respond appropriately to emerging situations such as disease outbreaks or product safety issues.

City of London Law Society

1.799 We agree criminal offences should be created and amended only through primary legislation. We think it may be difficult to determine what is a minor detail that can be amended in some other way and are dubious that this exception is appropriate. Many European Directives are implemented by statutory instruments under the European Communities Act. We do not believe it is always necessary to impose criminal offences to ensure Directives are properly implemented and we think a requirement that criminal offences can only be created by primary legislation would help to reduce the number of criminal offences created. We also think it would be worth considering something like the German and French approach to administrative offences.

Kiron Reid, Liverpool Law School

1.800 Yes.

Financial Services and Markets Legislation City Liaison Group

1.801 In general, we support this proposal, but views do differ as to whether there should be an exception for "minor details." We recognise that there may be many instances where it is appropriate for the detail relating to criminal offences to be contained in secondary legislation; for example, in respect of technical offences or where the provisions might need to be amended expeditiously. By way of illustration, the Regulatory Activities Order ("RAO") sets out in detail the activities and investments which are regulated under FSMA – thereby setting the so called "regulatory perimeter" – whilst section 19 of FSMA creates the criminal offence of carrying on regulated activities without 'authorisation' or 'exemption' (the latter also being an example of an ambulatory reference effected by secondary legislation). That said, there are concerns that it will not be practicable to define what "minor" means for these purposes.

HSE

1.802 The HSWA framework enables criminal offences to be created through secondary legislation made by Ministers. Allowing the creation of legislation through this process has the benefit of efficiently in how Parliamentary time is used. The offences/penalty provisions of HSWA will automatically apply to secondary legislation made under HSWA as amended (unless disapplied). Bearing in mind the current structure of health and safety legislation, including EU obligations in this field, we do not think it would be possible for new legislation and amending legislation to be dealt with solely through primary legislation – there would simply not be enough Parliamentary time available to do this.

1.803 Some Health and Safety legislation needs updating regularly to reflect changes in scientific knowledge, for example, to add/remove substances to be regulated to the legislation or to change things like exposure limits. Such changes might be domestic in origin or arise from comitology proceedings in Europe. Not to be able to make those changes quickly through secondary legislation would risk the legislation becoming fossilised and unworkable and in relation to amendments to European legislation could open the UK to infraction proceedings for late implementation of EU obligations. We were also unsure how this proposal would impact upon, for example, where legislation make ambulatory references to other documents so that amendments to those documents are automatically read into the legislative regime. This is permissible under section 15(4) HSWA and section 2(2) European Communities Act 1972. An example of this is where Sch 3 of the Control of substances Hazardous to Health Regulations regulates biological agents by reference to an approved classification that classification is on an approved list that is separate from the legislation and which consequently can be updated extremely quickly to add, remove or reclassify micro-organisms… This is very important to enable HSE to respond quickly to new and emerging biological organisms that pose a threat to human health, for example, the swine flu virus.

RSPCA

1.804 Section 12 of the AWA is cited at para 3.149, page 61 of the Consultation document as an example of the potentially wide power for the appropriate national authority to make secondary legislation. A person guilty of an offence under the Regulations to be liable for summary conviction. It goes on to say at para 3.150:-

(1) “To give hypothetical examples, it follows that the national authority could, if it saw fit, make it an imprisonable offence for someone to stroke a pet’s fur the wrong way, to play loud music in the presence of a pet, or for someone to tether a dog outside a supermarket, it to do so risks exposing the dog to getting wet in the rain”.

(2) The AWA was designed to evolve over time to have a positive impact on attitudes to animals. The purpose of the Codes of Practice made under the AWA is to give practical advice to owners and others responsible for animals on how to meet the welfare needs of their animals. Failure to comply with the Codes is information to be used by a court to illustrate whether an owner has complied with the AWA.

(3) Examples of Codes of Practice that have been made in England and Wales include for the welfare of dogs, cats, horses and primates and Regulations relating to mutilation.

(4) The welfare of farmed animals are additionally protected by the Welfare of Farmed Animals (England) Regulations 2007 (S.I. 2007 No.2078), made under the AWA. These Regulations ensure that farmed animal welfare legislation is aligned with the provisions of the Animal Welfare Act.

(5) Codes of Recommendations for the Welfare of Livestock which were originally made under different primary legislation continue to apply under the AWA and cover laying hens, meat chickens and breeding chickens, ducks, turkeys, cattle, sheep, pigs, goats, farmed deer and rabbits.

(6) Regulations made to date under the AWA have been the subject first of public consultation and been the subject of Parliamentary scrutiny, discussion and approval thus the concerns expressed in the Consultation paper have been overstated.

QEB Hollis Whiteman Chambers, Justices' Clerks' Society, Leicester City Council, Ivan Krolick, Judges of the Court of Session

1.805 Agree.

BBA

1.806 Believes only Parliament should have power to create new offences (cf regulatory agencies or upon ministerial order).

The Magistrates' Association

1.807 Agree strongly.

Trading Standards Institute (TSI)

1.808 As a lot of Trading Standards work involves technical delegated legislation, TSI would continue to approve of having ministerial departments oversee this and would disagree with the above Proposal. Departments such as BIS do possess great amounts of information and, therefore, free Parliamentary time for debating other issues. Removing criminal offences from delegated legislation could only lead to having a waiting list for offences to be brought in through primary legislation.

MOJ

1.809 Too restrictive. Parliament has legislated for Government to create offences by secondary legislation (eg enforcing EU obligations may be created in Orders made under European Communities Act 1972). Parliament has concluded that secondary legislation provides sufficient parliamentary scrutiny in particular circumstances and it reflects the practical reality that requiring primary legislation would significantly restrict Government's ability to create or amend regulatory regimes. Government is content that MOJ gateway (operates equally to primary and secondary legislation) will provide a sufficient safeguard going forward to test necessity in a consistent and proportionate way before legislation containing offences if put before Parliament.

Care Quality Commission (CQC)

1.810 Attractive in principle but in the context of health and social care, proposal brings significant risks. Health and social care market place is fast-changing with a number of importance changes to policy and legislation through 1980s, 1990s and 2000s, including changes underpinning the current emphasis on flexible, responsible and personalised services.

1.811 Over the years, primary legislation on health and social care regulation has often lagged behind changes to delivery-related legislation. The experience of predecessor regulator shows that the greater ease of developing secondary legislation has been essential to making sure regulation is able to keep up with changes in how health and social care is delivered. CQC doubts that in their context, enforcement powers based solely on primary legislation would be responsible and flexible enough for a fast developing and changing policy and delivery environment.

UK Environmental Law Association (UKELA)

1.812 Given UKELA's view that criminal offences can be an appropriate means of implementing European legislation, proposal seems administratively unworkable. Limits on parliamentary Bill time and procedural uncertainties would make it unlikely that new European legislation could be implemented by the due date using primary legislation. This would give rise to breaches of European and international obligations. If concern is that secondary legislation avoids due democratic process, perhaps more use could be made of the affirmative resolution procedure.

EEF: The Manufacturers' Association

1.813 EEF has been concerned for some time that regulations are made without proper parliamentary scrutiny or in many cases the awareness of most members of the Commons and Lords. We criticised this de3mocractic deficit in the recent report "Reforming Regulation – improving competitiveness, creating jobs". We are particularly concerned that so many EU directives with far-reaching consequences are never debated in Westminster. This lack of scrutiny reduces the workload of Parliament but to the detriment of parliamentary accountability. The ease with which regulations can be made has contributed to excessive regulation. If regulations warrant criminal sanctions, they also warrant proper debate in parliament and the profile that this brings EEF therefore strong supports a requirement that all regulation creating criminal offences must be enacted through primary legislation. This would address a serious democratic deficit. If an offence is serious enough to warrant a penalty in criminal law, it also warrants full consideration by parliament.

Faculty of Advocates

1.814 The enactment of a new criminal offence is a serious step and is one that should be reserved to primary legislation.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.815 It is for Parliament to create legislation. The scope for agencies and local authorities to make secondary legislation is highly limited, so the comments in the consultation paper are not easy to follow, although they may have been easier had we had the time to take up the academic reference to article, "Better Regulation and the Small Enterprise" by J Kitching in the book, "Better Regulation" 2007, S Weatherill (ed.)

1.816 If the amount of criminal offences being created were not to reduce drastically, we doubt if Parliament would have the time to enact what is needed. Provided legislation is well drafted, deals with the issues that arise, gives certainty to businesses that are regulated and that emergency legislation can be enacted to deal with emergency situations, such as emerging safety issues, we have no preference about whether it is in primary or secondary legislation.

Food Law Group

1.817 The Group does not see this proposal to limit the creation of criminal offences to primary legislation only to be a practical or necessary provision and could result in adverse consequences. Many regulatory offences in the food sector are now created under EU regulations and the only UK legislation involved is the enforcement provision which it would be cumbersome to deal with as primary legislation.

CBI

1.818 We strongly agree. This would enable appropriate Parliamentary scrutiny and debate to be undertaken. It is not clear how there can be, (nor indeed that there should be), a carve-out for minor details.

East of England Trading Standards Association

1.819 Again this is a proposal which appears superficially attractive. However it ignores the problem of securing Parliamentary time to enable the passage of any required primary legislation.

1.820 Equally because of the technical nature of many regulatory offences and indeed the need to be able to react rapidly to regulatory issues, such matters are, in our view, best dealt with through secondary legislation. A possible solution may be for Parliament to exercise greater scrutiny of secondary legislation perhaps through the creation of specialist committees of MP's. or to require any offences for which the penalty is a term of imprisonment, be subject to an affirmative Parliamentary resolution.

Local Government Regulation (LGR)

1.821 We appreciate the concerns over the constitutional significance of criminalisation, particularly where the offence would lead to imprisonment or unlimited fines. However we would refer to our general response to proposals 1 & 2. In view of this it may be appropriate in some circumstances to continue to introduce criminal offences via Statutory Instrument. We are also concerned about the delay that may be brought about if enactment was solely via primary legislation and the parliamentary time required to achieve this. Equally because of the technical nature of many regulatory offences and indeed the need to be able to react rapidly to regulatory issues, such matters are, in our view, best dealt with through secondary legislation. A possible solution may be for Parliament to exercise greater scrutiny of secondary legislation perhaps through the creation of specialist committees of MP's. Or to require any offences for which the penalty is a term of imprisonment, be subject to an affirmative Parliamentary resolution.

1.822 Parliament has, on occasion, introduced statutes fairly quickly such as the Video Recordings Act 2010 to repeal and replace the Video Recordings Act 1984. It is our view that this would need to become the norm, rather than the exception, in order to maintain a truly flexible legislative framework. Such flexibility must be maintained in order to respond appropriately to emerging situations such as disease outbreaks or product safety issues.

Residential Landlords Association

1.823 We heartily endorse this proposal. One of the major concerns is that individual departments spew criminal offences out by the use of secondary legislation. The primary legislation conferring authority to do so is drafted in the broadest terms. There is, however, an enforcement problem with an unwritten constitution as to how you would implement this proposal, as well as the EU issue to which we have already referred. Most EU legislation via EU directives is implemented by secondary legislation made under the European Communities Act 1972 rather than through primary legislation. We believe that it should be a fundamental principle that all criminal offences must be created by primary legislation, including those emerging from the EU. However the corollary of this is that it is vital that Parliament reforms itself so that sufficient time is given to properly debate these issues even if only at the Committee stage as Bills pass through Parliament. The use of guillotines/timetables would otherwise make this suggestion effectively worthless. If only because of Parliamentary time this would be a vital check to reduce the flow of additional criminal offences. At the same time it needs to be coupled with a repeal bill to cut back on the number of existing offences. We already have such a vast number that action is needed to be taken to deal with these just as much as any new offences which may be required.

Trading Standards North West (TSNW)

1.824 Primary legislation is not reactive, and as Trading Standards legislation may not sit high up on Parliamentary priority – secondary legislation can be useful. For example with the BSE and Foot and Mouth outbreaks, the latest regulations were published daily / weekly.

Criminal Bar Association and Bar Council

1.825 Arguably the practical impact of adoption of this proposal could be paralysis of regulatory regimes. The restriction introduced could result in the criminal law being unable to respond effectively and quickly to a constantly changing regulatory environment. We invite consideration of the following.

> Section 33(1)(c) of the Health and Safety at Work etc Act 1974 (HSWA 1974) creates an offence of contravening a provision in a health and safety regulation. The terms of such health and safety regulations have been subject to frequent variation, repeal and replacement not least as a result of the need to secure the UK's compliance with various EU Directives. Would an offence contrary to s 33(1)(c) of HSWA 1974 fall foul of this proposed principle? Would amendment, repeal or replacement of health and safety regulations be required to be effected by primary legislation in compliance with such a principle? Or, would s 33(1)(c) provide an effective circumvention of the ambit of such a proposed principle?

The Regulatory Reform (Fire Safety) Order 2005 [SI 2005/1541] consolidated all the various fire safety enforcement legislation in one Order; it created new serious criminal offences where breach of a duty resulted in the exposure of persons to the risk of death or serious injury from the effects of fire; it amended over 40 different Acts of Parliament and repealed many provisions in primary legislation, including the whole of the Fire Precautions Act 1971. What effect would such a proposed principle have on this secondary legislation? Would amendment of the terms of the duties under Order require primary legislation? Would compliance with the principle require such future consolidation and reform of regulatory regimes to be effected through primary legislation?

Kingsley Napley LLP

1.826 We agree in principle that criminal offences should be created and amended, save for minor detail, only through primary legislation. We also foresee, however, that were a new situation to come into existence, for example, some technical or scientific development which gives rise to an urgent need to criminalisation of conduct, then the regulatory body charged with the statutory function to oversee that field may be hampered from acting. If that were the case, then the public would be reliant on the Government's speed in responding to concerns, in order to be safeguarded. In the light of the lack of process being made with the availability of RESA sanctions, one wonders if this approach may give rise to difficulties.

PROPOSAL 9

Clifford Chance

1.827 Proposal is too limited. First, it is acceptable for recourse to be to a specialist tribunal where technical regulators are concerned, provided that the tribunal is independent of the regulator and demonstrably impartial. Recourse does not have to be to a criminal (or civil) court. Second (cf CP 3.168) recourse to the courts or a tribunal should never be confined to a review of the regulator's decision or to a point of law, leaving the regulator as the sole fact finder or requiring the accused to prove that the regulator has acted unreasonably. An accused (whether criminal or civil) should always have the opportunity of referring the matter to a tribunal or court for complete re-hearing at which the burden of proof rests firmly on the prosecutor to prove all elements of the offence.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.828 Agree in principle. In first instance, envisage appeal to an independent adjudicator or tribunal rather than to Court with a right to appeal that decision to the Court on a point of law.

North East Trading Standards Association (NETSA)

1.829 We agree that a regulatory scheme that makes for the provision of any civil penalty should allow for an appeal mechanism to challenge that penalty on a point of law.

QEB Hollis Whiteman Chambers, Justices' Clerks' Society, East of England Trading Standards Association, Food and Drink Federation

1.830 Agree/ support.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.831 We strongly support his proposal. The lack of this right undermines controls over the fair and just application of their responsibilities by regulators.

Chamber of Shipping

1.832 An unfettered right of recourse to the courts to challenge a civil penalty is strongly supported. It is in the interests of justice being "seen to be done" that there must be a mechanism for appeal to an independent and impartial outside body.

HSE

1.833 In our existing regime we have appeals systems as previously mentioned. There is also the remedy of JR which exists to challenge any decision of a public authority – albeit this challenge is limited to challenging how the decision was taken rather than the correctness of the decision itself.

Kiron Reid, Liverpool Law School

1.834 Could possibly lead to bureaucratic and costly delay. This might mean justice for large firms that can afford high flying lawyers, not for small ones? Challenge by way of a hearing of the allegation that was made subject to the penalty etc. rather than an appeal on a point of law would appear to be the reasonable way forward. At the same time the safeguards, above, will be more important in practice if a comparison with individuals and PNDs is justified. Individuals almost never challenge receipt of a PND from a police officer. Maybe businesses will be more likely to challenge a civil measure imposed by a regulator however.

Trading Standards South East Ltd

1.835 TSSE does not feel that this proposal is necessary. Alternative sanctioning measures which are already in existence such as Fixed Penalty Notices, Penalty Charge Notices, Licensing Reviews, already have a method of appeal 'built in'. To introduce another method of appeal would, in the view of TSSE, lead to confusion.

Trading Standards Institute (TSI)

1.836 TSI would like to think that should the recipient of a civil penalty have cause to complain, they should be able to first approach the LA – then, if they are not satisfied, they should be able to go higher, to an independent body of experts already in place. They would thus avoid having to go to court, which is an added expense for both the recipient and the taxpayers of the LA concerned.

Financial Services and Markets Legislation City Liaison Group

1.837 Whilst we support this proposal, we would go further and suggest that the right of recourse to the courts should be for a full re-hearing and that appeals should be heard on matters of fact as well as points of law.

1.838 We would note that firms and individuals have the right of appeal to the independent Upper Tribunal (Tax and Chancery), a court of first instance, which carries out a full rehearing, should they wish to challenge a regulatory sanction imposed, or an administrative decision made, by the FSA. However, it should be noted, firms and individuals may appeal against decisions of the Upper Tribunal to the Court of Appeal or the Court of Sessions on points of law only.

Judges of the Court of Session

1.839 We agree that recourse to courts is necessary. Such recourse will require to comply with the Human Rights Act 1998. We would be concerned that in some areas of regulation there may develop an extra layer if the civil penalty is routinely rejected and the determination of a court is sought. If that were to happen frequently there would seem to be little point in attempting to deal with the matter by means other than a court.

The Law Society

1.840 We agree with this proposal as we think it is very important to provide for unfettered recourse to the courts. We do not think it would be enough, however, for this to be limited to a judicial review of a decision or an appeal only on a point of law – it is important that it is possible to have a full re-hearing in all cases.

1.841 The use of civil measures, with a full right of rehearing or appeal to allow access to a court to challenge the imposition of that measure, and Proposal 1 - that the criminal law should only be employed to deal with wrongdoers who deserve criminal stigma and not be used as the primary means of promoting regulatory objectives - taken together, provide a neat solution to the problem of removing many regulatory offences from the criminal law.

1.842 There is a concern that by removing offences from the criminal jurisdiction, with its due process guarantees, and turning them into civil offences, would allow regulators to become 'judge, jury and executioner'. However by allowing someone accused of regulatory offence recourse to the courts preserves the rule of law, and provides an essential safeguard against the oppressive or overzealous regulator.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.843 We support this proposal. Our comments elsewhere on civil penalties are premised on the basis that they will be subject to process fairness and an unfettered recourse to the Courts (not only by way of appeal on a point of law) is fundamental to process fairness.

City of London Law Society

1.844 Yes. We think it is very important to provide for unfettered recourse to the courts. We do not think it would be enough for this to be limited to a judicial review of a decision or an appeal only on a point of law – it is important that it is possible to have a full re-hearing in all cases.

RSPCA

1.845 As stated in this response already, the RSPCA are concerned about the imposition of a two tier system and delay that may be caused by exhausting the civil sanctions route before being able to commence the criminal route.

Institute of Employment Rights

1.846 In relation to proposals 7, 9 and 11 we do not agree that corporate offences and individual offences should be further differentiated in this exercise. The Law Commission's argument about fairness simply does not hold water, particularly when we consider that corporate offenders already are likely to have access to more resources to support them through court proceedings than individuals. If the effect of the measures being proposed in the document is indeed more likely to boost business confidence in the justice system, this boost can only be achieved at the expense of a further undermining of public confidence in the criminal justice system.

Food Standards Agency

1.847 Agree that appeals should be available. Concerns that proposal goes significantly further than requirements of Regulatory Enforcement and Sanctions Act. Appeals against Macrory sanctions should go to first-tier tribunal or alternative statutory tribunal. Court of Appeal recently concluded that Upper Tribunal is not susceptible to JR. Proposals also seems to run counter to overarching thrust of freeing courts by recommending a move to non-criminal sanctions.

Association of Chief Trading Standards Officers (ACTSO)

1.848 Proposal would create independent means of assuring fairness but ACTSO suggests that an internal appeal mechanism is also appropriate. If only route of appeal is to courts, court time may be taken up unnecessarily in dealing with matters that could have been considered by the authority through an internal review. Recourse to courts should be possible, many recipients of a civil penalty would be content to appeal first to regulator concerns and should not be obliged to appeal to courts which would add unnecessary waste.

Local Government Regulation (LGR)

1.849 Whilst we agree that a regulatory scheme that makes for the provision of any civil penalty should allow for an appeal mechanism to challenge that penalty on a point of law we have doubts as to whether this proposal is necessary. Alternative sanctioning measures are already in existence such as Fixed Penalty Notices, Penalty Charge Notices, and Licensing Reviews, which already have a method of appeal 'built in'. To introduce another method of appeal would lead to confusion. This is also borne out by the business response to the fixed and variable penalties in the Regulatory Enforcement and Sanctions Act which indicated they did not want local authority regulators to have their own appeals system.

1.850 Whilst recourse to the courts should be possible, many recipients of a civil penalty would be content to appeal first to the regulator concerned and should not be obliged to appeal to the courts, which would add unnecessary cost to the process. Experience of fixed penalty notices for littering shows that councils are subject to a very high proportion of appeals. If this were to be generalised, we would seek to be able to recover any internal or external costs of appeal.

Leicester City Council

1.851 Disagree: trial via the back door. Any improper decision by a local authority can already be subject of JR.

The Magistrates' Association

1.852 Agree very strongly. If there is the power for a regulatory body to impose sanctions and penalties on a business there must be available an unfettered route for that business to appeal the imposition preferably to a court of law.

Care Quality Commission (CQC)

1.853 Health and Social Care Act already includes means by which representatives to CQC, appeals to an independent tribunal, and appeals to courts can be made in relation to CQC's civil and enforcement powers. In respect of Penalty Notices, recipient can either accept it and pay the penalty or refuse to do so, in which case, CQC can begin criminal proceedings leading to prosecution. In practice, the Notice would only be issues if the offender admitted the offence and chose to accept a fixed Penalty Notice in lieu of prosecution.

Faculty of Advocates

1.854 A regulatory scheme that makes provision for the imposition of a civil penalty or equivalent must provide for unfettered recourse to the courts to challenge the imposition of that measure. IN the Scottish context, sheriffs already have a very wide jurisdiction to deal with the review, but summary application, of a wide range of administrative acts (see Macphail's "Sheriff Court Practice"). It seems that the kind of recourse to the courts which is envisaged is properly funded by legal aid, at least where the person concerned is an individual, because the alternative is that any right of review, regarded by the Commission as essential, would be illusory. The other question which would arise is that of expensive. A business or individual prosecuted for a regulatory offence might, subject to the availability of legal aid for he individual, have to pay for their own legal representative plus whatever penalty was imposed b the court. A business or individual seeking to challenge an administrative penalty would, in addition, be at risk of an order for payment of the expenses of the regulator whose decision was being challenged. In some cases, that would act as a disincentive to the exercise of the right of recourse to the court and run contrary to what the Commission contemplates.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.855 In principal we cannot disagree that there should always be a right to appeal to an independent arbiter, provided there are adequate grounds to do so. We note business response to the fixed and variable penalties in the RES Act indicated they did not want local authority regulators to have their own appeals system. We agree. This is expensive and experience of fixed penalty notices for littering shows that councils are subject to a very high proportion of appeals.

1.856 If this were to be generalised, we would seek to be able to recover any costs of appeal, internal or external, from the defendant if a tribunal finds in favour of the local authority.

Ivan Krolick

1.857 I agree with the sentiment. However, it may be difficult for the courts to rehear decisions made by specialists and experts in a technical field. Should there not be a right to a rehearing within the regulatory scheme before an internal tribunal, with an appeal to the courts on issues of law? I am a little troubled by "unfettered", since there may have to be financial considerations and conditions, and the court may also be unable to decide against appellants in a summary way in cases which do not have merit. I suspect that this proposal would require a deal of discussion and variation before it becomes accepted law.

Food Law Group

1.858 Agreed. We recall the discussion during the Auld review of the desirability of a specialist regulatory tribunal that could deal with these issues and note that s52 of the Regulatory Enforcement and Sanctions Act 2008 provides for a right of appeal which will be made to the first tier tribunal of the General Regulatory Chamber. We would add that any right of appeal should be accompanied by disclosure requirements which demonstrate the criteria on which the decision to impose any civil penalty has been taken. Please see below.

CBI

1.859 Strongly agree. Effective judicial oversight of any administrative/civil sanctions regime is likely to be key to its credibility. It would not be satisfactory merely to permit the decision of a regulator to impose a civil penalty, or equivalent measure, to be challenged by way of judicial review.

1.860 Nor is it acceptable for the only right of appeal to lie with a designated appeals body, as was proposed by BIS in its March 2010 Civil Sanctions Pilot Consultation. Rather, there should be a formal right of appeal of any such decision to the courts, and the courts should be permitted to consider material errors of fact as well as law. Subsequent rights of appeal (i.e. to a higher court) could perhaps be by leave, rather than by right.

Residential Landlords Association

1.861 We agree that this is a vital safeguard. Otherwise, there is a risk of the regulatory authority becoming the Judge in its own cause. Judicial review alone is not an appropriate method and there needs to be recourse to an independent core tribunal on all occasions without restriction.

Trading Standards North West (TSNW)

1.862 Fixed penalties can already be challenged. There is currently the option to have day in Court. TSNW would like 're-hearing' defined in this instance. Would it be the same process as a licensing review? TSNW agree that an appeal should be made to a different body from the one which imposed the civil penalty.

Kingsley Napley LLP

1.863 We agree that a right of appeal on a point of law or by way of re-hearing, is necessary for compliance with Article 6 ECHR. Consideration must be given as to which is the appropriate court in terms of speed, expertise and cost.

1.864 We also note that the biggest downside of what the paper suggests is that, if conduct is de-criminalised, then it is also taken out of the criminal system. In consequence, those accused will not have access to legal aid and all the other rights and safeguards that are afforded by the criminal system. Thus the "defendant" is less able to defend himself in circumstances where the consequences may still be severe; a defendant can lose his job and his reputation. This impacts on proposal 9, as whilst the concept of a right of appeal can exist, the likelihood of its correct exercise may be diminished if the accused does not have recourse to legal advice.

Kingsley Napley LLP

1.865 Agree. A potential model could be based on the provisions in the Regulatory Reform (Fire Safety) Oder 2005, that provide for appeal by way of complaint to a Magistrates' Court against enforcement notices.

PROPOSAL 10

Institute of Employment Rights

1.866 In relation to proposals 3 and 10, it is not clear from the Law Commission document how we could differentiate clearly between low-level and high-level criminal offences. More careful analysis is needed to inform these proposals, particularly if we recognise the scale of the potential harms to the public and the environment that corporate offending - even at 'low levels' - engenders. Given their ubiquity and the scale of operations of some of the largest corporations, the unique potential for economic, physical and environmental harms on the part of corporations cannot be ignored. Together the proposals may undermine the use of the criminal law against offending which engenders major risks. Already in the case of health and safety offences, there are an increasing number of offences that go unpunished in criminal law.[23]

23 The figures cited in the following paragraphs are taken from Tombs, S and Whyte, D (2007) Regulatory Surrender: death, injury and the non-enforcement of law, Liverpool: Institute of Employment Rights.

1.867 Due to a series of budgetary and political pressures, Health and Safety Executive (HSE) inspectors are increasingly likely to use penalty notices (improvement notices and prohibition notices) as forms of enforcement in place of prosecution. Between 1999/2000 and 2008/09, the absolute number of HSE prosecutions fell by 48%. This decline also applies to those incidents which we might expect are most likely to result in prosecution – fatal injures to workers. Between 1999/00 and 2006/07, the number of worker deaths that resulted in prosecution by HSE fell by 39% (from 129 to 79). This collapse is most dramatically illustrated in the rate of prosecutions following deaths at work – falling from 46% to 28% in six years. An instructive context in which to place such low and declining levels of prosecution is HSE's own longstanding research-based finding, to the effect that in the majority of cases of occupational injury, the primary cause is located within management; thus, for example, the HSE's Accident Prevention Advisory Unit has shown that 70% of safety incidents could have been prevented by management action.[24]

Judges of the Court of Session

1.868 We agree in principle. We have some concern that some failures to attain appropriate standards of behaviour may be seen as acceptable and that a civil penalty may be seen as a cost. A careful system of stop notices may avoid such risks.

HSE

1.869 The term "unjustified risk-taking" is an interesting concept that does not readily read across to health and safety law. The law we enforce does not approach risk in terms of justifying the level of risk that may remain. Rather, the approach is to identify any risk and then mange that risk done to a level so far as is reasonably practicable. The steps that should be taken will be related to the degree of risk and what would be considered as proportionate in the circumstances. If this proposal is in relation to offences where the duty holder is calculating how much risk taking they can justify and still remain within the law, then we do not see how this concept would apply within any health and safety regulatory regime.

1.870 In general, the majority of legislative requirements in health and safety law do not require the prosecution to prove a fault element. These offences are directly concerned with the prevention of harm to the health and safety of workers an those affected by work activities whether the emphasis is on the management of risks, so far as it reasonably practicable. The difficulty with this "fault element" concept is the emphasis on linking the conduct to the harm done. Health and Safety duties aim to reduce risk rather than focus upon harm done. This is appropriate because it is the potential for harm that the law is addressing, not the realisation of that harm. For example, the failure to provide instruction or training may appear to be a minimal offence. This may be the case if the equipment in use is a hammer, but where that equipment is a forklift truck, chainsaw or part of a major chemical plant installation, the breach could lead to a serious consequence.

24 Health and Safety Executive (1995) Improving compliance with safety procedures: reducing industrial violations. Human Factors Research Group, Sudbury: HSE Books.

1.871 The proposal does not address the circumstances where a licensing regime is designed to deal with high hazard matters, where there is an indirect link between the activity and harm, for example, explosives or nuclear, and other permissioning regimes.

OFT

1.872 We would generally agree with the proposal that fault elements in criminal offences should be proportionate. However, we have some difficulty in reconciling what is proposed here with what is said in connection with fault when adopting a hierarchical approach. Our major concern for reasons already stated is that the result would be that the only remaining criminal offences were difficult to prosecute in practice because of a need to establish a high level of fault.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.873 We agree that the mere fact that conduct is to be deterred or punished in some way is not sufficient to warrant it being made a criminal offence. We also agree that criminal offences should be used where the conduct is morally wrong, in the sense of involving dishonesty, intention or knowledge that the conduct is a criminal offence. We do not agree that a criminal conviction for a company does not have the same effect as for an individual and it is not always open to a company to re-form or re-brand its operations to diminish the impact of a conviction.

1.874 We think criminal liability should only be imposed where there is dishonesty, intention or knowledge. It should not be imposed where there is negligence. Imposing criminal liability for recklessness can make it very difficult for companies to know what action they must take or avoid in order to avoid committing an offence. In some cases involving criminal offences, including market abuse, it can be very difficult to know, or advise with certainty, whether a particular course of action will constitute a criminal offence or not. This means that applying the test of whether a company has taken a risk that is unjustified to take that has been appreciated but ignored is not a satisfactory test to determine recklessness. Of the approaches to recklessness set out in Appendix C we think the approach adopted in Canada (where it must be shown that either a director or senior officer in an organisation had the relevant knowledge or mental state) is preferable and the approach adopted in Australia (which provides that bodies corporate are liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of their employment or within their actual or apparent authority where the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence) is not appropriate. In particular, we think the Australian approach of showing that there is authorisation or permission by proving that there is a corporate culture that tolerated non-compliance or a corporate culture that led to non-compliance does not apply a sufficiently high test of knowledge or intent.

1.875 We think it is important that directors of companies should be clear about the actions they are expected to take or avoid to avoid committing a criminal offence.

The Law Society

1.876 As a general concept we agree that proposal 10 makes a great deal of common sense, but we feel that it is necessary to take care in applying it in some specific contexts.

1.877 We agree that the mere fact that conduct is to be deterred or punished in some way is not sufficient to warrant it being made a criminal offence. We also agree that criminal offences should be used where the conduct is morally wrong. We do not agree that a criminal conviction for a company does not have the same effect as for an individual and it is not always open to a company to re-form or re-brand its operations to diminish the impact of a conviction. `

1.878 We think criminal liability should only be imposed on the basis of strict liability where the harm suffered or risked is so serious that the need for deterrence is necessary. In order to maintain this level of deterrence strict liability should be used very sparingly.

1.879 The test of whether a company has taken a risk that is unjustified to take, that has been appreciated but ignored, is likely to be a difficult test to apply. This is not only because of the difficulties of deciding who, in the company, must have appreciated the risk but ignored it and to what extent the directors must have known this but also because, for some offences that may be committed by companies it is difficult to determine the "risk" that needs to be appreciated. If all legislation included specific provisions setting out what needs to be shown for a company to be liable, some of the concerns about the difficulty of applying the recklessness test to companies would disappear. Specific legislative provisions would make it both easier to advise companies how to avoid committing an offence, and to prosecute where the relevant elements of the offence were present.

1.880 Of the approaches to recklessness set out in Appendix C we think the approach adopted in Canada (where it must be shown that either a director or senior officer in the organisation had the relevant knowledge or mental state) is preferable and the approach adopted in Australia (which provides that bodies corporate are liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of their employment or within their actual or apparent authority where the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence) is not appropriate as we think the test of tolerating a corporate culture or having a corporate culture that led to non-compliance does not apply a sufficiently high test of knowledge or intent.

1.881 We have commented further on another particular concern in our observations below on Proposal 11.

Trading Standards South East Ltd

1.882 TSSE believes that this proposal is unnecessary. Parliament has intended that certain activities by their simple commission, result in criminal offences being committed. Parliament has also recognised that in some circumstances prosecution may not be appropriate where it can be shown that the offender has set up a system to avoid the commission of any criminal offences, and, reviews that system to ensure it remains effective. This is the basis of the statutory defence of 'due diligence'. The majority of offences for which local authority Trading Standards are the enforcement agency already attract a statutory defence of due diligence. A considerable body of case law exists to aid in the interpretation and application of the due diligence defence. It is the view of TSSE that should any person (including companies by reference to the Interpretation Act) be able to satisfy the due diligence defence then they will not face criminal prosecution at all. As such, fault elements should only be present within offences for which there are no statutory defences available.

Kiron Reid, Liverpool Law School

1.883 Should also be adopted as a general principle across the law. My interpretation of what you are saying about the justification for this is: the greater the harm the less fault (*mens rea*) that is required. However I agree with the point at para. 1.54 that criminalisation of remote harm with an appropriate fault element can be justified.

North East Trading Standards Association (NETSA)

1.884 We are confident that existing mechanisms within a consumer protection context and the defences found within those statutes offer a proportionate response to the issue of fault in criminal offences. Many offences are of strict liability, subject to this statutory defence, and we believe this system works effectively. Some offences, such as breach of the general prohibition on engaging in a commercial practice which contravenes the requirements of professional diligence require *mens rea* elements of "knowingly or recklessly", recognising that this more general prohibition in comparison to specific prohibited actions justifies a higher fault threshold. We do not necessarily agree that the harm test and the remoteness of harm will always be a valid guide. In some instances neglect may seriously compromise the fair trading environment and warrant criminal proceedings. This again will invariably be considered within a fair enforcement policy.

Chamber of Shipping

1.885 This is supported. *Mens rea* should be the dominant factor in determining fault together with the objective and intended result of the guilty deed. This would eliminate from criminal sanctions many of the existing "offences" of non-compliance with a regulatory requirement.

City of London Law Society

1.886 We agree that the mere fact that conduct is to be deterred or punished in some way is not sufficient to warrant it being made a criminal offence. We also agree that criminal offences should be used where the conduct is morally wrong. We do not agree that a criminal conviction for a company does not have the same effect as for an individual and it is not always open to a company to re-form or re-brand its operations to diminish the impact of a conviction.

1.887 We think criminal liability should only be imposed where there is dishonesty, intention or knowledge. It should not be imposed where there is negligence. Imposing criminal liability for recklessness can make it very difficult for companies to know what action they must take or avoid in order to avoid committing an offence. In some cases involving criminal offences, including market abuse, it can be very difficult to know, or advise with certainty, whether a particular course of action will constitute a criminal offence or not. This means that applying the test of whether a company has taken a risk that is unjustified to take that has been appreciated but ignored is not a satisfactory test to determine recklessness. Of the approaches to recklessness set out in Appendix C we think the approach adopted in Canada (where it must be shown that either a director or senior officer in an organisation had the relevant knowledge or mental state) is preferable. We do not think the approach adopted in Australia (which provides that bodies corporate are liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of their employment or within their actual or apparent authority where the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence) is appropriate as we think that proving that a corporate culture existed that tolerated the relevant provision or having a corporate culture that led to non-compliance should not be enough to show that the body corporate authorised or permitted the offence.

1.888 We think it is important that directors of companies should be clear about the actions they are expected to take or avoid to avoid committing a criminal offence.

QEB Hollis Whiteman Chambers, Clifford Chance, Justices' Clerks' Society, Leicester City Council, Ivan Krolick, Food Law Group, Food and Drink Federation, Financial Services and Markets Legislation City Liaison Group, Institute of Chartered Accountants of England and Wales (ICAEW)

1.889 Agree / support.

Local Government Regulation (LGR)

1.890 It is unclear whether this proposal is to be of general application, especially in light of the statement made in paragraph 4.55 of the Consultation Paper – *"The interest of third parties, such as consumers, may thus be better protected in some areas by a negative fault regime…"* This statement seems to argue that strict liability with a due diligence defence is the most appropriate approach in some fields.

1.891 We also think the proposal as drafted seeks to over complicate the current situation, and may well be seeking to suggest for example that a manufacturer of a product would take less responsibility than a retailer? A court would look at issues of remoteness and culpability in its considerations. Is it being suggested that there are 4 offences and if authorities mis-categorise as dishonesty rather than intention, knowledge, or recklessness then there is an acquittal?

1.892 We also contend that Parliament has intended that certain activities by their simple commission result in criminal offences being committed. Parliament has also recognised that in some circumstances prosecution may not be appropriate where it can be shown that the offender has set up a system to avoid the commission of any criminal offences, and, reviews that system to ensure it remains effective. This is the basis of the statutory defence of 'due diligence'. The majority of offences for which Local Authority Trading Standards are the enforcement agency already attract a statutory defence of due diligence. A considerable body of case law exists to aid in the interpretation and application of the due diligence defence. It is our view that should any person (including companies by reference to the Interpretation Act) be able to satisfy the due diligence defence then they will not face criminal prosecution at all. As such, fault elements should only be present within offences for which there are no statutory defences available

1.893 We are therefore confident that existing mechanisms within a consumer protection context and the defences found within those statutes offer a proportionate response to the issue of fault in criminal offences. Many offences are of strict liability, subject to this statutory defence, and we believe this system works effectively. Some offences, such as breach of the general prohibition on engaging in a commercial practice which contravenes the requirements of professional diligence require Mens Rea elements of "knowingly or recklessly", recognising that this more general prohibition in comparison to specific prohibited actions justifies a higher fault threshold. We do not necessarily agree that the harm test and the remoteness of harm will always be a valid guide. In some instances neglect may seriously compromise the fair trading environment and warrant criminal proceedings. This again will invariably be considered within a fair enforcement policy. Further discussion might be needed on this issue to better define what is meant by the link between gravity of harm done and level of sanction imposed.

RSPCA

1.894 A person responsible for an animal can commit the offence of unnecessary suffering under Section 4 of the AWA by an act or omission Thus criminalised conduct can not be confined to offences which involve dishonesty, intention, knowledge or recklessness.

1.895 Further, the test in respect of Section 4 AWA offences is well established to be an objective test – what a reasonable, competent, caring person would do or expected to do in the circumstances of the case.

1.896 The above proposal that only a higher fault element would be required, is a lessening of the mens rea and is inappropriate in respect of AWA offences.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.897 Proposals 10, 11 and 12 should be approached together. Underlying principle should be that the criminal law should only be engaged where the conduct or action regulated involves really serious consequences for public and the breach is intentional or reckless (including dishonesty but dishonesty might not justify the intervention of the criminal law if the consequences of the action or default do not meet the "really serious" threshold). "Remoteness" is different from the "really serious consequences" test but would only result in criminal sanction in those cases where action or breach, remote from the harm done, is such as to cross a seriousness threshold.

1.898 Whatever test is adopted, any extension of the concept of strict liability should be resisted. Truly criminal activity will generally require mens rea and that should be the principle where a regulatory breach involves criminal process and criminal sanction. Leads into matters in proposals 12 to 15 where corporate defendants are subject of criminal process and the doctrine of identification is engaged. Situation of smaller businesses inevitably results in some unfairness and a risk of disproportionate levels of prosecution . Far more difficult to identify "controlling minds" within substantial corporate structures and smaller organisations.

MOJ

1.899 Clearly important for offences to be targeted at conduct intended to be criminalised and fault provides a tool to formulate an offence restrictively with a clear focus. However, concerned that to require a minimum level of fault for all offences would result in a lack of flexibility to address particular issues arising in individual regulatory regimes. Accordingly, Government intends to reflect the proportionality principle by assessing whether departments and agencies have formulated individual offences so that they do not criminalise behaviour beyond that which is strictly necessary for their particular regime.

Care Quality Commission (CQC)

1.900 Burdens of proof and processes already required by Heath and Social Care Act mean it can be difficult to hold larger and more complex providers to proper account for failing to meet essential standards of quality and safety. It could be argued that changed are needed so that more complex organisations and their senior managers are more easily held to account when people experience unnecessary harm. CQC does not think there is a case for providing organisations with further protections under health and social care regulation. Requirements in the Act are pitched at the level of preventing unnecessary harm to people and it is important that relevant individuals can be held to account where people have suffered harm. They should not be able to hide behind corporate identity.

Food Standards Agency

1.901 Support but do not see the need. MOJ/BRE guidance on creating criminal offences already makes clear that departments need to consider proportionality. Although have “due diligence” defence in food and feed cases, MOJ currently has to clear new offences and would normally expect to see elements (eg intention, recklessness, knowledge, without reasonable excuse) included in offence. Concern for FSA would be that inclusion of a mental element would not be in keeping with ostensibly absolute requirements of European legislation and might leave liable to infraction proceedings. FSA’s investigative powers might also need revision.

Association of Chief Trading Standards Officers (ACTSO)

1.902 Difficult to understand how the proposals would apply practically. Logic behind proposal is clear but circumstances around what might appeal similar regulatory law breaches vary considerably from case to case. How would proposal take account of differing size of regulated entities and resources available to them to ensure compliance with regulatory requirements? How will proposal be responsible to differing levels of harm for individual consumers? How would proposal take account of reliance that other businesses in the supply chain place on information provided by component manufacturers?

The Magistrates’ Association

1.903 Seems to reduce the importance of harm or potential harm in arriving at appropriate decision. Harm should be first consideration before considering conduct.

The Faculty of Advocates

1.904 The principle ought to be that all of the elements of all criminal offences ought to be proportionate to the mischief which they seek to address. Proposals 10 and 11 seem capable of being regarded as simply an application of that general principle.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.905 Fine in principle. We would suggest that the word “remote” is a dangerous one: the test should be one of foreseeability and must ensure accountability. The writers of the paper should note the inclusion of "knowingly or recklessly" in Regulation 8 of CPRs, this being added on the basis that the provision (general duty) was an extension of existing protections so it was deemed suitable for a mens rea element.

CBI

1.906 Strongly agree.

East of England Trading Standards Association

1.907 It is unclear whether this proposal is to be of general application, especially in light of the statement made in paragraph 4.55 of the Consultation Paper – *"The interest of third parties, such as consumers, may thus be better protected in some areas by a negative fault regime…".* This statement seems to argue that strict liability with a due diligence defence is the most appropriate approach in some fields.

1.908 Although the difficulties of proving *mens rea* are recognised, this proposal does not specifically address them. It also raises the question of whether it would be a requirement for the outcome of the risk taking to be foreseeable. In any event the taking of unjustified risks should always be accompanied by appropriate sanctions as surely the aim of regulation must be to deter such actions and to encourage businesses to act responsibly.

Residential Landlords Association

1.909 As already indicated, the RLA has always been concerned at the concept of the absolute offence. When thinking about it ordinary people would expect that to impose criminal sanctions there should be some degree of fault or blame. At the least one would expect culpability in the form for negligence connoting a degree of carelessness meriting criminal censure. Indeed, in the case of certain transgressions one can perhaps consider two tier offences. Alternatively, this can be addressed through the imposition of penalties, applying a higher level of penalty for example if there is intent instead of carelessness. To avoid over complication two tier offences should, in our view, be restricted. One example may be offences where dishonesty is involved or it may not be covering the same ground. There are precedents for this for example under social security legislation. Having said this, we agree with the general proposition contained in this proposal.

Trading Standards North West (TSNW)

1.910 We believe this is over-complicating the matter. Is the suggestion that a manufacturer of a product would have less responsibility than a retailer? The Court considers remoteness and culpability anyway. Is the suggestion that there are 4 offences and if an offence is mis-categorised as dishonesty rather than intention, knowledge, or recklessness then is there an acquittal? If a Director just says 'no comment' then is there no ability to continue to successful prosecution? How are offences decided upon? Presumably we would consider laying informations for all offences and withdraw based on negotiations with defence?

Kingsley Napley LLP

1.911 Where the risks are high, or the potential harm is great, a requirement for proof of negligence may rightly be regarded as having the effect of marking out the conduct in question as genuinely criminal. We agree that proportionality is important. Using the example of filling in forms (eg registration/license to work) required by regulatory bodies, the question as to whether conduct should be criminalised should not be an automatic one. In this example, it should be recognised that the simple provision of inaccurate information/omission, may often be too remote to cause harm, whether directly or indirectly and therefore should not be a criminal offence unless done so knowingly or recklessly. It therefore follows that errors in the provision of information should only be subject to a criminal sanction if committed knowingly or recklessly. In our experience most forms used by regulators will contain a declaration of truth and accuracy as to contents, so it is not difficult for the regulator to make out a knowing or reckless fault element where forms have been completed.

1.912 Consistency and proportionality in approach would be achieved by the 'rule of thumb' set out in proposal 10. By suing the same words and the same concepts to establish fault, consistency is achieved across the regulatory sphere for conduct that is morally blameworthy. The accused individual or business will be better advised if the law is consistent across regulatory offences. Clarity in the law will doubtless reduce the need for litigation whether via a civil penalty scheme such as RESA or through the Criminal Courts; it is likely to promote an understanding of what is required by law and reduce the scope for unnecessary prosecution for simple errors in infor5mation provided.

PROPOSAL 11

Institute of Employment Rights

1.913 In relation to proposals 7, 9 and 11 we do not agree that corporate offences and individual offences should be further differentiated in this exercise. The Law Commission's argument about fairness simply does not hold water, particularly when we consider that corporate offenders already are likely to have access to more resources to support them through court proceedings than individuals. If the effect of the measures being proposed in the document is indeed more likely to boost business confidence in the justice system, this boost can only be achieved at the expense of a further undermining of public confidence in the criminal justice system.

Trading Standards South East Ltd

1.914 TSSE is of the view that this proposal is fundamentally wrong. The proposal seems to suggest that the effect of failing to provide information is an administrative error and will not result in harm; accordingly any breach should not result in criminal sanction. Parliament has intended that where information is to be provided, it is done so for a reason. The failure to provide that information at all, or in consistent ways, can have catastrophic effects. The failure to properly label a food product as containing nuts could lead to a potential fatal anaphylactic shock in a nut allergy sufferer. The failure to label a toy with appropriate age or safety warnings could lead to severe, or potentially fatal, injuries to a child.

GC100 (association for general counsel and company secretaries for the FTSE 100), City of London Law Society, QEB Hollis Whiteman Chambers, Justices' Clerks' Society, Leicester City Council, Food Law Group, Food and Drink Federation, Financial Services and Markets Legislation City Liaison Group

1.915 Agree / support.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.916 We agree with this proposal. The text of the consultation document suggests that strict liability offences for the failure to provide information should not be introduced into any new legislation, but we believe that it should also be removed from those statutes where it currently applies.

Chamber of Shipping

1.917 This is fully supported. As noted elsewhere, criminal sanctions are increasingly being imposed for administrative failures and bureaucratic tidiness. Sanctions, if they are to be applied, should be in terms of civil penalties and, even then, used as a last resort. In the initial stages, regulators and enforcement bodies should use alternative means such as warning letters, or as applicable enforcement provisions, to encourage compliance. The provision "unless the wrongdoing was knowing or reckless" would be likely to be problematic and should, perhaps, be considered only in cases of fraud or other forms of deception.

The Law Society

1.918 We agree, but as noted above, in some, exceptional, cases it may be appropriate for a situation to demand the provision of correct information, and make it an offence of strict liability not to supply the correct information, where the risk of harm is high. This may be so in the context firearms offences and offences relating to motor vehicles. In some contexts, particularly where the sanction of criminal law is to be used as a deterrent to promote public safety, it may be so important that accurate information is provided that there should be a strict liability element, rather than knowledge or recklessness as to their wrongdoing. This together with publicity of these offences may help to ensure that the public take care not to provide inaccurate information in these situations.

Judges of the Court of Session

1.919 We agree that consistency throughout regulated activities is desirable and that simple failure to provide information should not be a criminal offence. Persistent or obdurate failure may justify criminal proceedings.

HSE

1.920 In health and safety law, a failure to provide information required by the relevant statutory provisions is a strict liability offence with no requirement to prove fault,. Where that information is provided and is false, the offence does require proof of fault or recklessness (s33(1)(k)).

1.921 In the HSWA context we consider this an unjustifiable proposal as it has no regard to the purpose of a requirement to provide information or the effect of any failure to provide that information.

1.922 Most of the requirements to notify information relate to particularly hazardous substances or procedures and often operate as part of an actual or quasi-permissioning regime with the work not being allowed to commence either until actual permission has been given or until a set period of time has elapsed from the notification, for example, the Genetically Modified Organisms Contained Use Regulations 2000 as amended. Under this proposal, no consideration is given to the purpose of a notification or the effect of any failure to notify. Failure to notify an intention to work with a Hazard Group 4 organism for the first time directly impacts on the risks to the health of workers and the general public because HSE would not have the opportunity to ensure the adequacy of the risk assessments or the containment measures necessary to ensure the work can be carried out safely.

1.923 Further notification requirements in COSHH and GMO(CU) (ad other regimes such as COMAH) largely stem from European requirements and those Directives require the notification requirements to be enforced irrespective of fault.

1.924 Secondly, in terms of the requirement to provide information for the purposes of an investigation or examination (HSWA s20(2)(j)), this proposal would inhibit proper investigation,. Most of the information we require in order to properly investigate any incident, including a work related fatality, is held within the employer company and its servants are the gatekeepers. In this circumstance we are concerned with intentional refusal to provide that information, either by applying pressure to employees to not assist a criminal inquiry. This proposal appears to capture this situation too and we would not agree to its application for the reasons given,

Trading Standards Institute (TSI)

1.925 Providing all the information consumers and businesses need to make an informed decision is very important – a large part of the offences under the Consumer Protection from Unfair Trading Regulations 2008, which is the cornerstone of Trading Standards legislation, is reliant on this. Consumers today expect a large amount of information before their transactional decision is made. Relaxing rules on providing information can lead to businesses cutting corners and consumers not being sure of what they are actually getting into (this is especially the case in credit agreements). In these financially challenged times most businesses will see this as a cost-cutting measure, decreasing consumer confidence and leading consumers into possible debt and unsatisfactory purchases.

RSPCA

1.926 As mentioned in response to Proposal 10, the required fault element of the AWA is an objective one. Criminal sanctions are entirely appropriate in relation to offences against animals and it would not be in the public interest to excuse those “only” guilty of failing to provide (or inadvertently providing the wrong) information.

OFT

1.927 With regard to the fault requirements for the provision of information, we agree that criminal liability should only exist where the wrongdoing was knowing or reckless. We believe that criminal offences should exist in these circumstances to ensure that the enforcer is able to access information in order to instigate action against traders when necessary.

Kiron Reid, Liverpool Law School

1.928 Agree. Your argument at the end of para. 1.56 is particularly good. Personally I would extend this principle to cover other areas, not only business's dealings with regulators. Under your proposal the travel agent in *Wings v Ellis Ltd.* (1984, HL) would now have a defence (though there is one in the equivalent statute nowadays I imagine). I would agree that they should have no criminal liability if they have not been negligent anyway and your proposal would achieve that.

1.929 So if negligent the subject would not be liable for a criminal offence but could be liable for a civil penalty. Does this include constructive knowledge / 'wilful blindness' and other similar formulations? I disagree that these are the same as knowledge or are the equivalent of recklessness but Smith & Hogan and everyone take the contrary view.

1.930 Re. para. 1.57. The requirement to provide information should be framed as a direct duty on the business to avoid management being able to escape liability by blaming a junior employee (though this ties in with your later discussion on the forms of business liability).

Clifford Chance

1.931 Agree. Any "civil" penalties should be proportionate to the nature of the offence.

The Pensions Regulator

1.932 The Regulator understands that the proposal would mean the s77(1) type offence would be replaced with some sort of civil penalty. There are existing civil penalties under s10 Pensions Act 1995 (imposition of which is exercisable by the Regulator's internal Determinations Panel). Assume that any new civil penalty would fit within the existing framework.

1.933 S72 extremely important for the Regulator to gather information (often deals with matters involving millions of pounds of pensions liabilities involving large multinational companies and professional advisers). If proposal 11 were implemented, it would fetter our ability to obtain information. In the proposed circumstance, a determined individual could ignore a s72 notice and would not fall foul of any criminal sanction. Only deterrent would be a civil penalty. Regulator doubts that a £5k fine for an individual and £50k for a body corporate would have any deterrent effect in situations were millions of pounds were at stake.

1.934 Concern also that proposal 11 would be contrary to Article 13 Directive 2003/41/EC on activities and supervision of institutions for occupational retirement provision, which requires that member states have the "necessary powers and means: (a) to require" information. Pensions Regulator thinks the only meaningful way to "require" information is by way of the threat of a criminal sanction.

Food Standards Agency

1.935 Agree so long as failure to provide information was not "fraudulent/dishonest", "without reasonable excuse" etc. For purpose of protecting public health, need accurate and reliable information. Ideally, should be a persuasion for individuals to respond accurately and with care. For FSA, reckless would include a case where individual was aware of how information would be used and understood its importance. Have concerns also that proposals does not address issue of failure of corporate bodies to provide information.

Association of Chief Trading Standards Officers (ACTSO)

1.936 Need to consider potential harm that may arise from not providing information. Provision of information can be very important to consumers and other businesses in supply chain. Consider the information consumers are required to be given in relation to consumer credit agreements so that they can understand their obligations and the cost of the credit. Use of criminal offences under Consumer Credit Act 1974 is important tool in tackling illegal money lending. Offending by such loansharks is often widespread and causes significant harm to individuals and local community. Removing criminal sanctions may undermine efforts to tackle this. Consider also provision of information relating to content of food and risks for allergy suffers. Consider important of comprehensive instructions for use of electrical appliances, where there might be a risk of fire from misuse. In relation to large and diverse businesses, proving knowledge or recklessness on behalf of controlling mind can be very difficult.

North East Trading Standards Association (NETSA)

1.937 We agree that clarity and consistency, as well as fairness should be elements of any offence applicable to a business, however we would suggest that the existence of the potential criminal penalty serves to focus the mind of responsible officers to avoid giving misleading information or more importantly failing to give relevant facts.

The Magistrates' Association

1.938 As long as a business which is being intentionally obstructive can fall foul of Fraud Act, then agree.

EEF: The Manufacturers' Organisation

1.939 Individuals should face criminal prosecution for paperwork offences only if their wrongdoing was knowing or reckless.

The Faculty of Advocates

1.940 The principle ought to be that all of the elements of all criminal offences ought to be proportionate to the mischief which they seek to address. Proposals 10 and 11 seem capable of being regarded as simply an application of that general principle.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.941 We do not have any concern about this proposal. We do need basic information for enforcement purposes but this provision seems to adequately deal with a failure to provide it.

Ivan Krolick

1.942 Agreed. Is it intended that the obligation to prove knowledge or recklessness should be on the prosecution, or does the proposal envisage that this may an implied reverse burden defence?

CBI

1.943 Strongly agree. Even in a civil context, care is required on any decision to seek civil remedies or sanctions. For example, any decision to impose strict liability is difficult to justify, and there should normally always be some fault element in any enforcement proceedings in civil / administrative cases.

East of England Trading Standards Association

1.944 In principle we would agree with this proposal, although we have some reservations as to how this would work in practice under some of the legislation enforced by Local Authorities and indeed can only comment in that context.

1.945 For example under Animal Health legislation if an element of mens rea were introduced into the simple provision of information, this could have significant implications for enforcement agencies for example in the event of a disease outbreak. Arguably it is the prospect of criminal proceedings that ensures that the required information is kept diligently and is made readily available to enforcement agencies.

Local Government Regulation (LGR)

1.946 In principle we support the proposal and agree that clarity and consistency, as well as fairness should be elements of any offence applicable to a business. However we would suggest that the existence of the potential criminal penalty serves to focus the mind of responsible officers to avoid giving misleading information or more importantly failing to give relevant facts. We consequently have some reservations as to how this would work in practice under some of the legislation enforced by Local Authorities and indeed can only comment in that context.

1.947 We are aware that in IPPC regulation there is an offence for failure to provide information on a regular basis such as monitoring results for flue gas emissions. This requirement would be laid out within the permit for industrial premises and is an important part of the regulator being assured that the process is not polluting the environment. Should that information not be forthcoming then the recourse is to criminal prosecution for non compliance of the permit. This serves as a useful staged process and although not widely used in practice, is nonetheless has an important deterrent effect.

1.948 Under Animal Health legislation if an element of Mens Rea were introduced into the simple provision of information, this could have significant implications for enforcement agencies for example in the event of a disease outbreak. Arguably it is the prospect of criminal proceedings that ensures that the required information is kept diligently and is made readily available to enforcement agencies.

1.949 The proposal seems however to suggest that the effect of failing to provide information is an administrative error and will not result in harm; accordingly any breach should not result in criminal sanction. If Parliament has intended that where information is to be provided, it is done so for a reason. The failure to provide that information at all, or in consistent ways, can have catastrophic effects. The failure to properly label a food product as containing nuts could lead to a potential fatal anaphylactic shock in a nut allergy sufferer. The failure to label a toy with appropriate age or safety warnings could lead to severe, or potentially fatal, injuries to a child. Or for information consumers are required to be given in relation to consumer credit agreements so that they can understand their obligations and the cost of the credit. The use of the criminal offences under the Consumer Credit Act 1974 is an important tool in tackling illegal money lending ('loan sharks'). In this instance, the offending by the loan shark is often widespread and causes significant harm to individuals and the local community. Removing the criminal sanctions may undermine efforts to tackle loan sharks. Or perhaps more pointedly the provision of information relating to the content of food and the risks for allergy sufferers

Residential Landlords Association

1.950 We very much agree with this. Indeed, we argued for this in respect of the information offence which was created under the Housing Act 2004 in relation to HMO licensing. This is particularly important for larger organisations where information may be spread amongst various individuals/departments.

Trading Standards North West (TSNW)

1.951 We agree that individuals should not be criminalised for a form filling error, but what about clocking for a car or not providing cancellation rights to an elderly and vulnerable person purchasing services in the home. Both of these could be classed as 'form filling frauds'? A change to this would alter the criminal landscape. A reasonable precautions and due diligence defence falls away where there is knowledge. Where a TSO is given false information this could be knowingly or recklessly. Also we have obstruction charges which can be used for giving false information during an interview.

Kingsley Napley LLP

1.952 Where the risks are high, or the potential harm is great, a requirement for proof of negligence may rightly be regarded as having the effect of marking out the conduct in question as genuinely criminal. We agree that proportionality is important. Using the example of filling in forms (eg registration/license to work) required by regulatory bodies, the question as to whether conduct should be criminalised should not be an automatic one. In this example, it should be recognised that the simple provision of inaccurate information/omission, may often be too remote to cause harm, whether directly or indirectly and therefore should not be a criminal offence unless done so knowingly or recklessly. It therefore follows that errors in the provision of information should only be subject to a criminal sanction if committed knowingly or recklessly. In our experience most forms used by regulators will contain a declaration of truth and accuracy as to contents, so it is not difficult for the regulator to make out a knowing or reckless fault element where forms have been completed.

1.953 Consistency and proportionality in approach would be achieved by the 'rule of thumb' set out in proposal 10. By suing the same words and the same concepts to establish fault, consistency is achieved across the regulatory sphere for conduct that is morally blameworthy. The accused individual or business will be better advised if the law is consistent across regulatory offences. Clarity in the law will doubtless reduce the need for litigation whether via a civil penalty scheme such as RESA or through the Criminal Courts; it is likely to promote an understanding of what is required by law and reduce the scope for unnecessary prosecution for simple errors in information provided.

Criminal Bar Association and Bar Council

1.954 Underpinning proposals 10 and 11 is the argument from CP 1.53 and 1.54. "Unnecessary and undesirable risks" and "unjustified risk of harm" we understand to include general duties under HSWA and a risk of environmental harm arising from a breach of statutory duty.

1.955 As a general rule it must be that "conduct that poses an unjustified risk of harm" is the starting point for criminal liability: "unjustified" marks the threshold; risk is a measure of the seriousness of harm that be caused and the chances of that harm eventuating. The concept of "remoteness of an act that creates risk, from the harm that may result" appears to be simply a way of describing a low chance of resultant harm.

1.956 There are many examples of conduct, states of affairs or acts that create only a remote or low chance of harm resulting but, nonetheless, are considered to create a material risk because the harm that may result is so grave (extreme example is nuclear safety and the approach to risk in that regime).

1.957 Remoteness of resultant harm cannot be elevated into a test for imposing additional fault requirements; the remoteness of resultant harm from conduct will always be fact and situation sensitive; it will always be one part of an assessment of the extent of risk and one factor in measuring seriousness of an offence involving the creation of "unjustified risk".

1.958 In regard to regulatory permissioning and licensing regimes there is conduct that neither creates “unjustified risk" nor necessarily requires intention, recklessness, or any specific fault but which nonetheless amounts to wrongdoing, requiring the stigma of potential criminal sanction.

1.959 Breach of nuclear site license conditions is an example of a criminal offence which is the subject of very rare prosecution. It requires no higher fault element, involves conduct that may be very remote or even divorced from the risk of resultant harm but nonetheless amounts to “wrongdoing" that requires the potential public stigma and opprobrium flowing from criminal conviction and not merely the imposition of a civil penalty by the industry regulator.

1.960 All nuclear installations in the UK are subject to the nuclear licensing regime created by Nuclear Installations Act 1965, which created site licenses with specific conditions of conduct attached, breach of which is a strict liability offence punishable by unlimited fine in the Crown Court. The 2006 prosecution of *British Nuclear Group Sellafield Ltd* for breach of nuclear site license conditions provides a good example of a serious offence where the conduct, (the breach of the license conditions), exposed no person to the risk of harm nor created the risk of any environmental harm.

1.961 The facts related to the loss from primary containment at the THORP reprocessing plant of 89,000 litres of the most highly radioactive liquid fuel. This remained undetected by any of the monitoring systems, alarms etc for a period of over 8 months, with ultimate discovery of the loss arising through accounting procedures. The liquid collected as a significant sized pool on the floor of the giant and extremely thick concrete bunker that made up the required secondary containment. The company was fined £500,000 by Mr Justice Openshaw at Carlisle Crown Court on 16th October 2006 at a full and public hearing that was the focus of international media attention.

1.962 Proposal 11 is a general principle focussed on wrongdoing bearing on the simple provision of (or failure to provide) information, the proposed principle being that in all such cases criminal proceedings are justified only where there is knowing or reckless fault. Whilst the examples of existing provisions provided by CP 4.62 to 4.80 reveal a range of differing fault requirements, the report also identifies how in one example (the Education and Skills Act 2008, s 90), “it is arguable that a lesser fault requirement than, say, dishonest, intentional or reckless disclosure, is warranted. This is because the disclosure in question involves a direct violation of someone’s privacy".

1.963 There is an equally powerful argument for distinguishing offences concerned with the provision of information in permissioning and licensing regimes. It is submitted that asbestos work, its licensing and notification provides an example where even “wrongdoing bearing on the simple provision of (or failure to provide) information" requires potential criminal sanction, without proof of intent, knowledge or recklessness. Asbestos related disease is overwhelmingly the largest cause of work related death in the UK, with currently 4,000 resultant deaths per year.

1.964 Work to or involving asbestos can only be lawfully undertaken by licensed contractors and is subject to various notice requirements: breach of such health and safety regulations is a criminal offence, again, contrary to s 33(1)(c) HSWA. The circumstances of trust involved in the holding of a license; the resultant benefit to the licensee of potential remuneration; the super-hazardous nature of the activities; the importance of the requirements of notice, accurate detail of the nature and of the extent work; and the likely effect of criminal conviction on the status of a licensee are all reasons that "wrongdoing" by "simple ... failure to provide information" is required to potentially attract the public stigma of criminal conviction.

1.965 Consistency cannot be applied across all regulatory offences concerned with the supply, receipt or disclosure of information because the context of such offences varies, particularly the nature of the obligation upon the dutyholder and the nature of the harm or wrong the regulation is addressed.

PROPOSAL 12

HSE

1.966 The term "unjustified risk-taking" is an interesting concept that does not readily read across to health and safety law. The law we enforce does not approach risk in terms of justifying the level of risk that may remain. Rather, the approach is to identify any risk and then mange that risk done to a level so far as is reasonably practicable. The steps that should be taken will be related to the degree of risk and what would be considered as proportionate in the circumstances. If this proposal is in relation to offences where the duty holder is calculating how much risk taking they can justify and still remain within the law, then we do not see how this concept would apply within any health and safety regulatory regime.

1.967 In general, the majority of legislative requirements in health and safety law do not require the prosecution to prove a fault element. These offences are directly concerned with the prevention of harm to the health and safety of workers an those affected by work activities whether the emphasis is on the management of risks, so far as it reasonably practicable. The difficulty with this "fault element" concept is the emphasis on linking the conduct to the harm done. Health and Safety duties aim to reduce risk rather than focus upon harm done. This is appropriate because it is the potential for harm that the law is addressing, not the realisation of that harm. For example, the failure to provide instruction or training may appear to be a minimal offence. This may be the case if the equipment in use is a hammer, but where that equipment is a forklift truck, chainsaw or part of a major chemical plant installation, the breach could lead to a serious consequence.

1.968 The proposal does not address the circumstances where a licensing regime is designed to deal with high hazard matters, where there is an indirect link between the activity and harm, for example, explosives or nuclear, and other permissioning regimes.

Clifford Chance

1.969 Agree. Might be something with which Parliament Counsel can assist Government departments.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.970 We agree with this proposal. Previously introduced inconsistencies and lack of clarity should also be removed, as soon as opportunity presents.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.971 Agree subject to points raised under 10.

Food Standards Agency

1.972 Support but do not see the need. MOJ/BRE guidance on creating criminal offences already makes clear that departments need to consider proportionality. Although have "due diligence" defence in food and feed cases, MOJ currently has to clear new offences and would normally expect to see elements (eg intention, recklessness, knowledge, without reasonable excuse) included in offence. Concern for FSA would be that inclusion of a mental element would not be in keeping with ostensibly absolute requirements of European legislation and might leave liable to infraction proceedings. FSA's investigative powers might also need revision.

Trading Standards Institute (TSI)

1.973 TSI can see no problems with greater clarity and consistency in criminal offences, but would like to make sure that we are consulted on each change to regulatory law.

City of London Law Society, GC100 (association for general counsel and company secretaries for the FTSE 100), QEB Hollis Whiteman Chambers, North East Trading Standards Association (NETSA), Justices' Clerks' Society, Financial Services and Markets Legislation City Liaison Group, Judges of the Court of Session

1.974 Agree / support.

Chamber of Shipping

1.975 We fully endorse the suggestion for ensuring greater consistency between Government departments and agencies in relation to "offences" to support regulatory aims.

The Law Society

1.976 We agree that fault elements should be proportionate and consistent when the offence in question is used by departments and agencies for a similar purpose, and across the various regulatory areas, and we therefore support this in principle. However, the devil is in the detail and there needs to be a detailed analysis of the practical application of this principle.

RSPCA

1.977 The separation of powers should remain strong and legislators should not take the place of law makers when discussing 'proportionate' fault elements. The criminal system allows for a hierarchy of seriousness already, which is defined by the court's discretion when sentencing.

Local Government Regulation (LGR)

1.978 We believe that in relation to most legislation enforced by Trading Standards Services that this is already the case that there already exists the clarity and consistency that is suggested by this proposal. This is largely due to the role that LG Regulation currently plays in the formulation and dissemination of advice to Trading Standards Services as well as by means of the current statutory defence of all reasonable precautions and all due diligence to avoid the commission of the offence. We can also evidence nothing to suggest that at present Local Authorities are acting inconsistently.

1.979 However we consider that any additional measures that would aid such clarity and consistency as well better communication generally and specifically when drafting legislation between central government departments and other agencies would be welcome and accordingly we would agree with this proposal. We would also wish to ensure that the practical implications of the application of fault elements are fully understood when drafting or amending legislation to ensure that regulatory outcomes can be achieved in practice.

Association of Chief Trading Standards Officers (ACTSO)

1.980 Support initiatives to ensure consistency and clarity but wish to ensure the practical implications of application of fault elements are fully understood when drafting or amending legislation to ensure that regulatory outcomes can be achieved in practice.

Trading Standards South East Ltd

1.981 TSSE has already indicated in its answer to proposal 10 that the correct methodology for dealing with 'proportionate fault' is by means of the current statutory defence of all reasonable precautions and all due diligence to avoid the commission of the offence. If the prosecution is of the opinion that the defence is met, no prosecution will follow. TSSE does acknowledge, however, that clear lines of communications between central government departments and other agencies are always desirable.

The Magistrates' Association

1.982 Proposal doesn't mention harm or potential harm and it should.

Care Quality Commission (CQC)

1.983 Greater clarity is needed in relation to proportionate fault elements but CQC sees a need in relation to the difficulty in holding complex organisations to account for even serious unnecessary harm to people.

The Faculty of Advocates

1.984 The adoption of a coherent, principled position about how offences ought to be structured is at least highly desirable – not least to make it easier for practitioners and judges to handle the offences appropriately and consistently – and that would inevitably require some centralisation. We emphasise the importance of dealing with the Scots law dimension in an integrated way and suggest that the department of the Advocate General might appropriately share the task with the MoJ.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.985 Whilst we have strongly disputed the need for fault elements in relation to criminal offences that support regulatory aims, we would welcome government departments and agencies working together to improve the consistency and clarity of legislation.

Ivan Krolick

1.986 The sentiment is agreed. I thought that consistency and clarity was essential in all legislative drafting, including provisions leading to non criminal penalties etc. For that reason I do not understand why there should be a specific reference to a "similar purpose".

Food Law Group

1.987 This Proposal, particularly insofar as it is concerned with enforcement, is supported. It is of particular concern that enforcement decisions taken in a regulatory context, albeit purportedly made under published enforcement policies in accordance with the Regulators' Compliance Code, frequently lack transparency. It appears to us that there is a difference in practice between the various food enforcement authorities as to the provision of documents which show how any decision to prosecute has been taken. Some authorities will disclose the investigation recommendations to the decision-maker and the documents supporting the application of criteria, others will not, citing the decision in *Taylor v. Anderton (Police Complaints Authority Intervening)*[25] in support. From the point of view of a defendant exposed to regulatory sanctioning, this is an unsatisfactory state of affairs, not least because prosecution policies generally contain subjective elements, such as "confidence in management" or description of "seriousness" of an offence. If a regulatory defendant is to be exposed to a sanction of any description, we submit that he is entitled to know not only what the accusation is but on what basis it has been found appropriate to necessitate criminalisation or sanctioning. We would further comment that where civil penalties which involve the payment of money are concerned, these can operate as a form of indirect taxation because such sums are not ring-fenced but are paid into the consolidated fund.

CBI

1.988 We agree. And see our earlier comments recommending a code of practice and a set of common principles. It may be difficult to implement all the Law Commission proposals through primary legislation, so it may also be necessary to consider Protocols and other mechanisms.

25 [1995] 1 WLR 447

1.989 There is also the situation of requirements often being imposed by EU regulations or other prescriptive requirements, which often seem largely to by-pass the UK legislative and Parliamentary scrutiny process. However the approach of the EU generally seems to be to require that Member States adopt effective, dissuasive and proportionate penalties for breach - but this does not have to mean criminal penalties.

1.990 Therefore it should be possible for Parliament to deal with most future EU law implementation by imposing civil/administrative sanctions for breaches when appropriate, rather than criminal sanctions.

East of England Trading Standards Association

1.991 We believe that in relation to most legislation enforced by Trading Standards Services that this is already the case that there already exists the clarity and consistency that is suggested by this proposal. This is largely due to the role that LG Regulation currently plays in the formulation and dissemination of advice to Trading Standards Services.

1.992 However we consider that any additional measures that would aid such clarity and consistency would be welcome and accordingly we would agree with this proposal.

Residential Landlords Association

1.993 Going forward, we would strongly endorse the view that any new criminal offences must contain some fault element. Otherwise they would be unjustified. It would take time and effort to re-examine existing offences but at least going forward the new principles should be fully implemented. There needs to be consistency and clarity. Obviously, the suggestion that such offences could only be introduced by primary legislation would be very helpful. It would be a lot easier to achieve consistency through the office of Parliamentary Counsel, rather than the rather disparate drafting efforts of the individual lawyers within individual departments and agencies. The Minister of Justice would have an important part to play in this as suggested in the proposal.

Trading Standards North West (TSNW)

1.994 How would the Ministry of Justice propose to oversee it? How will they know consistency in their use without seeing? What about the time delay? It takes months for Cancer Act attorney general to sign off. What is the evidence that we are not being consistent?

Kingsley Napley LLP

1.995 Where the risks are high, or the potential harm is great, a requirement for proof of negligence may rightly be regarded as having the effect of marking out the conduct in question as genuinely criminal. We agree that proportionality is important. Using the example of filling in forms (eg registration/license to work) required by regulatory bodies, the question as to whether conduct should be criminalised should not be an automatic one. In this example, it should be recognised that the simple provision of inaccurate information/omission, may often be too remote to cause harm, whether directly or indirectly and therefore should not be a criminal offence unless done so knowingly or recklessly. It therefore follows that errors in the provision of information should only be subject to a criminal sanction if committed knowingly or recklessly. In our experience most forms used by regulators will contain a declaration of truth and accuracy as to contents, so it is not difficult for the regulator to make out a knowing or reckless fault element where forms have been completed.

1.996 Consistency and proportionality in approach would be achieved by the 'rule of thumb' set out in proposal 10. By suing the same words and the same concepts to establish fault, consistency is achieved across the regulatory sphere for conduct that is morally blameworthy. The accused individual or business will be better advised if the law is consistent across regulatory offences. Clarity in the law will doubtless reduce the need for litigation whether via a civil penalty scheme such as RESA or through the Criminal Courts; it is likely to promote an understanding of what is required by law and reduce the scope for unnecessary prosecution for simple errors in infor5mation provided.

1.997 We think that proposal 12 would greatly improve the clarity and understanding for regulators, the public, industry and the courts alike. It is thought that this will reduce the scope for contentious litigation and reduce the commission of offences, particularly where businesses or individuals are regulated by more than one body.

Criminal Bar Association and Bar Council

1.998 Agree, subject to the caveat that proportionality must include to the nature and importance of the obligation created by the duty and recognition of the wider variation in purpose in regulations.

PROPOSAL 13

Clifford Chance

1.999 Agree that legislation creating any form of offence should be properly drafted (to include setting out the basis upon which corporations may be found liable). Something Parliamentary Counsel may be able to help with. But, where legislation fails to do this, there should be a default presumption, set out in Interpretation act 1978, that the identification doctrine applies. Bingham said the law must be, as far as possible, intelligible, clear and practicable and leaving a matter such as the basis on which a corporation can commit an offence to statutory interpretation means that the law will not be so (see CP 5.103ff).

HSE

1.1000 We recognise that in general terms there can be doubt under certain legislation as to the basis for corporate liability. In some cases the principle of vicarious liability will apply. In other cases the "identification doctrine" will apply and the prosecution will have to point to actions or inactions of the directing minds of the company. Such lack of clarity in the criminal law is not desirable and the latter doctrine can mean that a smaller company is more likely to be liable than a large one. However, in the context of health and safety law and ss 2 and 3 HSWA, case law had decided (*R v Association Octel Co Ltd and R v Gateway Foodmarkets Ltd)* that these offences are of strict liability – subject to reasonable practicability – and neither the principles of vicarious liability of the identification doctrine apply.

Kiron Reid, Liverpool Law School

1.1001 "Legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable". Yes.

1.1002 Paras. 1.64 and 1.65 set out a very clear and compelling short critique of the identification principle (plus the point made at the end of para. 1.66).

1.1003 However "the courts should treat the question of how corporate fault may be established as a matter of statutory interpretation" is trickier. I originally read this proposal as drafted as potentially letting companies 'off the hook'. However I realise that that is not what is intended. The courts would assume under existing doctrine, if a statute was silent, that the identification doctrine applies. So ideally the basis of liability – or this anti-presumption - needs to be clearly spelt out, possibly in the Act that would put into place your general defence of due diligence. The suggestions at para. 1.67 are too vague to have the desired effect. A clear statement in legislation is needed or at the very least a clear statement by the Minister responsible in Parliament in introducing legislation.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.1004 The more that different criminal provisions can be drafted consistently and in the same terms, and interpreted by the Courts on a consistent basis, the more efficiently and reliably appropriate controls and procedures can be introduced and maintained by businesses for compliance with them all. For this reason, we would strongly prefer there to be a single basis on which criminal liability may be established for companies and other businesses, rather than leaving this to be drafted specifically for different statures, and left as a matter for statutory interpretation in all other cases.

1.1005 We understand the difference in principle between crimes which are committed for and on behalf of a business (such as bribery and some frauds), crimes which are committed by individuals for their own profit but using their employer's time and resources (such as producing indecent images of children) and crimes which occur due to an aggregation of gross negligence (such as corporate manslaughter). But we believe that the appropriate response to all such areas of risk of misconduct, which are serious enough to require a business offence to be introduced, is the same for all businesses – that is by appropriate standards of governance and internal control.

1.1006 Appropriate wording has already been formulated in Statute in the Bribery Act, which would also be appropriate (with appropriate modifications, such as removing the necessary extraterritorial provisions, and application to agents as well as employees, included in that Act) to other business crimes. Similarly, the principles based guidance on the appropriate procedures which would represent a defence to this criminal charge of corporate bribery offences would apply equally well to other business crimes.

1.1007 We believe that the Courts should not just be encouraged to presume that the identification doctrine does not apply to business crimes, but that specific legislation should be introduced to negate this element of the common law. The continuation of this doctrine continues a wholly unjustified divergence in the treatment of equivalently serious offences, in accordance with the size or constitution of the body within which they were committed. This is not appropriate. Rather, we consider that a uniform approach should be taken, with an initial presumption that a corporate offence of committing, or of failing to prevent, the underlying crime would apply in all these circumstances, though strongly modified by a due diligence offence which is appropriately applied with less diligence required for more remote and less harmful possible crimes.

Chamber of Shipping

1.1008 We understand that the proposal is intended to fill a void when (as with much existing legislation) there is uncertainty about corporate and vicarious liability. Further explanation as to how the proposal is likely to work in practice is needed.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.1009 Agree with underlying principle.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.1010 If a statute is intended to impose criminal liability on companies or their directors, the statute should make it clear how this could occur. If the statute is unclear it should be amended. Clarity is very important in these circumstances and we doubt this can be achieved through statutory interpretation, encouraging the Courts to a particular view or through Guidance subsequently issued by Regulators. These approaches have the disadvantage that they make it difficult for companies to know in advance what action they must take or avoid to avoid committing an offence.

Financial Services and Markets Legislation City Liaison Group

1.1011 We support this proposal, including, in particular, the proposal that legislation should indicate the basis upon which companies may be found liable. In the absence of any indication in specific legislation, we are, however, concerned that treating the basis upon which companies may be found liable as a matter of statutory interpretation will create considerable uncertainty. We wonder, therefore, whether there would be benefit in exploring the merits of there being a general default position that would be applied in the absence of any indication in specific legislation.

1.1012 We note that generally legislation on corporate liability in recent years has moved towards a "failure to prevent" offence. The Bribery Act 2010 is one such example as it introduces a corporate "failure to prevent bribery" offence where an employee or associated person has been convicted or a bribery offence.

1.1013 We would also note that the FSA also has "systems and controls" rules which can be cited against firms for failing to prevent breaches of FSA rules.

Judges of the Court of Session

1.1014 We agree that legislation should be specific and that if provisions are not specific then the statute must be interpreted. We do not understand the mechanism proposed for encouraging courts to take a particular stance on interpretation. We appreciate the difficulties with the doctrine of identification but are not of the view that it can be abolished in this fashion.

Food Standards Agency

1.1015 Already have provisions. Proposal seems to ignore/plays down influence of senior managers in the way corporate bodies behave and thus in conflict with ethos of Corporate Manslaughter Act.

City of London Law Society

1.1016 We feel strongly that legislation should include specific provisions to indicate the basis on which companies may be found liable. It would be helpful if there were a broad consensus on this so that a different approach is not taken from one statute to another. Leaving this to the courts as a matter of statutory interpretation is undesirable as it means companies cannot know in advance what action to take or avoid in order to avoid committing an offence. We agree that there are difficulties with the identification doctrine.

The Law Society

1.1017 We agree that there are difficulties with the identification doctrine and that this can make it difficult to prosecute companies. We feel strongly that legislation should include specific provisions to indicate the basis on which companies may be found liable. It would be helpful if there were a broad consensus on this so that a different approach is not taken from one statute to another. Leaving this to the courts as a matter of statutory interpretation is undesirable as it means companies cannot know in advance what action to take or avoid in order to avoid committing an offence.

1.1018 If it is decided not to include specific provisions in legislation to indicate the basis on which companies may be found liable, we suggest that, to ensure consistency, predictability of the application of the law and assistance to the courts, there should be some guidance provided on how to interpret statutes to determine whether the identification doctrine applies or not and if it does not apply then how liability would be established. This guidance should be consulted on before being finalised.

Allen & Overy

1.1019 If it is possible to include specific provisions in criminal offences to indicate basis on which companies may be found liable, would be best solution provided that proper consideration is given to where the bar for liability is set and whether it is possible to cater properly for broad range of business structures. Agree that it is important that only most serious cases of corporate failings should attract corporate criminal liability. Should be reflected in statutory provisions and where this is not possible, the identification principle should be retained. Already examples of courts looking to underlying purpose of statutory scheme for guidance on the right basis on which to hold companies liable for offences committed relating to that scheme (notably, *Meridian Global Funds Management Asia v Securities Commission* [1995] 2 AC 500). SFO Guidance on corporate prosecutions (para 20) already recognises that certain regulatory offences may require a more purposive interpretation in addition to the primary rules of attribution. Courts have struck right balance between strict application of doctrine and modified application based on statutory interpretation.

OFT

1.1020 Our understanding of proposal 13 is that the courts should be able to consider the intention of the underlying principles of the legislation when deciding the basis on which companies and individuals should be found liable. If our interpretation is correct, we would agree with the rationale that the identification doctrine may be less fair to smaller businesses and that larger companies should not be able to escape liability by strict application of the directing mind doctrine. We agree that the courts should look more closely at the underlying principles of the legislation being applied in order to ensure fairness not just for smaller businesses but for consumers of both small and larger companies and so that the statutory intention is not circumvented.

Trading Standards South East Ltd

1.1021 TSSE is in agreement that it would, on occasion, be useful for legislation to contain better indications as to the circumstances under which companies can be found liable. TSSE also feels, however, that the concept of vicarious liability still plays an important part in the regulatory context. Criminal offences are normally committed by the actions, or lack of action, on the part of individual employees but the company should still have oversight of those employees. They should provide proper guidance, training and monitoring. Not only would this reduce the likelihood of any offence occurring, but, would increase the chances that the company are able to satisfy any statutory defence.

North East Trading Standards Association (NETSA)

1.1022 We are of the opinion that the existing approach taken by the courts which is to presume the identification doctrine applies should continue. However, we acknowledge that courts have adopted a degree of flexibility in the application of the doctrine with regard to the legislative context. We are of the opinion that the courts have regard to statutory interpretation (e.g. the purpose of legislation and the practical implications) when applying the identification doctrine and do not consider it necessary to encourage the courts to alter this approach.

QEB Hollis Whiteman Chambers

1.1023 Agree that, where possible, statutes would set out the basis on which companies may be found liable. We cautiously agree with the Law Commission's analysis of the doctrine of identification. We do not wish the principles of clarity and consistency to be sacrificed at the expense of widening corporate liability.

Professor Colin Reid, University of Dundee

1.1024 It would be very welcome indeed for legislation to be clearer on the basis for corporate liability and the move away from the universal application of the identification principle is welcome.

Association of Chief Trading Standards Officers (ACTSO)

1.1025 Agree that it can be difficult to prove offences against large companies where proof of fault of a member of controlling mind is required. Can significantly impede delivery of regulatory outcomes. Clarity and consistency is important, and agree that legislation should indicate basis on which companies can be found liable for criminal offences.

Trading Standards Institute (TSI)

1.1026 TSSs often experience difficulties in deciding fault on the controlling mind of the company and any legislation which promotes greater transparency in this respect would be welcome. This will save time and money in investigations, whether they are civil or criminal.

Sir Richard Buxton

1.1027 Objections to doctrine well-recognised and unlikely to be challenged. Unfortunately doctrine and *Tesco v Nattrass* remains binding law (see dissent in *Odyssey v OIC Run-Off* [2001] 1 Lloyds Rep Insurance and Reinsurance 1 at 93-96). As a general rule for criminal liability, *Meridian* is almost as bad but different reason – not a criminal case; almost all authority discussed involved civil issues; and court (containing no one with expert knowledge of English criminal law) never grappled with general issues of criminal liability. General approach that court should decide whether a statute applies to corporations rather than individuals and how it applies by construing individual statute may possible be all very well for market-regulating provisions such as in *Meridian* but not for criminal liability. Where legislation takes form of saying conduct x is forbidden, without saying expressly whether or not prohibition extends to conduct x when committed by a company, it will always be the policy of the legislation that the conduct prohibited is covered by legislation. Nature of crime-creating legislation. Doubters (who continue to support *Meridian*) may want to take criminal statutes and demonstrate how construction approach would operate to reach a different decision in some cases rather than others.

1.1028 Solution must not be in particular rules for offences but a general rule for attribution to a comply of acts and states of mind of employees. Approach of *Nattrass* but terms are too restrictive. More sensible approach: Lord Templeman in *Pioneer Concrete* – an employee who acts for company within scope of his employment is the company. Should be a one-clause statute providing that in construing penal legislation, whether employee who did act with required state of mind was acting in court of employment will determine whether in a case his employer corporate body is liable to penalties that legislation provides. Would clear away all baggage and give real enforcement powers against persons who profit from unlawfulness and are in a position to ensure that breaches are not repeated. Statute could also extend to regulatory enforcement mechanisms that Commission has in mind. Basic concept of acting within scope of employment is well-known in law, sensible and easy to understand and apply.

1.1029 Recognise difficulty the Commission may have in persuading a business-friendly anti-regulation government to take a step that would undoubtedly extend control of law over error and unlawfulness in conduct of business (original and longstanding proposals found in s1(3) Corporate Manslaughter Act 2007 is ominous warning) but a body dedicated to rationalisation of law cannot leave present law up in the air, as proposal 13 provides. Any invitation to court to assume that doctrine does not apply will be met by defence arguing that *Nattrass* remains law. Defence likely to prevail and *Meridian* doctrine will cause endless confusion and argument (not make shorter or easier by judges and magistrates having to read, understand and hear submissions upon and endeavour to apply analyses of Cartwright and Wells).

Justices' Clerks' Society, David Wood, Care Quality Commission (CQC), East of England Trading Standards Association

1.1030 Agree.

The Magistrates' Association

1.1031 Will be helpful. Too easy for an officer in a large company to run a blind eye to conduct or not to make proper enquiries of employees thereby possible avoiding prosecution as one of the company's officers.

Local Government Regulation (LGR)

1.1032 We accept from the wording of the consultation paper that the law in this area should be reviewed particularly with regard to the issue of corporate liability for criminal offences and the liability of the company (and of officers and employees within it) and that this should be made clear in the legislation. The concept of vicarious liability still plays an important part in the regulatory context. Criminal offences are normally committed by the actions, or lack of action, on the part of individual employees but the company should still have oversight of those employees. They should provide proper guidance, training and monitoring. Not only would this reduce the likelihood of any offence occurring, but, would increase the chances that the company are able to satisfy any statutory defence.

1.1033 We are however of the opinion that the existing approach taken by the courts which is to presume the identification doctrine applies should continue. We acknowledge that the courts have adopted a degree of flexibility in the application of the doctrine with regard to the legislative context. We are of the opinion that the courts have regard to statutory interpretation (e.g. the purpose of legislation and the practical implications) when applying the identification doctrine and do not consider it necessary to encourage the courts to alter this approach. We believe however that the proposition may have limited effect as far as Local Authorities are concerned.

The Faculty of Advocates

1.1034 The basis of criminal responsibility on the part of companies is neither entirely clear nor entirely coherent. The question is one which ought to be approached from the point of view of principle and, whilst we agree with the proposal that legislation should indicate the basis of liability in any particular care, we think that this should be set within a general, coherent, framework of principle. It was the doctrine of identification which was applied in *Transco plc v HM Advocate* 2004 SCR 1.

1.1035 The criminal responsibility of bodies corporate has received attention at Council of Europe level, partly as a result of conceptual difficulties which civilian jurisdictions have encountered in complying with international and European obligations, in terms of which they are required to impose criminal liability on "legal persons". In a regulatory context in particular, where increasing numbers of the businesses regulated operate across national boundaries, it seems that it might be desirable to ensure that the principles applied in the UK are consistent with those applicable elsewhere. Article 18 of the Council of Europe Criminal Law Convention on Corruption offers a formula which has proved acceptable to over 40 European states, including the UK, and which might therefore provide a useful starting point for consideration.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.1036 It is a good idea to address the issue of corporate liability for criminal offences. From the consultation paper, it is apparent that the law does need a review. We agree that the liability of the company (and of its officers and employees) should, in general, be made clear in the legislation. From the point of view of clarity and certainty we do not like the idea that this be left as a matter of statutory interpretation for the courts. Clear principles as to how mens rea is to be attributed to the controlling mind of companies would always be preferable.

Ivan Krolick

1.1037 I do not agree. If criminal conviction is to carry a stigma (as in Proposal 1), then no person (corporate or otherwise) should be convicted of an offence which was not committed through his own personal involvement and on his own behalf). In the case of a company, unless the statute creating the offence expressly provides that the acts or omissions of an employee or agent are sufficient to establish criminal liability on the part of the company, then no offence should be committed without the involvement of the controllers of the company. Indeed, for this purpose, there should be no difference between a corporate body and a natural person who employs other persons and agents. Moreover, it is unclear whether the proposal is intended to include partnerships (whether or not licensed) and other unregistered associations. See also my general observations in paragraph 8 above.

1.1038 I am also concerned about statutory interpretation. Courts have held that, in some cases, companies can be held to be criminally liable by implication and statutory interpretation. I do not believe that any person's criminal liability should be created only by implication.

CBI

1.1039 Agree in principle with this approach. In addition, statutory offences should, save in exceptional circumstances, require the proof of fault as part of the offence. This should include a requirement for knowledge or recklessness on the part of, or attributable to, the defendant. We think it is particularly important that what constitutes recklessness for offences committed by companies should be made clear so that directors can avoid committing offences by taking action.

1.1040 As is demonstrated in Appendix C, what amounts to recklessness can vary considerably. There also needs to be a default position, when legislation does not make adequate provision. Leaving it to a court to decide the issue purely as a matter of statutory interpretation will make the law too uncertain. In our view, the default position should be the identification doctrine.

Residential Landlords Association

1.1041 Corporate fault does raise its own particular difficulties because of the inanimate nature of the corporate body and the fact that it has to operate through human agency. As the paper points out smaller companies are more likely to be prosecuted than larger companies because of the identification doctrine where in the same circumstances both may equally merit prosecution. In a way the law is stacked unfairly against the smaller incorporated company. It is not just about the perverse incentive identified in paragraph 1.65 but it is just a matter of a question of fairness and a level playing field. Paragraph 1.66 expresses this in a slightly different way. We believe that these kind of issues need to be addressed by general legislation which is then applicable to individual offences unless for good reason a particular offence provides otherwise. In other words we need some kind of general interpretation provision dealing with this. Clearly, a case can be made that the normal rule should be that the identification doctrine should not normally apply. Clearly, the more serious the offence the higher the fault level which should be required.

Trading Standards North West (TSNW)

1.1042 Most legislation enforced by trading standards officers is strict liability, so the doctrine of identification is rarely encountered especially since s 14 of the Trade Descriptions Act 1968 was repealed.

Kingsley Napley LLP

1.1043 The courts have long recognised that the strict application of the doctrine of identification in corporate prosecutions gives rise to unjustified disparity between small companies, in which the directing and controlling mind can be readily identified and larger companies, in which responsibilities and decision-making has been devolved. It is agreed that this disparity should be addressed but it is unclear exactly how it is suggested this should be resolved.

1.1044 In cases in which an individual director's actions have taken place within the context of the company's agreed priorities and strategy, it is often more important that the corporate body is fully investigated and where appropriate, held to account. In our experience, we have encountered situations where the corporate boy has been able to reply upon the actions of individuals within the company in the face of clear evidence of the board's agreement and involvement in the court of criminal conduct.

1.1045 Whilst we agree with the difficulties identified by the Commission with the current law, we do not believe that the above proposal to "encourage the court not to presume the application of the doctrine of identification" adequately resolves those difficulties. In particular, it cannot provide the necessary level of certainty required with respect to potential criminal liability.

Criminal Bar Association and Bar Council

1.1046 Rational of proposal best understood from reading CP 5.103. In respect of regulatory regimes involving frequent prosecution there is settled case law that provides certainty and an unquestionable basis for interpretation of future statutory provisions enacted within these regimes. Thus, the personal nature of health and safety duties is well established as is the manner in which this impacts upon corporations (*R v Associated Octel* [1996] 1 WLR 1543 and *R v Chargot* [2008] UKHL 73). In relation to environmental offences, again liability arises in respect of a corporation through its operation or undertaking, thus by the acts or omissions of its employees and agents.

1.1047 There are difficulties posed by the adoption in future legislation of specific provisions regarding the basis for corporate liability. A company is only one type of person subject to duties, albeit the common form adopted by businesses. However, there are many more forms, such as partnerships, joint ventures, trusts, associations whose structure will be wholly different to a company. Furthermore, there is increasing variety and uncertainty in the form and status of employment and employees: many companies may be dutyholders but have no employees or have entered into business agreements where the scope of agency is defined. Any specific provision as to the basis for corporate liability may risk prescription and encourage the creation of structures aimed at avoidance.

PROPOSAL 14

Criminal Sub-Committee of the Council of HM Circuit Judges

1.1048 General defence of due diligence where strict liability might otherwise apply seems appropriate and desirable. Support 14 and 15, test should be exercise of due diligence in all the circumstances. (Questions 1 and 2: no).

Food Standards Agency

1.1049 Already for food and feed legislation. Great deal of case law. Fully support utility of defence. Would wish to retain standard form of words for defence for food and feed sectors. In the light of *R v Lambert* (2001), defence in feed and food law creates evidential burden.

Chris Williamson MP

1.1050 Due diligence should be exercised strictly – there should be a higher burden of proof for due diligence to ensure that all possible steps were taken to avoid the criminal actions that the individual/company undertook. We must also ensure that the concept of due diligence is applied universally.

Kiron Reid, Liverpool Law School

1.1051 Agree in principle. This should be clearly put in statute.

HSE

1.1052 See proposal 15.

The Law Society

1.1053 See proposal 15.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.1054 The circumstance and terms of the underlying offences will be very different in different circumstances, but we would strongly prefer the due diligence defence to be worded in the same way for all corporate and other business offences. Businesses should not be asked to apply different types or principles of governance or control in relation to different criminal offences, though the degree and standards to which those controls should be applied will vary according to the likelihood of occurrence and the harm or seriousness of the behaviour concerned. That would result in a compliance nightmare, with a watching brief needing to be kept over possible changes to the large and increasing number of potential business crimes, to ensure that the differing terms of all of them had been complied with.

Financial Services and Markets Legislation City Liaison Group

1.1055 We support this proposal and would go further to suggest that there should be a due diligence defence that applies in all cases except where Parliament deems otherwise. Leaving it to the courts to determine whether there should be a due diligence defence by applying the test set out in paragraph 6.19 of the Consultation Paper would create too much uncertainty.

Judges of the Court of Session

1.1056 We agree, though we have some concern about the provision of a power, the exercise of which might vary from court to court.

Chamber of Shipping

1.1057 This is supported as it would provide a helpful response to the rise of *de facto* strict liability and effective "guilty until proved innocent".

OFT

1.1058 The majority of criminal legislation we deal with applies a general defence of due diligence and we agree that this defence should be available where there is no requirement for proof of fault. In principle we would support the stricter form, as is already applied within the Money Laundering Regulations.

City of London Law Society

1.1059 We agree except that we think a due diligence defence should apply in all cases, rather than it being left to the court to decide whether or not it applies. We strongly agree that a general defence to a criminal offence should not counsel perfection. We also agree that the form should be most generous to the defendant. As explained above, in many cases it is hard to be sure whether a particular course of action will involve an offence and this makes it important that a due diligence defence applies as widely as possible. Judicial decisions about whether a due diligence defence applies in a particular case are likely to be very important to companies in determining the action they must take or avoid.

North East Trading Standards Association (NETSA)

1.1060 We agree that in the pursuit of natural justice it is appropriate for a defendant to be afforded the opportunity of establishing a statutory due diligence defence for offences which do not require proof of fault.

1.1061 We are of the opinion where regulatory legislation does not contain such defences consideration should be given to how best to afford the defendant such a defence. We agree that the burden of proof should rest with the defendant. We suggest that the appropriate process would be for the defence to be raised by the defendant for the courts consideration, rather than for the court to be responsible for deciding when to consider such defences.

1.1062 To minimise confusion or doubt it would seem appropriate to specify the legislation to which the defence is afforded. This may be achieved by way of an enabling act and subordinate legislation. Consultation on the proposed application of the defence to specified legislation should be undertaken prior to implementation.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.1063 We support this proposal. The absence of a due diligence defence for certain criminal offences can mean that statutes can operate unfairly leading to the conviction of the accused in the absence of fault or what might normally be considered criminal behaviour. The power to apply a due diligence defence, perhaps along the lines of the defence that exists within the Health and Safety at Work Act, is a concept familiar to the Courts.

1.1064 However, on occasions Parliament has intended, as a matter of policy, to create strict liability offences which were intended to allow for conviction in the absence of fault. Therefore more detailed consideration is perhaps required, alongside consideration of the role of civil penalties for strict liability criminal offences.

Trading Standards South East Ltd

1.1065 TSSE does not agree with this proposal. It implies that the Regulatory arena of law is strewn with offences for which an element of *mens rea* is not required, yet, for which there is no corresponding statutory defence. It is the view of TSSE that such offences are few and far between. For those that do exist, it is the view of TSSE that this is because it was Parliament's intention that for certain activities there can be no defence in law.

1.1066 TSSE is also concerned that the introduction of such a defence will lead to confusion within the Court process and inevitably wasted costs.

Allen & Overy

1.1067 Proposals 14 and 15 should be read in the light of proposals as a whole, suggesting that the role of strict liability criminal offences should be limited to cases where wholly necessary. Where necessary, as a general principle, we agree that the courts should be given power to apply the defence to any statutory offence that does not require that D was at fault. Expect the courts would apply the defence in a way commensurate with harm caused by the offence that therefore there would be no need to adopt a stricter form of defence or for Parliament to restrict its application to certain statutes.

1.1068 Note that, to the extent that the law moves away from doctrine of identification, and the lower the bar for corporate liability may be set, the more important such a defence may become even in cases where fault is required. Existence of a defence may encourage companies to focus on processes (eg as seen with preparations for coming into force of Bribery Act). The more clarity provided about the level of due diligence the better. May be helpful for the Commission to obtain evidence from businesses about how they see this working in practice.

Association of Chief Trading Standards Officers (ACTSO)

1.1069 Need for certainty as to when defence applies to an offence. Certainly of benefit to regulator and those regulated. Should not be left for court to determine whether a general due diligence defence should apply in the circumstances – would be costly to regulators and regulated and lead to court time being wasted because of uncertainty. Correct and appropriate application for Code for Crown Prosecutors and local enforcement policies are likely to ensure prosecutors are not commenced for a breach of legislation without fault requirement if business concerned would be able to make out a due diligence defence. Is there evidence that current system doesn't work? May not be the purest application of law, but cost of change needs to be balanced against benefit which is not clear.

1.1070 Re CP 6.39. Appropriate addition when offence is concerned with provision of information in many cases provided to the regulated body by another person. Context specific defences often required and general provision will be difficult to draft which encompasses all circumstances appropriately.

1.1071 Some offences (eg Reg 3 Consumer Protection from Unfair Trading Regs 2008) do not have a statutory defence since fault requirement is addressed in offence. Care needed to ensure applicability of general defence provision is clear to regulators and courts.

1.1072 Commonly businesses fail to respond to requests for info from regulatory agencies investigating breach of legislation. Trading Standards powers include provisions requiring disclosure and seizure of information required as evidence of an offence, but do not extend to information supporting any defences. Thus general proposal should be tempered by requirement on businesses to provide info on defences to regulators so that appropriate assessment of any defences can be made before proceedings are commenced.

Trading Standards Institute (TSI)

1.1073 The Trading Standards Institute feels that the current system, whereby a defendant has to show due diligence for some Trading Standards offences, is acceptable.

Justices' Clerks' Society, The Magistrates' Association, QEB Hollis Whiteman Chambers, David Wood, Food and Drink Federation

1.1074 Agree / support.

Local Better Regulation Office (LBRO)

1.1075 Defence may continue to work effectively if "all reasonable precautions" were to be retained.

Legislative and Parliamentary Sub-Committee of the Association of Pension Lawyers (APL)

1.1076 There is scope for defence to be used by courts in relation to provisions relating to employer-related investment restrictions (s40(5) Pensions Act 1995). The harm the restriction is supposed to address is relatively clear – to ensure the pension arrangement's assets are not, subject to the threshold, invested in the sponsoring employers of that arrangement in practice – it gives rise to issues and is difficult to police. See response for more detail.

1.1077 Pensions Regulator recently released statement in relation to employer-related investments in which it recognises some difficulties trustees face managing investments (eg where made through collective investment scheme). Also sets out what Regulator may take account in determining whether to use its power in respect of a potential breach of employer-related investment restrictions. Clear from the statement that the Regulator acknowledges that it can be difficult for trustees to keep track of scheme investments in particular as they become increasingly complicated. Therefore extent to which trustee was at fault in relation to breach and whether it took steps may need to be considered.

1.1078 Statement goes some way to providing comfort to trustees in respect of how Regulator may exercise powers but it does not go far enough. Provisions relating to employer-related investments which currently would give rise to strict liability and imposition of criminal sanctions on a trustee would benefit from proposed due diligence defence. Preference for the wider defence for trustee to discharge burden of showing that due diligence was exercised in all circumstances but the alternative of trustee showing that he took all reasonable precautions and exercised all due diligence would also be beneficial.

1.1079 Defence should also be used in relation to offence of disclosing "restricted information" received from Pensions Regulator and Board of Pension Protection Fund (s87 and 197 Pensions Act 2004) and acting as an auditor or actuary of a pension scheme when ineligible to do so (s28 Pensions act 1995).

1.1080 Generally support proposed new guidelines and defence. Pension scheme trustees often have little incentive not to be overly cautious and imposing criminal sanctions on a strict liability basis only increases the likelihood that they will act in this way. Therefore believe that introducing a defence to offences set out above especially those relating to a breach of employer-related investment restrictions, would assist efficient management of pension scheme investments.

Care Quality Commission (CQC)

1.1081 Consider 14 and 15 together. Secondary legislation under Health and Social Care Act already includes defence of all reasonable steps and due diligence. CQC has significant anxieties about the implications extending the due diligence defence unless it is accompanied by robust safeguards. Health and social care businesses often have complex structures, training and qualifications standards without any statutory basis for most occupational groups, large numbers of low paid staff working without direct supervision and training and qualification arrangements that have low expectations and internal validation arrangements. Health and Social Care Act registered manager arrangements mean that paid employees can share legal responsibility for meeting essential standards of quality and safety while not sharing equal power in relation to the allocation of resourced and making other significant business decisions. These factors mean that it can be relatively easy for a provider to present a compelling case for due diligence that does not reflect what actually happens in their organisation.

1.1082 Question 1: feel strong that at the very least the stricter form should be adopted.

1.1083 Question 2: any form of due diligence applied to the regulation of health and social care should be accompanied by very strict safeguards and limits able to ensure there are meaningful and robust tests, checks and balances in relation to due diligence claims.

UK Environmental Law Association (UKELA)

1.1084 Recognise the range of arguments in favour for and against this proposal which are not fleshed out in the CP. Strict liability offences play a significant role in environmental law. Introducing the defence would represent a fundamental shift in approach. The courts have also grappled with this issue within and outside the environmental field. Introducing the defence for certain offences might fall foul of European requirements that remedies are effective, proportionate and dissuasive. This issue overlaps with the question of whether criminal offences are necessary. Evidence, further debate and legal consideration is needed before it can be concluded that the defence should be introduced for all environmental offences.

EEF: The Manufacturers' Organisation

1.1085 A due diligence defence should be provided for all regulatory breaches. To take advantage of this, the onus should be on D to demonstrate that they exercised all due diligence to ensure that all reasonable precautions were taken. Duty holders should not be held accountable when they have exercised all due diligence to avoid commissioning the offence.

1.1086 To utilise the defence, it should be necessary to prove that the duty holder exercised all due diligence to ensure that all reasonable precautions were taken. This form of words would provide recognition that a duty-holder cannot exercise absolute control over the implementation of reasonable precautions.

1.1087 The addition of a due diligence clause would go a significant way to addressing a difference between English law and that operating in other EU member states, whose legal systems effectively provide for their courts to exercise a due diligence test in interpreting statute. The fact that English law does not regularly puts manufacturing companies at a competitive disadvantage, effectively 'gold-plating' implementation in the UK.

The Institute of Employment Rights

1.1088 We welcome the thrust of the proposals 14 and 15. We also agree that the burden of proof should be placed on the defendant to establish a defense and that this should take a stricter form, as set out in question 1.

Local Government Regulation (LGR)

1.1089 Although we support this proposal in principle we would question whether such a defence would be appropriate for all regulatory offences particularly those which are strict liability. It implies that the Regulatory arena of law is strewn with offences for which an element of Mens Rea is not required, yet, for which there is no corresponding statutory defence. It is our view that such offences are few and far between. For those that do exist, this is because it was Parliament's intention that for certain activities there can be no defence in law.

1.1090 We are further concerned that the introduction of such a defence will lead to confusion within the Court process and inevitably wasted costs. The majority of regulatory offences that fall within the remit of Trading Standards Services already encompass a due diligence defence where the burden of proof lies with the defendant.

1.1091 For example, would such a defence be desirable in matters which relate to safety of others, animals or the environment e.g. overloaded HGV's or indeed some offences under Animal Health legislation where the impact of offending can be significant either on animal welfare or disease precautions.

1.1092 Correct and appropriate application of the Code for Crown Prosecutors and local enforcement policies are likely to ensure that prosecutions are not commenced for a breach of legislation without fault requirement if the business concerned would be able to make out a due diligence defence. Is there evidence that the current system does not work? It may not be the purest application of the law, but the cost of change needs to be balanced against the benefit, which is not clear here.

1.1093 Paragraph 6.39 of the consultation paper states- "Another example is the offence of making a false or misleading statement about a prescribed matter in the course of an estate agency business or a property development business contrary to section 1 of the Property Misdescriptions Act 1991. There is a defence under section 2(1) to show that the defendant took all reasonable steps and exercised all due diligence to avoid committing the offence. However, this defence is restricted in that it cannot be used where the defendant has relied on information unless he or she shows that it was reasonable in all the circumstances for him to rely on it."

1.1094 This is an appropriate addition when the offence is concerned with the provision of information, in many cases provided to the regulated body by another person. As such, context specific defences are often required, and a general provision will be difficult to draft which encompasses all circumstances appropriately.

1.1095 Further, some offences (e.g. offences under Regulation 3 of the Consumer Protection from Unfair Trading Regulations 2008 (failing apply professional diligence) do not have a statutory defence since the fault requirement is addressed in the offence (to act in accordance with 'honest market practices'). As such care needed to ensure the applicability of a general defence provision is clear to regulators and courts.

1.1096 Commonly, businesses fail to respond to requests for information from regulatory agencies investigating a breach of legislation. Trading Standards powers include provisions requiring disclosure and seizure of information required as evidence of an offence, but do not extend to information supporting any defences. As such, this general proposal should be tempered by a requirement on businesses to provide information on defences to regulators so that an appropriate assessment of any defences can be made before proceedings are commenced

1.1097 We agree that in the pursuit of natural justice it is appropriate for a defendant to be afforded the opportunity of establishing a statutory due diligence defence for offences which do not require proof of fault. We are of the opinion where regulatory legislation does not contain such defences consideration should be given to how best to afford the defendant such a defence. We agree that the burden of proof should rest with the defendant. We suggest that the appropriate process would be for the defence to be raised by the defendant for the courts consideration, rather than for the court to be responsible for deciding when to consider such defences.

1.1098 To minimise confusion or doubt it would seem appropriate to specify the legislation to which the defence is afforded. This may be achieved by way of an enabling act and subordinate legislation. Consultation on the proposed application of the defence to specified legislation should be undertaken prior to implementation.

The Faculty of Advocates

1.1099 See under proposal 15.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.1100 In general, regulatory offences do have some form of due diligence defence, and they are broadly similar. In general local authorities would not prosecute if, evidentially, a defence would probably be established.

1.1101 However, we would defend Parliament's privilege to create strict liability offences, without statutory defences, or offences with narrower defences than the common forms of due diligence. There may be circumstances where they consider it necessary to do so. If it is clear there was no intention to imply due diligence into the legislation, the courts should not be able to add it against the will of Parliament. There are circumstances, such as an employee selling alcohol to a child, where "all reasonable precautions" is not an appropriate defence. In this case the alternative of "no reasonable person would have believed the child was under 18" is better, and is included in the legislation.

Ivan Krolick

1.1102 Agreed. However, please see my general observations on the extent of the defence in paragraphs 11 and 12 above. I am also concerned about the reference to the court being given a "power" (and thus a discretion) to apply a due diligence defence. Either there is such a defence, or there is not. It should not depend on what the judge ate for breakfast!

Food Law Group

1.1103 For the food lawyer, questions about the extent of due diligence systems, their applicability and what needs to be done in any individual case forms one of the most difficult areas in advising clients and determining liability. Due diligence defences are available for nearly all food offences. Like the Bar Council, we do not support the idea that it is a defence which should be applied across the board to all no-fault criminal offences that do not currently have such a defence. We have no objection to a review of strict liability defences in order to consider the appropriateness of such a defence but would comment that such an approach should be undertaken with caution.

1.1104 The availability of a due diligence defence, in our view, tends to reflect the seriousness of the offence when viewed against an offence that has no such defence. Those offences which carry no defence tend to be those seen as most trivial. The fact that the offence is of strict (absolute) liability is a factor which may be prayed in aid in mitigation. On the other hand, where an offence may be negated by a due diligence defence, its character is raised: offences which have due diligence defences are designed to criminalise negligence or something akin to that standard (see below).

1.1105 Furthermore, there are a number of problems with the defence, notwithstanding that the opinion of the Food Law Group has historically been that a due diligence defence should be retained.[26] Improving the formulation of the offence as suggested in Proposal 15 (not just if Proposal 14 were to be accepted) might reduce the rigour of the test for the defence which is considerable (see below). We strongly support the proposal for reformulation to a standard that requires the court to consider whether due diligence has been exercised in all the circumstances but would comment that this would not resolve all the problems to which the defence currently gives rise. We thought that it may be of assistance to the Law Commission if we set out our perceptions.

1.1106 *Penalising negligence*: It is important at the outset to understand how strict liability offences and due diligence defences dovetail: the combined effect of these is to penalise negligence or, indeed, may be to penalise conduct which falls even short of negligence. This appears to contrast with the prevalent approach of the Law Commission that negligence should not generally be penalised, but be the subject of civil procedures. The speech of Lord Diplock in *Tesco v. Nattrass* on which the proposition that the due diligence defence criminalises negligent behaviour is at page 199D as follows:

> "Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind — a lack of care for the consequences of his physical acts on the part of the person doing them. To establish a defence under section 24(1) (b) of the Act, a principal need only show he personally acted without negligence."

1.1107 This passage has been cited with approval (based upon a concession by Counsel) in *Bilon v WH Smith* [2001] EWHC Admin 469. No other member of the House of Lords in *Tesco v. Nattrass, however,* formulated the test by reference to the common law concept of negligence and it is questionable whether it is right to do so.

1.1108 *The scope of the due diligence test is large:* Running a due diligence defence involves in every case the need for the business to show the court the steps taken to avoid the occurrence of the offence after the offence has occurred. It is not clear to what extent the defence is related to causation because it is the planning and implementation by the business which is important, not whether the presence, adequacy or absence of the system occasioned the offence. For example, in a case where a food manufacturer undertook no inspections of its production methods and a foreign body was found in food, the court might not be able to apply the defence even if it were proved that the particular foreign body was an act of sabotage to which inspection procedures would have made no difference. The defendant would not have taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

26 Abolition of the defence in all food law cases was considered informally by the Food Standards Agency shortly after its inauguration: the hypothesis was advanced by members of the Agency that the due diligence defence might not meet the requirements of European law. This was never the subject of a formal study.

1.1109 In a major food business, the documentation supporting the due diligence steps is likely to have been extensive and proof of its various stages can involve a large number of witnesses. This is because of the nature of the test described by Viscount Dilhorne in *Tesco v Nattrass* at page 186C:

> "[The defence] could not be established merely by showing that a good system had been devised and a person thought to be competent put in charge of it. It would still be necessary to show due diligence on the part of the accused in seeing that the system was in fact operated and the person put in charge of it doing what he was supposed to do. "

1.1110 In a large organisation, therefore, it is necessary to trace the pattern of supervision and auditing, often including random audits and the keeping and signing off of records from the level of the shop assistant through middle management to the Board of Directors in order to discover whether there were indications of a problem which ought to have been acted upon. Ironically, the more careful the due diligence system, the longer it takes to identify whether there have been material failures.

1.1111 There are few occasions when the evidence is capable of being limited by agreement with a prosecutor. This is in part because, despite the fact that the availability of a defence is a matter that most prosecution policies require to be considered and appears also at paragraph 4.5 of the Code for Crown Prosecutors 2010, prosecution authorities rarely have the opportunity fully or at all to investigate a due diligence defence. The explanation for this is likely to be due to lack of prosecution resources and to the incremental nature of any such investigation process, often carried out by correspondence.

1.1112 This is very onerous for Defendants who, in order to defend themselves have to expend disproportionate sums of money and resources in order to put the necessary information before the court. For example, in one case last year a major supermarket was prosecuted in respect of two informations involving five packets of bacon for which the "use by" date had expired. The maximum potential fine was £10,000. Trying this case before a deputy district judge took one week, excluding pre-trial applications made as to "bad character" – necessary to show that there was a systemic failure within the organisation – and involved two members of the senior management and a store manager as well as replenishment staff and expert witnesses on trading standards for both prosecution and defence. The prosecution case took about one day, the defence case, four days. It is likely that the costs were in excess of 10 times the maximum fine. There is a question about the proportionality of due diligence defences, therefore, which the Food Law Group would suggest should be viewed with some caution before any decision be made to make the defence a generally applicable one.

1.1113 Should the defendant fail to argue due diligence, the company is likely to be convicted, suffering loss of reputation and possible brand damage which may also be out of proportion to the fine which Parliament has set as the appropriate penalty. In addition to the argument referred to above that the perception of the seriousness of the offence is greater when there is a defence which has not been run than if there were no defence at all, there is a point of principle: if the defendant makes a commercial decision not to run an expensive due diligence defence, the use of criminal proceedings becomes a form of fund raising for the benefit of the consolidated fund.

1.1114 *The re-formulation of the defence: t*he Food Law Group would support the proposal to omit the word "all" where it appears in the current defence. This is because its effect in the current formulation is uncertain. There is a difference of approach between prosecutors and defendants as to its significance in every case. Prosecutors draw attention to the inclusion of the word "all". On the other hand, it has been established, most recently in *Enfield v Argos Ltd* [2008] EWHC 2597[27] that this defence does not mean that the defence fails merely because the prosecutor can identify another precaution that could have been taken. Thus, although there has been a determination as to what the word "all" does not achieve, there is no clear guidance as to what it does. This is unsatisfactory.

1.1115 *The standard of the test is also difficult to identify:* Furthermore, in its current form the test is in reality one of hindsight. It raises questions framed in the context of the offence about how many people should have been employed, whether external consultants should have been used, whether the staff recruited were sufficiently clever or were of sufficiently robust temperament or sufficiently vigilant. It examines the culture of the business and the decisions made as to frequency of testing, equipment replacing, renovation of plant and premises. The question in every case is whether the defendant has done enough to exclude himself from the criminal band. It is always set against a business and capitalistic background in which balances need to be found between compliance, training, investment and foresight. It is not clear to what extent the court ought to put itself in the position of the business and come to a decision afresh, or whether it should consider that decisions rationally taken are within the reasonable range of responses and therefore that the defence should be proven. Even in the case of ASDA v. *Birmingham City Council*, the court, when considering an issue that the company had addressed, appeared to consider that the court could have come to a different view of what was appropriate from that of the company. On the assumption that this approach is correct, it involves the engagement of the court in, sometimes, technical matters of which it may have no prior experience or skills and differs from the more limited approach that the court would take when considering a decision made by a public body in judicial review proceedings. There is a question whether that is the appropriate level of intervention. Reformulation of the test to exclude the word "all" may do much to address this difficulty.

1.1116 *Delegation:* The Group agrees with the Law Commission proposal and would suggest that the same approach be applied to the "act or default" offence.

27 Also see Smith v. T&S Stores (1994) 39 LGR 98

CBI

1.1117 In our view, statutory offences should, save in exceptional circumstances, require the proof of fault as part of the offence. However, for the limited situations where a strict liability offence may be appropriate, we support the Law Commission's approach in principle. However, there still also needs to be requirements for knowledge or recklessness on the part of or attributable to the defendant.

1.1118 If legislation does not address expressly whether the due diligence defence applies to a particular offence, the default position should be that the defence does apply. Leaving it to a court to decide whether the defence should apply by the application of the test set out in paragraph 6.19 of the Consultation Paper will make the law too uncertain. Courts are well used to deciding innocence and guilt on the facts before them, but less well equipped to decide the difficult policy issues involved in the test set out in paragraph 6.19.

1.1119 Granting such a power/duty to the court would help address the worrying lack of legislative consistency as to which regulations contain an express due diligence defence, and which do not.

1.1120 To give one recent example, The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008 (the ROHS Regulations) contain a due diligence defence at reg. 21. However, the REACH Enforcement Regulations 2008 (the REACH Regulations) contain no such defence.

1.1121 Both sets of regulations enforce EU environmental/consumer protection legislation and both are made under section 2(2) of the European Communities Act 1972. The fact that the ROHS Regulations implement an EU Directive, while the REACH Regulations enforce an EU Regulation, cannot be determinative, since a variety of UK statutory instruments that provide for the enforcement of EU Regulations contain due diligence defences.[28] Arbitrary inconsistencies of this sort contribute to a lack of business certainty and raise the possibility of inconsistent enforcement,[29] but could be properly addressed by the creation of a power/duty of the sort that the Law Commission proposes.

1.1122 As in response to Proposal 7, it is also for consideration whether the proposed "power" given to a court should rather be strengthened to refer to a "duty" of the court.

1.1123 We would also remark in connection with the new corporate offence in the Bribery Act that 2010 that a due diligence defence would have been much preferred to the defence of "adequate procedures" used in that Act.

East of England Trading Standards Association

1.1124 The majority of regulatory offences that fall within the remit of Trading Standards Services already encompass a due diligence defence where the burden of proof lies with the defendant.

1.1125 Although we support this proposal in principle we would question whether such a defence would be appropriate for all regulatory offences particularly those which are strict liability. For example, would such a defence be desirable in matters which relate to safety of others, animals or the environment e.g. overloaded HGV's or indeed some offences under Animal Health legislation where the impact of offending can be significant either on animal welfare or disease precautions.

28 We refer, by way of example, to: (a) Regulation 18(1) of the Materials and Articles in Contact with Food (England) Regulations 2007 (SI 2007/2790), which are made in relation to Regulation (EC) No 1935/2004; (b) Regulation 6(c) of the Genetically Modified Food (Scotland) Regulations 2004 (SSI 2004/432), which are made in relation to Chapter II of Regulation (EC) No 1829/2003; (c) Regulation 23(1) of The Detergents Regulations 2005 (SI 2005/2469), which are made in relation to Regulation (EC) No 648/2004; (d) Regulation 7(1)(b) of The General Food Regulations 2004, which are made in relation to Regulation (EC) No 178/2002; and (e) Regulation 12 of the Beef Labelling (Enforcement) (England) Regulations 2000 (SI 2000/3047), which are made in relation to Title II of Regulation (EC) No 1760/2000, Regulation No 1825/2000, Regulation (EC) No 1141/97. [To check these refs]

29 For example, an electronic goods firm that, despite excellent quality assurance procedures, imported a product into the UK that (without the company's knowledge) contained a dangerous chemical substance might commit an offence under both the ROHS and the REACH Regulations, as well as under other legislation such as the General Product Safety Regulations 2005. The company could rely on a due diligence defence if prosecuted under the ROHS Regulations or the General Product Safety Regulations, but not if prosecuted under the REACH Regulations.

Residential Landlords Association

1.1126 We strongly endorse this proposal. We have already pointed out that this is second best but, nevertheless, it is an improvement on the current position. We do not necessarily endorse the proposal regarding the burden of proof. Whilst it should be the defence to raise a prima facie case we believe then the burden should switch to the prosecution to negative the defence. This is in line with the normal criminal standard of proof and is an already accepted approach in certain instances.

Trading Standards North West (TSNW)

1.1127 We accept as a reasonable proposal. We think that s 75 RTA is the only offence that trading standards commonly encounter wherein a defence of due diligence does not already apply.

Kingsley Napley LLP

1.1128 We agree. We consider the ambit of the defence should be outlined in statute, rather than left to the courts to determine.

PROPOSAL 15

Clifford Chance

1.1129 Question 2: agree in principle; should apply to all offences whether criminal or civil but do not consider that the courts should merely have the "power" to apply a due diligence defence depending "on the court's assessment of the strength of the case for its application … as a basis for promoting fairness to accused persons … without unduly hindering regulatory prosecutions" (CP 6.19). Rather, due diligence should be a defence to all offences that do not require fault on the party of the accused, unless legislation creating the offence expressly provides otherwise. Giving court the "power" to apply this defence begs the question as to when the court should exercise that power and would leave the law far too uncertain.

1.1130 Do not consider courts and tribunals well-equipped to make the policy-based assessment demanded by para 6.19 CP.

1.1131 Defence should take the form of the accused proving it has taken reasonable measures to comply with the law. Burden (civil standard) should be on the accused.

1.1132 Question 1: Due diligence should not take the stricter form set out in that question. It is enough that what are reasonable measures will necessarily depe4nd upon eh foreseeable consequences of a failure to comply with the law. If consequences include death or personal injury, the requirement standards of reasonableness will be more than if eg a regulator will receive a piece of information late.

1.1133 Question 2: favour the application of the defence to all strict liability offences unless parliament, in primary legislation, decides otherwise. In any event, defence should apply to all offences, whether criminal or "civil" under Financial Services and Markets Act 2000 and FSA's rules.

HSE

1.1134 Under this proposal, and in respect of questions 1 and 2, we understand that it is the courts that are to be given this power. This would be discretionary and would not provide the legal certainty necessary for duty-holders to understand what they must do to comply with the law. Also, this would make it difficult for enforcement authorities to issue guidance and to understand the parameters of enforcement action (unless the courts themselves provided detailed guidance on this.)

1.1135 In respect of the proposal on a form of words for any due diligence defence, this could given rise to challenge from EU if the introduction of the proposals caused any different in how "so far as is reasonably practicable" is interpreted in UK law. We would question the value of introducing an additional test that applies to health and safety law where, as Professor Cartwright's analysis of Corporate Criminal Liability at para B 27 explains, the (stricter) due diligence test is analogous to the obligation under HSQWA to take all such precautions as are reasonably practicable. We would suggest that if such a defence was introduced HSWA and associated legislation should be exempt, to avoid duplication and confusion.

The Law Society

1.1136 It is unclear to the Law Society whether the strict liability offences referred to are co-extensive with the offences referred to that do not require proof of fault or, if not, the Law Commission is proposing that the due diligence defence should apply in cases that are not strict liability offences but are offences that do not require proof of fault - and what cases would fall in this category. The Law Society is happy for the defence to apply in cases of strict liability but in view of the uncertainty about whether the intention is that the defence should also apply in cases that are not strict liability cases but do not require proof of fault, it would like to understand if there is intended to be a difference and, if so, to consider the position further in relation to those cases.

1.1137 If it is intended that this defence apply only to businesses then we suggest there would need to be further consideration of how widely it would apply given that this would obviously introduce a distinction between businesses and individuals.

1.1138 It is not clear whether it is suggested that this due diligence defence is to be a defence that will only be applied at the discretion of the court or whether it is proposed that statute will introduce such a general due diligence defence that can be applied by the courts to both existing and future offences that do not involve fault.

1.1139 One potential concern if this is to be a defence that is only applied in the discretion of the court is that a defendant would not necessarily know in advance whether the defence would apply which raises issues in terms of the certainty and predictability of the law. As explained above, in many cases it is hard for companies to be sure whether a particular course of action will involve an offence. Judicial decisions about whether a due diligence defence applies in a particular case are likely to be very important to companies in determining the action they must take or avoid. We suggest that, if it is proposed that the defence should only be applied in the court's discretion (rather than applying in all cases or where specified in a particular statute), general guidance should be issued as to when it would be appropriate to allow such a defence. The guidance should be consulted on before it is finalised.

1.1140 If the defence is to be introduced by statute to all offences, including retrospectively, there are some strict liability offences that are so serious that it may be arguable that such a defence should never apply. Examples are those that relate to the handling of nuclear material or some road traffic act offences. We recommend that there is full consultation on the scope of any such statutory defence before it is introduced.

1.1141 In the case of future legislation, we believe the due diligence defence should apply by default in all cases unless Parliament expressly states in legislation that it should not.

1.1142 We agree that where a defendant seeks to rely on a defence of due diligence, the burden of proof falls on the defendant.

1.1143 We strongly agree that a defence of due diligence to a criminal offence should be on the basis of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence. A defence formulated on the basis of 'did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence' risks a "counsel of perfection" approach.

1.1144 It will also be necessary to consider in much greater detail how the standard of due diligence is to be interpreted. Should a court take into account the resources of the defendant, the cost of any measures that could have been taken, the industry in which the defendant operates, the standard practice of other similar persons or companies, guidance issued by professional or other bodies? Section 9 of the Bribery Act 2010 allows for the issuing of Guidance to assist companies seeking to avoid an offence under section 7. Again, we suggest that some form of guidance should be available if this discretion is given to the court and that it should be consulted on before being finalised.

Food and Drink Federation

1.1145 Support the general principle.

1.1146 Q1: support he premise of the defence as a defence to food regulations, however, any changes to the defence needs to be the subject of a wider debate in which the food industry is fully consulted. It is not desirable for the defence to be revised in a manner that makes it more onerous for food operators than is currently the case.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.1147 The circumstance and terms of the underlying offences will be very different in different circumstances, but we would strongly prefer the due diligence defence to be worded in the same way for all corporate and other business offences. Businesses should not be asked to apply different types or principles of governance or control in relation to different criminal offences, though the degree and standards to which those controls should be applied will vary according to the likelihood of occurrence and the harm or seriousness of the behaviour concerned. That would result in a compliance nightmare, with a watching brief needing to be kept over possible changes to the large and increasing number of potential business crimes, to ensure that the differing terms of all of them had been complied with.

1.1148 Q1: The wording of a due diligence defence in such absolute terms as all reasonable precautions and all due diligence implies a counsel of perfection that is unlikely to be achieved in practice. This is unhelpful in the context of running a business. Our preference would be for the wording to avoid the term “due diligence” at all, in favour of the wording of the defence recently introduced by the Bribery Act 2010 of having “adequate procedures” for the prevention of the relevant corporate offence. This implies a continuing requirement for internal control procedures sufficient to give reasonable assurance that the criminal law had been complied with, while “due diligence” is sometimes used in the context of a single exercise of examination and confirmation, for example in the context of a corporate take-over. Further, the “adequate procedures” defence in the Bribery Act is required to be backed by Guidance published by the Secretary of State, which is expected to provide useful assistance in judging what levels of assurance will be “adequate”. The final version of this Guidance is not yet available, but the consultation draft published by the Ministry of Justice includes a summary of the type of internal controls that would be suitable for businesses in preventing the commission of bribery offences. These procedures would be equally relevant in preventing any other business crime.

1.1149 We have responded to the Ministry of Justice consultation on guidance on “adequate procedures” suggesting a number of changes to make the terms of the Guidance easier to apply and less onerous, particularly for small businesses. However, this does not take away from our belief that this is an appropriate way forward, not just in relation to bribery, but for other business crimes as well.

1.1150 Q2: We believe that a due diligence defence should apply to all criminal offences of companies or other business entities. Paragraph 1.80 of the consultation document comments that in some contexts, such as road traffic offences, the general application of a due diligence defence may lead to long and costly, albeit vain, attempts to avoid a conviction by defendants. However, if this defence is available to businesses but not to individually culpable drivers, and fines are levied at an appropriately high level, we do not think that this would be a problem. If a company or other business does have appropriate procedures to prevent road traffic offences being committed on its behalf, taking into account the likelihood and severity of such offences, then we think that such a defence should be available to it. If the availability of a due diligence defence is limited to companies and other business entities, we do not think that the difficulties expressed by the Commission in paragraph 2.24 of the consultation (that the overlap between regulatory offences and other public interest offences would make this too complicated, using Anti-Social Behaviour Orders as an example) would be a problem.

Financial Services and Markets Legislation City Liaison Group

1.1151 Q1: No, we believe that an "all reasonable" steps standard pitches the defence so high as to be rarely available. Instead, we believe that the defence should be concerned not with what else could have been done but with whether the precautions taken and due diligence exercised are "adequate" or "reasonable in all the circumstances".

1.1152 Q2: We support this proposal and would go further to suggest that there should be a due diligence defence that applies in all cases except where Parliament deems otherwise. Leaving it to the courts to determine whether there should be a due diligence defence by applying the test set out in paragraph 6.19 of the Consultation Paper would create too much uncertainty.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.1153 Support the approach.

1.1154 Q1: No, we think the defence of due diligence being exercised in all the circumstances to avoid the commission of the offence is preferable to the stricter form of taking all reasonable precautions and exercising all due diligence to avoid the commission of the offence. We think this latter formulation risks a "counsel of perfection" approach. We do not think a company should incur criminal liability just because it made a negligent slip in taking precautions or because it can be shown that there was another precaution it could have taken but did not.

1.1155 Q2: We believe the due diligence defence should apply in all cases unless Parliament decides it should not.

Trading Standards South East Ltd

1.1156 TSSE believes that if proposal 14 is accepted it should take the form of the stricter version of 'all reasonable precautions and exercised all due diligence to avoid the commission of the offence'. There is already an extensive body of case law that exists to serve the Courts and all parties concerned with interpretation as to this defence. As a result, it is applied consistently by the Courts and interpreted consistently by enforcement agencies. This is turns means that businesses can be consistently advised. TSSE have already stated that it believes having different versions of this defence will lead to confusion and inconsistency on enforcement.

Judges of the Court of Session

1.1157 We agree that such a defence should be available and expand out in view in answer to question 1 below.

1.1158 Q1: We think the defence should be in the stricter mode if a court is to be given power to read it in to statute where Parliament has not explicitly provided for such a defence.

1.1159 Q2: We do not think that we can suggest to Parliament which statutes if any should not be subject to such a defence.

Chamber of Shipping

1.1160 We would support the proposed defence that "due diligence was exercised in all the circumstances". This would provide greater flexibility on a case-by-case basis. The defendant would not be required to "do everything possible" but all things considered to be relevant in a given situation. A defendant who had not taken every action or put every precaution in place would not necessarily be "guilty" if the arrangements were sufficient and adequate to respond to the expected and anticipated risks of the operation but the event was unusual, exceptional or extreme.

1.1161 Q1: It follows that we do **not** support the alternative stricter version which implies a requirement to put in place additional precautions beyond the ordinary scope of due diligence envisaged in Proposal 15. By way of example, experience might indicate that one spare tyre is adequate as a replacement for the occasional puncture whereas "all reasonable precautions" might be interpreted as two for the possible (but unlikely) risk of an exceptional emergency.

1.1162 Q2: This may be appropriate. However, without a more definitive indication of the possible areas of exclusion, we are not able to offer comments.

The Institute of Employment Rights

1.1163 We welcome the thrust of the proposals 14 and 15. We also agree that the burden of proof should be placed on the defendant to establish a defense and that this should take a stricter form, as set out in question 1.

North East Trading Standards Association (NETSA)

1.1164 We are of the opinion that where a due diligence defence is introduced, as proposed in 14 above, the defence should be in the form 'take all reasonable precautions and exercise all due diligence to avoid the commission of the offence'.

Trading Standards Institute (TSI)

1.1165 Q1 Yes – the stricter form has been tested before the courts many times and in our experience this is sufficient.

1.1166 Q2: TSI would like to think that offence involving under-age sales should still have a due diligence defence as Trading Standards Professionals are often looking for negligent failures in systems rather than a guilty mind. We would, however, welcome consideration of other offences, subject to consultation.

QEB Hollis Whiteman Chambers

1.1167 Agree.

1.1168 Q1: yes; Q2: yes.

Kiron Reid, Liverpool Law School

1.1169 Specifically, regarding the proposal in para. 1.77 & reasoning in paras. 1.75 – 1.76. This would modernise and rationalise the law and help provide consistency. There is nothing wrong with the presumption of fault *per se*, what is wrong (as you say at para. 1.72) is that it is inconsistently applied and lacks objective criteria. Therefore the wording of statutes about fault should be clearer, as you suggest here. The examples in the full paper on when the courts have interpreted some cases as strict liability and others as not illustrates the inconsistency very clearly: "We suggest that there is in fact nothing in principle to distinguish these cases. It does not seem likely that what drives the distinctions the courts have drawn between 'true' crime and 'regulatory' crime has been some intrinsic factor present in one but absent in the other."

1.1170 Although in my work I have called for clear statements about whether strict liability should be applied or not (the default to be generally not) and have critiqued the 'true crime' distinction, I did not myself articulate this point that you make obvious of the inconsistency in criteria and application (except in relation to the extreme example of liability for individuals in drug possession cases).[30]

30 K Reid, "Strict Liability: Some Principles for Parliament" (2008) 29 Statute Law Review 173, at 185.

1.1171 I argue that the proposal to introduce a general due diligence defence should not abolish or replace the presumption of fault required except for business liability in the contexts of this report. For the avoidance of doubt, for penal statutes involving 'general' individual criminal liability the presumption should definitely apply.[31] I assume that this proposal would apply only to offences aimed at companies (I appreciate the query is largely rhetorical for this paper). Presumably courts could rely on it where they felt that imposing strict liability would not help to achieve the purpose of the statute. However, presumably on grounds of fairness it would have to apply to a particular statute or not (albeit the – rather than apply to a defendant in one case but not another. There could of course be more complex arguments about different interpretations in different sections of legislation as in the well known Licensing Act 1872 cases. The full paper does note this issue at para. 6.14 (the contrast with *Cundy* v. *Le Cocq* (1884) presumably implied).

1.1172 Questions 1 (and para. 1.79). Is this really different? I defer to experts on these areas of law about that but honestly cannot see the difference myself. The two alternative formulations sound the same. I have not, though, checked for relevant caselaw.

1.1173 Question 2. For new statutes it should clearly state in the text if the defence is *not* to apply. Para. 1.80. This respondent specifically agrees in relation to road traffic offences. Too many people who break the law and too many immoral lawyers waste too much time with legally spurious defences in such cases as it is.

Food Standards Agency

1.1174 Already for food and feed legislation. Great deal of case law. Fully support utility of defence. Would wish to retain standard form of words for defence for food and feed sectors. In the light of *R v Lambert* (2001), defence in feed and food law creates evidential burden.

City of London Law Society

1.1175 We strongly agree.

1.1176 However, the Law Commission says that consultees may prefer this defence to have the same wording and to impose the same standards as the most commonly encountered form of the defence. Accordingly, the Law Commission asks the following questions:

1.1177 Q1: No. We think this formulation risks a "counsel of perfection" approach. We do not think a company should incur criminal liability just because it made a negligent slip in taking precautions or because it can be shown that there was another precaution it could have taken but did not.

1.1178 Q2: We believe the due diligence defence should apply in all cases unless Parliament decides it should not. For the reasons set out above, we would expect such cases to be very infrequent.

31 A recent significant example is Crown Prosecution Service v M and B [2009] EWCA Crim 2615 regarding the Prison Act 1952. See also the arguments at Reid (supra) p. 193.

Local Government Regulation (LGR)

1.1179 Q1: We consider that the stricter form namely "the *taking of all reasonable precautions AND the exercise of all due diligence to avoid the commission of an offence"* would be a more appropriate form of the defence. It is a defence that is clearly understood and there already exists a wealth of case law on its meaning and application. This in turn means that businesses can be consistently advised. The word "all" is often important. If it is removed, this could lead to an erosion of the statutory protection for consumers. As a catch-all for all offences, we would recommend it should not be set at the "lowest common denominator" for due diligence defences, but at the highest level. We consider that having different versions of this defence will lead to confusion and inconsistency on enforcement. We therefore disagree with this proposal

1.1180 Q2: See response to proposal 14, which encapsulates our views on this issue

Allen & Overy

1.1181 See above under proposal 14.

Association of Chief Trading Standards Officers (ACTSO)

1.1182 Trading Standards Services are familiar with common form of statutory defence. Clarified through case law and has a degree of certainty. What is reasonable for large business not necessarily so for small business. In context, ACTSO would prefer existing form of defence remain to avoid uncertainty that change would create (change could lead to increased costs for regulators and businesses until new defence was fully understood). The 2 stage defence (all reasonable precautions and all due diligence) fits with modern practices of large businesses. Preventing regulatory breaches depends significantly on good design of systems (eg training employees in multiple locations). Defence of having applied due diligence in all circumstances seems to imply focus on specific breach by a business, rather than focus on design of systems to prevent similar breaches more generally. Could result in significant reduction in protection for consumers and ACTSO favours the more strict form of defence should proposal be pursued.

BBA

1.1183 Question 1: would welcome application of a defence to any statutory offence not requiring proof that D was at fault in engaging in the wrongful conduct. Prefer less onerous standard that D exercised "due diligence in all the circumstances" rather than "all reasonable precautions and proof that the defendant exercised all due diligence". Latter would create too many complexities for D and would make it difficult to discharge required burden of proof. Nearly always possible to suggest another not unreasonable precaution that could (with hindsight() have been taken and accordingly a failure to have done "all" that was required. Would not therefore adequately redress imbalance between interests of the prosecution and defence caused by presumption of fault principle. Our form is more flexible but still properly onerous.

1.1184 Question 2: Not aware of any statutes in financial services to which defence should not apply. Do not agree with suggestion that road traffic context may not be suitable for application of defence.

Justices' Clerks' Society

1.1185 Agree. Question 1: agree; question 2: possible not necessary – anticipated lengthening or arguable issues may be illusory as similar matters will already be argued in mitigation in such cases.

The Magistrates' Association

1.1186 Agree. Question 1: yes; question 2: no, there should be no restriction.

David Wood

1.1187 Question 1: no, the more general defence should apply. This would require D to show that due diligence had been exercised in all circumstances, rather than the stricter requirement of showing that D took all precautions and exercised all due diligence to avoid commission of the offence.

1.1188 Question 2: defence should be available in all circumstances.

Care Quality Commission (CQC)

1.1189 See above (proposal 14).

The Faculty of Advocates

1.1190 The concept of criminal offences which do not require the prosecution to establish fault does not seem to sit very comfortably with Proposals 1 and 2. If there is no fault, it is hard to see why there should be criminal liability. We agree that someone who has used due diligence to avoid committing the offence ought not to be liable to conviction and we also agree with the particular formula by which it is expressed in Proposal 15. In particular, we agree that due diligence should be enough and that "all" due diligence is too onerous a requirement. The level of diligence that is due must depend on the nature of the risk involved and the practicability of the steps available to avoid it. However, we have reservations about the proposals that it should be for the courts to apply such a defence and we not that this reliable on judicial law-making seems to sit uncomfortably with the rejection (CP 3.19) of simply trusting the judiciary to apply the offence with the exercise of some ingenuity in the application of their law-application function . In our view, if the meaning of a statute is to be qualified at all, it ought to be done by statute.

1.1191 We also have reservations about the proposition that the onus ought to be on the accused. We are more comfortable with the position reached in *Harvey and Reid v HM Advocate* 2005 SCCR 282 in terms of which, once the accused has led evidence which puts a defence in issue, it is for the prosecution to negate it by evidence.

1.1192 Whether or not the application of the defence should be excluded from any statute comes to be a question about whether strict liability offences are justified at all. There has been a clear policy view for many years that they are. That being so, we take it that Government would wish to exclude the defence from all those offences which it is desired to characterise as strict liability.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.1193 Consistent wording in defences would be ideal. The word "all" is often important. If it is removed, this could lead to an erosion of the statutory protection for consumers. As a catch-all for all offences, we would recommend it should not be set at the "lowest common denominator" for due diligence defences, but at the highest level, hence "all reasonable precautions and all due diligence."

Ivan Krolick

1.1194 I agree, but consider that "circumstances" should include ignorance of any matter concerning the elements of the offence, including any statutory provision which created the offence, provided due diligence was employed. See my general observations above.

1.1195 Q1: No. I do not understand the difference between "*all* due diligence" and "due diligence". Nor do I understand the difference between "taking all reasonable precautions" and "exercising due diligence" or even "all due diligence". It seems tautology to me. I'm not even sure that this is a stricter form. Moreover, existing similar provisions should be reconsidered to see if they are capable of precise meaning and effect.

1.1196 Q2: No. The PC seems to consider that the defence may not be used in road traffic cases because it may place an unreasonable burden on the courts. I cannot see that as a reason to exclude the defence when it applies in other, similar situations not linked to road traffic. In any event, it is not easy to see how the exception could be phrased. Would it include prosecutions under the Construction and Use Regulations; or hygiene regulations concerning mobile cafes; or licensing of drivers etc?

CBI

1.1197 We prefer this formulation to that in Q.1 below, as this gives greater discretion to the court to apply the due diligence test in the way the court judges more appropriate and having regard to the particular facts and circumstances of the particular case and the fact that a due diligence defence should not counsel perfection.

1.1198 Due diligence needs to be considered and assessed both in the context of the behaviour of the company as well as in the context of the particular offence.

1.1199 Q1: We do not support this approach. We also oppose the increase use of the "restricted due diligence defence" formulation described at pages 119-120 of the consultation document.

1.1200 Q2: We consider that Parliament should not prevent or restrict the application of a due diligence defence to certain statutes, and in particular a due diligence defence should apply to any strict liability offences, unless Parliament expressly provides otherwise.

East of England Trading Standards Association

1.1201 We consider that the stricter form namely "the *taking of all reasonable precautions AND the exercise of all due diligence to avoid the commission of an offence"* would be a more appropriate form of the defence. It is a defence that is clearly understood and there already exists a wealth of case law on its meaning and application. We therefore disagree with this proposal.

1.1202 Q1: See response to Proposal 15

1.1203 Q2: We are unable to answer this question as a significant number of regulatory offences enforced by Trading Standards Services already encompass this defence.

Residential Landlords Association

1.1204 We strongly take the view that the formulation of due diligence defence should be that as suggested in the consultation paper. It should not take the stricter formula. The stricter formula is effectively a counsel of perfection and would by and large negative the advantage of having such a defence. We have already made the point that we do not believe generally speaking that absolute offences should exist where this defence is needed anyway. We consider that the new due diligence defence should apply across the board where they do exist. We find it hard to conceive of cases where there should be a true absolute offence. This will introduce some degree of culpability.

Trading Standards North West (TSNW)

1.1205 Agreed.

1.1206 Q1: *William Frank Smith v T&S Stores Ltd* (1984). A defence can be made out, even if a precaution that it was reasonable to take had not been taken. Should it be limited to certain statutes? We believe our offences are pretty much fine as is.

1.1207 Q2: This is a matter for Parliament and which statute is also a matter for parliament.

Kingsley Napley LLP

1.1208 We think that the proposal as outlined in question 1 would be a fair and just requirement as if an individual has taken all reasonable precautions then in effect he or she is, in the vast majority of cases, likely to have exercised due diligence.

Criminal Bar Association and Bar Council

1.1209 The adoption of proposal 14 would introduce enormous uncertainty across every existing regulatory regime, and would have significant impact upon those regimes where recourse to prosecution is most frequent (ie which include serious offences) and in respect of which there is a body of settled case law.

1.1210 It is unclear whether the proposal is intended to extend to qualified duties: the employer's general health and safety duties to ensure safety under HSWA are qualified by "reasonable practicability". These duties represent the cornerstones of health and safety in the UK. By section 40 of that Act, a legal burden is cast on a defendant to show that all reasonably practicable steps were taken to comply with the duty. The scope of the duties and the operation of "reasonable practicability" was settled with the speeches of the House of Lords in *Chargot*. The Sentencing Guidelines Council guidance on sentencing organisations in fatal health and safety cases arguably establish a floor of £100,000 below which a fine will seldom fall.

1.1211 They are a great many health and safety provisions qualified by reasonable practicability or similar terms and subject to the operation of s40 of the Act. "Reasonable practicability" can be styled as a defence to the offence of breach of such duties or the duties described as qualified by that term. The offences do not require proof of fault.

1.1212 The introduction of a due diligence defence to such offences would be unworkable; it may place the UK in contravention of its obligations in respect of the various EU Directives which form the basis for many of the provisions of health and safety regulations. (Infraction proceedings by the European Commission against the UK were unsuccessfully attempted in respect of the ambit of the qualification of "reasonable practicability" in the general duties and the requirements of the Framework Directive on Health and Safety see *Commission of the EC v UK* [2007] ECR I-4619).

1.1213 At CP 1.80, it is acknowledged how "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". The broad nature of the proposed power would appear to invite such attempts across many areas.

1.1214 The difficulty of defining areas or types of legislation that the power should not extend to rather than specific Acts or statutory instruments that should be excluded from its ambit provides a powerful further argument that the proposal would be unworkable.

1.1215 It would appear that the mischief sought to be addressed by the proposal could be far better met through the introduction of a single amending provision introducing the defence to various specific sections of Acts and statutory provisions where such a need had been identified. Where this is the case, our preference would be for a form of due diligence defence in the terms as suggested in proposal 15.

1.1216 In relation to the different forms of due diligence defence found in statutory provisions, we anticipate that the wording of some owe its genesis to EU Directives. Uniformity of approach in future statutory provisions could be encouraged through the adoption of proposal 12.

PROPOSAL 16

Clifford Chance

1.1217 Agree. Question 3: agree that it is inappropriate for a director to be charged with the offence, but replacing this with an offence of neglect is, in practice, a distinction without a difference. Must still be proved that the corporation has committed the underlying offence, but with more specific details of the director's responsibility for the offence. It will often be impracticable to identify a single individual within a company who should have prevented the offence (negatives of this sort are unsatisfactory basis for liability) and the threat of this witch hunt is likely to create scapegoats as well as conflict within a corporation (see CP 7.29). It will lead to corporate officers seeking to avoid responsibility, which will obstruct regulatory objectives.

1.1218 Question 4: agree that doctrine of delegation should be abolished but do not consider that the suggested replacement is appropriate not least because café owner in *Allen v Whitehead* would still be guilty because he clearly has "failed to prevent an offence being committed" even though conduct was entirely reasonable. "Failure to prevent" is not a satisfactory basis of criminal liability; more active participation in the offence should be required.

GC100 (association for general counsel and company secretaries for the FTSE 100)

1.1219 We agree. One of the difficulties here is what knowledge of the facts, action or inaction by a director amounts to consent or connivance.

1.1220 Q3: We do not agree. Negligent conduct should not normally be used as a basis to impose criminal liability on individuals. It would cause particular difficulty for non executive directors who may not have detailed knowledge of particularly circumstances that have led to the offence. .

1.1221 Q4: We would support the introduction of a new offence provided that it is carefully drafted. For example delegating to someone obviously unsuitable is one thing and might justify a criminal offence if it would involve reckless disregard for the consequences. Delegating to someone who appeared suitable but was not or who was suitable but acted in an unexpected way should not be the basis of criminal liability.

Professor Colin Reid, University of Dundee

1.1222 Q3: The inclusion of the offence of negligently failing to prevent offences would be welcome in many circumstances.

1.1223 Q4: The doctrine of delegation should be abolished and replaced with clearer and more firmly based rules on responsibility that fit the practicalities of modern commercial operations.

Criminal Sub-Committee of the Council of HM Circuit Judges

1.1224 Not appropriate that, where a company is found to have committed an offence based upon a regulatory breach, there is a separate criminal offence on the part of a director based upon negligence failure to prevent. Do not support doctrine of delegation for reasons similar to those in CP.

1.1225 Question 3: No.

1.1226 Question 4: No unless the defence of due diligence applies. Mere failure, without attaching some culpability would be inappropriate. If delegating the running of a business whilst away could result in liability for failing to prevent an offence on the part of a delegator, who had taken all reasonable steps but was not present on the day, he would be unfairly penalised. Cannot accord with general principles of criminal law and would impose unjustified strict liability. Do not support any further extension of strict liability crime.

Institute of Chartered Accountants of England and Wales (ICAEW)

1.1227 We agree with this proposal.

1.1228 Q3: We would be content with a corporate offence of negligently failing to prevent the commission of a criminal offence (as has been done with the Bribery Act) but on balance we would expect the "consent or connivance" offence to be sufficient in relation to individual directors or equivalent officers or proprietors. If this was considered by Parliament to be sufficient in the contest of the very serious issue of bribery, we fail to see why a stronger formulation should be considered necessary in other contexts. The Bo0ard of Directors should have collegiate responsibility for the actions of the company, and we would not think it appropriate for individual directors to be targeted for the negligence that should be attributable to the company as a whole.

1.1229 If individual directors are culpable otherwise than through negligence, and the consent or connivance provisions are not sufficient, it would appear likely that an individual director would be liable either for personally committing the offence, or else through one of the inchoate offences. If not, then the corporate offence would be the main punishment of the business (together with prosecution of individuals directly committing the offence) and if fines are set at an appropriate level, the shareholders or other proprietors will have reason to take action for any negligence, as appropriate.

1.1230 Q4: We agree that the doctrine of delegation should be abolished. We think it is sufficient for the "failure to prevent" offence to apply to corporates or other business entities, with the "consent or connivance" offence to be committed by directors or other officers.

City of London Law Society

1.1231 We agree. One of the difficulties here is what knowledge of the facts, action or inaction by a director amounts to consent or connivance. If it were clear that an individual must know that wrongdoing is taking place or will do so to be shown to be consenting or conniving, that would be very helpful. However, that may not go far enough, as there will be cases when a director will be aware of what is proposed but will not be able to stop the proposed action or failure taking place. It would be helpful to make it clear that consent or connivance is not shown merely because a director participated in a board meeting where a decision is taken. Directors will be concerned to understand whether, to show they did not consent or connive at an offence, it is sufficient for them to show that they voiced their opposition, even if this is not recorded in the minutes (typically minutes only record the decision, which is usually taken on a majority basis, and not anyone who dissented and a director may not be able to insist on how the minutes are recorded). Directors may also wish to understand whether they must resign in order to show they did not consent or connive. A director may feel that it would be better not to do this to try to protect the shareholders' interests. Another grey area is the extent to which directors (particularly non-executive directors) can rely on information provided to them.

1.1232 Q3: We feel strongly that a director should not be liable for negligently failing to prevent the commission of an offence by the company. Liability should only be imposed if there is assent to wrongdoing. We do not think mere awareness should be a ground for liability as a single director may not be able to prevent the conduct.

1.1233 Q4: We are not entirely clear how the delegation principle applies and how it applies to companies. We do not think criminal liability should be imposed for failing to prevent an offence being committed by someone to whom the running of the business has been delegated. If someone has delegated to a person who appears to be suitable and has appropriate procedures in place to check if the delegation is working appropriately, liability should not be imposed merely because the person to whom the delegation was made committed an offence. We do not think the argument that the stigma attaching to such an offence would be less is a good one.

Trading Standards Institute (TSI)

1.1234 Q3: Company directors and equivalent officers play a vital part in ensuring compliance and a separate offence could help maintain a culture of fair trading and ensure that senior management are held accountable for the performance of their companies. A Trading Standards Institute Member made the following comment: *"I tend to agree with the principle the senior directors should be allowed to delegate tasks such as regulatory compliance to people they have good cause to believe are competent to do it. With non-exec directors, as long as they have good cause to be satisfied that the execs are competent in their capacity, they should not be expected to be auditing the firm for regulatory compliance."*

1.1235 Q4: TSI feels that the system already in place is sufficient.

Food Standards Agency

1.1236 Already have this sort of provision in food legislation (s36 Food Safety Act 1990 and Reg 18 Food Hygiene Regs 2006, including instances where company's offence is attributable to neglect on part of an individual director or equivalent).

1.1237 Question 3: Food law already contains following offences (s20 Food Safety Act 1990 and reg 10 Food Hygiene Regs 2006) where commission of offence by A is due to act of default by B, B may be charged and convicted of offence even where no proceedings taken against A. Common provision in trading statutes but introduced into food law by Food Safety Act 1990.

North East Trading Standards Association (NETSA)

1.1238 We do not object to the proposal of introducing an offence of 'negligently failing to prevent' that offence. However, we would not consider it appropriate to lessen the existing penalties.

1.1239 It would appear that the primary reason for the proposal is to remove social stigma in relation to individuals for offences committed by the company. We are of the opinion that it would be beneficial to detail specific legislation and to quantify the number of instances where such 'social stigma' may result in order to determine the most proportionate and effective method of removal (if required).

1.1240 We are of the opinion that the delegation doctrine should remain. However, we acknowledge that care is needed when having regard to the construction of the offence even where this would make the provision difficult to enforce.

1.1241 In some cases the more relevant question may be whether the elements required for the offence have been correctly identified having regard to the construction of the offence rather than should the delegation principle be applied.

1.1242 It would appear that the consultation proposal is based on the premise that it was not the intention of the legislature to extend criminal liability from consent and connivance to include negligence. Furthermore, that if it is accepted that a social stigma, in certain circumstances, may be attributed to an individual who is negligently liable for offences committed by a company, the consultation proposal is based on the view that this was not the intention of the legislature.

Allen & Overy

1.1243 Given wide range of conspiracy and of encouraging and assisting offences, query if there is a need to retain consent and connivance doctrine at all. Subtle theoretical distinctions but unlikely to be found in practice. In any event, agree with proposals 16 and Commission's view that imposing criminal liability for negligence is unfair. Do not consider it to be overly "generous" to individual directors as suggested in CP 1.87. Not extending criminal liability to include instances in which the company's offence is attributable to neglect on the part of the individual director or equivalent is consistent with proposals 1 and general purpose of criminal law. More usually appropriately dealt with in civil law.

1.1244 Question 3: No. Negligence based criminal liability is contrary to the purpose of criminal law and provision that an individual director can be liable for the separate offence of negligently failing to prevent an offence is inconsistent with proposals 1 and 10.

1.1245 Question 4: Agree doctrine should be abolished. If it is, do not agree that it should be replaced by an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated. Do not believe that negligence based criminal liability is appropriate.

Association of Chief Trading Standards Officers (ACTSO)

1.1246 Re large businesses, delegation of responsibility for specific activities is essential. ACTSO believes it is appropriate that persons to whom specific responsibility has been delegated should be personally liable for offences committed by company where they have failed to discharge delegated responsibilities. Important that company officers that consider or connive at company's commission of offence also commits offence. Removing provision would provide no disincentive for officers to take risks. Where officer is shown to have acted without appropriate care to avoid commission of offence is important that they be personally liable. Often very difficult to show that company officer has consented or connived but clear that officer has a separate offence of failing to prevent an offence being committed by a company apply to company officers.

BBA

1.1247 Welcome proposal and appreciate that there will be less stigma attached to a director convicted of negligently failing to prevent an offence, but unsure in what circumstances the offence would apply. Assume it would only be introduced in respect of very serious offences as otherwise there is a risk that such a proposal could potentially act to increase liability in regulatory contexts. The removal of minor offences would narrow areas in which criminal liability may arise but with regard to "consent and connivance" doctrine, we would encourage Commission to go further and restrict this to circumstances where it can be shown that individuals addressed their minds (or should have) to act or omission and that they knew (or ought to have known) that conduct was unlawful as opposed to situations where they consented to or connived in activity they had no reason to believe or known could amount to a criminal offence. If other proposals adopted and minor offences are decriminalised, likely to ensure that most remaining offences are subject to personal liability as matters a competent and conscientious director should reasonably have known or suspected to be criminal. It would allow for the state of a director's individual culpability to be taken into account.

1.1248 Question 4: welcome proposal but suggest that replacement offence should only apply to very serious offences for same reasons given above (preceding para). But also provided delegator can shown that it has exercised due diligence in selecting and supervising delegate.

Justices' Clerks' Society

1.1249 Agree (questions 1 and 2: agree).

The Magistrates' Association

1.1250 Disagree. If company's offence is attributable to neglect on part of an individual director, the directors should still be liable for the offence committed by the company.

1.1251 Question 3: agree; this could be useful provision. Question 4: we would not want the doctrine to be abolished. If possible the provision of an alternative offence of "failing to prevent an offence being committed" could be a useful addition.

David Wood

1.1252 Question 3: Nom, if company is proved to have committed offence, sufficient for that to remain the only offence committed if it came about through the negligence of a senior employee. Commission by consent or connivance will of course remain a separate offence for which an individual employee could be prosecuted, and that is justifiable because of the greater fault element involved in that individual's actions.

1.1253 Question 4: Yes. Doctrine should be replaced by offence of failing to prevent an offence being committed by someone to whom the running of a business had been delegated. In most circumstances, an office-holder's delegate would be convicted of substantive offence in addition to the possibility of office-holder being convicted of failing to prevent offence by his delegate.

Care Quality Commission (CQC)

1.1254 In health and social care context, failure to ensure a person's essential health and safety through acts of omission and neglect are potentially just as unsafe, damaging and avoidable as harmful acts of commission. CQC do not think that there are any compelling arguments for them to be treated differently.

1.1255 Question 3: Agree.

1.1256 Question 4: Recognise the principle behind the concern and proposal but do not feel that the doctrine of delegation should be wholly replaced by suggested approach. There are instances where willing providers who are anxious to comply with requirements are mislead by incompetent or neglectful local managers, where providers fail to exercise reasonable supervision and oversight of their service and mangers, and where competent managers are prevented from being able to meet essential standards of quality and safety through inappropriate interference and/or lack of adequate support and resources. It is necessary to have enforcement tools that can respond appropriately to the variety of circumstances and behaviours. Proposed offence would be a useful addition to CQC's statutory powers but also need access to processes that hold providers fully to account, where appropriate.

The Faculty of Advocates

1.1257 We are persuaded by the reasoning in support of this proposal. We consider that it might be appropriate to provide that individual directors could be liable to a penalty for negligently failing to prevent the commission of an offence by a company. Whether that should be criminal penalty depends upon whether it is accepted that negligence is an appropriate basis for criminal liability.

Central England Trading Standards Authorities (CETSA) and West Midlands Region County Chief Environmental Health Officers Group

1.1258 Except in cases that involve fraud, it is very difficult to prove consent, connivance or even neglect by a director to a standard that most local authority lawyers would accept makes the person culpable. Hence, these provisions are seldom used. On this basis, we believe the principles behind these provisions are probably quite reasonable. In fraud cases it is clear that action against a director is appropriate.

1.1259 Q3: "negligently failing to prevent" is broadly the same test as "neglect" in some existing legislation. We agree that this is a more appropriately worded offence than the director being guilty of the primary offence and would accept that it could replace existing "neglect" equivalent provisions.

1.1260 Q4: seems to be similar to question 3. We agree that the wording of this offence (failing to prevent) would be more appropriate in many cases than if the owner of the business were to be prosecuted for the primary offence.

Ivan Krolick

1.1261 Yes. However, I'm not sure that the situation would arise. If the person consents or connives at the commission of an offence, then negligence is irrelevant. Section 285 Copyright, Designs and Patents Act 1988 makes express provision for the criminal liability of partners. Where a partnership commits a relevant offence, all partners are criminally liable with the partnership, except for any partner who proves that he was ignorant of the commission of the offence, or who tried to prevent it from occurring. It is also a moot point whether the proposal should apply to a criminal offence which has negligence as an element.

1.1262 Q 3: No, unless the offence is one in which negligence is an element. Unless there are particular circumstances which require it, and express provision is made in the statute creating the offence, the criminal law should not punish a person who negligently fails to prevent an offence. Moreover there is no reason to distinguish a company from a partnership or a sole trader who employs others. In principle. why should the director of a company be criminally liable for failing to prevent the commission of an offence, whereas the same person (who carried out the same business, but under his own name) would not be criminally liable? And if the suggestion was extended to all employers, why should it not extend to any person who has control of others or is in a position to prevent a crime?

1.1263 Q 4: As drafted the suggested replacement offence appears to be an absolute offence, and I cannot see any difference between this and the doctrine of delegation. I can see a situation where the person wishes to divest himself of responsibility by delegating his legal responsibilities to a person who he knows to be inadequate. I suspect that this is one of those situations where individual statutes can make express provision for the license holder (or whatever) to remain liable for any acts of a person to whom he negligently delegates the responsibility of ensuring that the statutory provision is complied with. The negligence can be held to be in respect of the choice of person or the manner of delegation.

CBI

1.1264 We broadly agree. This approach is consistent with an approach to liability being based on knowledge or recklessness, and not negligence, which we welcome.

1.1265 Q3: No. A test of knowledge or recklessness as discussed elsewhere is more appropriate and should be the basis of any criminal liability, and not negligence.

1.1266 Also offences involving positive obligations on a person, including omission to do something he should have done (if relevant and appropriate in a particular case or circumstance) are strongly preferred to offences of failure to prevent something, when a failure to prevent something could wholly or partially to a material extent be out of that person's control.

1.1267 A director's duties are owed to the company of which he is the director. If the director has been negligent in performing his duties to the company, that should be a matter for the company to pursue with the director, and should not normally be a matter for the criminal law.

1.1268 Q4: It may be appropriate that there should be criminal liability in the circumstances when the delegation doctrine applies, such as when a clearly unsuitable person is placed in charge of something by his principal or employer.

1.1269 However the criminal offence is better framed in ways other than a failure to prevent something, to something imposing obligations, and a requirement for knowledge or recklessness.

East of England Trading Standards Association

1.1270 We do not consider that "neglect" should be removed in such circumstances. In our view the correct way of reflecting the difference in culpability is through a coherent sentencing policy.

1.1271 Q3: See response to proposal 16. However if the current offence of "neglect" were to be abolished then we consider that it should be replaced with the suggested offence.

1.1272 Q4: We do not agree with the suggested abolition of the doctrine of delegation, therefore we do not see the need for the creation of the suggested replacement offence.

Institute of Employment Rights

1.1273 There are some general principles that we wish to raise which are generally overlooked in the legal commentaries provided by the Law Commission. The general effect of the criminal law as it is applied to the corporation is to establish a *de facto* corporate veil. That is to say, in a way analogous to civil and corporate law, the corporation can effectively absorb criminal punishment, normally in the form of a fine, while its directors and senior managers are relatively rarely exposed to sanction. Previous research by the authors of this response has noted that between 1980 and 2004, eleven directors were convicted for manslaughter; of those, five were imprisoned, one received a community sentence and five were given suspended sentences; the average for those who were given custodial sentences approximated to two and a half years.[32]

1.1274 A situation where no 'omission' or 'failure to act' on the part of an individual can form the basis of criminal liability, in the absence of a positive legal duty on the part of the individual, remains a significant source of impunity for directors and senior managers. This rule is very significant in relation to directors because most allegations against them relate to their failures and omissions and not to their actions, while company directors have no legal duties to act in relation to the safety of their company. This is a legal anomaly that must be addressed and this should be prioritised by the Law Commission - as recognized in much of the debate around, and indeed the Home Office (2000) consultation on, the Law Commission's proposals on reforming the law of manslaughter in 1996.[33] The reputation of - and public confidence in - the criminal law is hardly likely to be enhanced if directors and senior company officers remain relatively unaccountable for their failures. For this reason, we are strongly opposed to proposal 16 because it merely perpetuates the high degree of impunity afforded to directors. We would support the premise established by question 3 as going some way towards addressing the problems highlighted above, although this should not be seen as a substitute for the development of a range of positive duties that could be placed upon directors and senior officers.

Local Government Regulation (LGR)

1.1275 We do not object to the proposal of introducing an offence of 'negligently failing to prevent' that offence. However, we would not consider it appropriate to lessen the existing penalties.

32 See Tombs, S and Whyte, D (2007) Safety Crimes, Collumpton: Willan.

33 Law Commission (1996) Legislating the Criminal Code: involuntary manslaughter. Report No. 237, London: HMSO.

1.1276 Trading Standards will consistently prosecute directors where it can be shown the offending of the Company would not have occurred if that particular director had done their job properly. In addition, many traders will form a limited company in order to limit their personal liability, yet, to all intents and purposes they are the limited company. In the event of the company becoming insolvent, the directors can still be prosecuted for criminal offences that have been committed by the company if the appropriate tests of consent or connivance, etc, are met. This therefore serves as an invaluable tool in the field of consumer protection and must be retained.

1.1277 Furthermore, where a director is found to set up limited companies and fold them only to re-emerge in the same trade – phoenix – to only be able to pursue the company would be impossible once it has been liquidated. Under these circumstances it is wholly appropriate to pursue the controlling minds of such companies and seek to ask the courts to ban individuals from being directors of companies.

1.1278 With regards to the doctrine of delegation, we consider that to abolish this and replace it with an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated will have no practical effect and will simply result in yet another offence being put onto the statute books. Traders, or businesses, who simply delegate their responsibilities to another person, have, in turn, a responsibility to ensure that delegation is properly carried out. Should that delegation not be properly managed and maintained, then if criminal offences subsequently occur in relation to the running of that business then all parties in the arrangement will have failed in their duties and should be liable to be dealt with accordingly.

1.1279 It would appear that the primary reason for the proposal is to remove social stigma in relation to individuals for offences committed by the company. We are of the opinion that it would be beneficial to detail specific legislation and to quantify the number of instances where such 'social stigma' may result in order to determine the most proportionate and effective method of removal (if required).

1.1280 We are of the opinion that the delegation doctrine should remain. However, we acknowledge that care is needed when having regard to the construction of the offence even where this would make the provision difficult to enforce.

1.1281 In some cases the more relevant question may be whether the elements required for the offence have been correctly identified having regard to the construction of the offence rather than should the delegation principle be applied.

1.1282 It would appear that the consultation proposal is based on the premise that it was not the intention of the legislature to extend criminal liability from consent and connivance to include negligence. Furthermore, that if it is accepted that a social stigma, in certain circumstances, may be attributed to an individual who is negligently liable for offences committed by a company, the consultation proposal is based on the view that this was not the intention of the legislature.

1.1283 Q3: We do not consider that "neglect" should be removed in such circumstances. In our view the correct way of reflecting the difference in culpability is through a coherent sentencing policy. However if the current offence of "neglect" were to be abolished then we consider that it should be replaced with the suggested offence.

1.1284 Q4: We do not agree with the suggested abolition of the doctrine of delegation, therefore we do not see the need for the creation of the suggested replacement offence.

QEB Hollis Whiteman Chambers

1.1285 Agree. We would also observe that consideration should be given to widening the scope of persons potentially liable. Large companies may delegate responsibilities to senior management who are not sufficiently senior to fall within the definition.

1.1286 Q3: yes; Q4: yes.

Residential Landlords Association

1.1287 The RLA agrees with this proposal. There needs to be some active involvement to personally criminalise a Director. We agree with the reasoning set out in paragraph 1.88. In response to question 4 we can see some logic in what is said but nevertheless we take the view that overall in the regulatory context in particular the criminal law needs to be reigned in; rather than creating new criminal offences.

RSPCA

1.1288 Offences by bodies corporate is already addressed at section 57 of the AWA where an officer of a body corporate can be convicted and punished for an offence committed by that body with his/her "consent or connivance" or attributable to his/her neglect. This is entirely appropriate and proper in relation to offences under the AWA.

Trading Standards North West (TSNW)

1.1289 We have 'neglect' within Trading Standards offences anyway. The examples appear to be mainly Health and Safety ones.

1.1290 Q3: It is neglect – do not see how that is different. This does not undermine what we currently have.

1.1291 Q4: Agreed. But there must be a requirement to ensure that X took appropriate steps to ensure compliance by Y.

Trading Standards South East Ltd

1.1292 TSSE is firmly of the view that the situation with regards to consent and connivance, neglect, etc and the doctrine of delegation must remain as it currently is in order to provide the level of protection afforded to consumers that they currently enjoy. Trading Standards will consistently prosecute directors where it can be shown the offending of the Company would not have occurred if that particular director had done their job properly. In addition, many traders will form a limited company in order to limit their personal liability, yet, to all intents and purposes they are the limited company. In the event of the company becoming insolvent, the directors can still be prosecuted for criminal offences that have been committed by the company if the appropriate tests of consent or connivance,etc, are met. It is the view of TSSE that this serves as an invaluable tool in the field of consumer protection and must be retained.

1.1293 Furthermore, where a director is found to set up limited companies and fold them only to re-emerge in the same trade – phoenix – to only be able to pursue the company would be impossible once it has been liquidated. Under these circumstances it is wholly appropriate to pursue the controlling minds of such companies and seek to ask the courts to ban individuals from being directors of companies.

1.1294 With regards to the doctrine of delegation, TSSE is of the opinion that to abolish this and replace it with an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated will have no practical effect and will simply result in yet another offence being put onto the statute books. Traders, or businesses, who simply delegate their responsibilities to another person have, in turn, a responsibility to ensure that delegation is properly carried out. Should that delegation not be properly managed and maintained, then if criminal offences subsequently occur in relation to the running of that business then all parties in the arrangement will have failed in their duties and should be liable to be dealt with accordingly.

OFT

1.1295 We do not believe that directors and equivalent officers should be able to escape liability for the actions of their companies when they had no knowledge of the offence in circumstances where that lack of knowledge or the commission of the offence arises from their own negligence. The Money Laundering Regulations and other consumer protection legislation provide for liability in these circumstances.

HSE

1.1296 We are opposed to this proposal. Section 37 HSWA explicitly extends liability to a director, manager, secretary or similar officer for neglect as well as consent or connivance. Removing “neglect” would leave little to address wilful blindness of those in the company whose actions inform the actions of the company. Without a neglect provision, there is no deterrent where Directors may deliberately fail to inform themselves of facts which they should be informing themselves, to avoid a charge of consent or connivance. HSE encourages strong leadership in organisations. This is essential to achieving health and safety outcomes. Reducing duties on individual directors would be detrimental, as it is by active engagement at Board level, visibility in risk management of their businesses, planning and monitoring performance, that directors have significant influence on behaviour and attitude in the workplace.

1.1297 Q3: HSWA already addre4sses this proposal as currently drafted with the wording provided for HSWA s37. Retaining the current wording would meet this proposal.

1.1298 Q$: As par to the consideration of whether the standard reached by the employer met that which would be expected, HSE would consider what it was reasonable for the business to have done in the circumstances where a task had been delegated to someone within the business. For example, where an employee has received training and instruction, is competent, has been supervised appropriately with work monitored where appropriate, and then fails to act in a manner that is safe, thus fiving risk to risk, HSE would, dependent upon the evidence available of what steps the employer had taken, look to potential breaches of HSWA s7. However, duties themselves cannot be delegated under HSWA. A further point is that under EU law duties are generally owed by employers and could not be delegated away as is the employer who owes the duty.

Chris Williamson MP

1.1299 Should be solidified. If a director has knowledge of criminal activity he should be criminally liable for that activity if he took no steps to prevent the criminal actions of his partners or employees.

1.1300 The delegation doctrine should be limited. If the director has to mens rea then he should not be made to be criminally liable. This is too harsh a punishment for small business owners who are reckless or at worst negligent with regards the choice of who to entrust their businesses to.

Kiron Reid, Liverpool Law School

1.1301 Perhaps negligence could act as a deterrent – if directors *know* about the offences. I do not like gross negligence as a concept but if such offences were created then perhaps gross negligence as clarified by *Misra*[34] could work as the fault element? It is possible thought that negligence itself is a clearer concept for courts to work with and sets the level for liability at an appropriate point where thought necessary.

1.1302 Question 3. This type of offence is outside of my knowledge but I put forward a couple of brief points for discussion. Generally such offences should not be the norm. They should be used only for specific problems and if the potential harm is serious enough to merit – possibly for health and safety, fraud, money laundering or (though not relevant for this consultation) complicity in violence even. The underlying aim, to therefore drive up standards, is a laudable one.

1.1303 Question 4. I agree in principle but here, unlike the above, it is much more reasonable, in principle, that the owner or operator be liable on a negligence basis. After all they have chosen to delegate running the business. The penalty should be able to reflect serious cases that are more akin to complicity or wilful blindness, although perhaps these are already covered by your proposals or the scope of the existing law. I agree with the reasoning at the end of para. 1.90.[35]

Chamber of Shipping

1.1304 We agree with the proposition that there should not be a separate offence of neglect by a director or other officer. This could lead to a situation where, in the event of corporate liability but with insufficient evidence of consent or connivance, directors will alternatively be at risk of prosecution for neglect. This would be unsatisfactory since directors would have to show absence of knowledge and, effectively, prove a negative which is a difficult burden to discharge and handicapped by the hindsight evidence likely to be produced by the prosecution.

1.1305 Q3: In line with our comments on Proposal 16, we would not support an offence of "negligently failing to prevent [an] offence".

1.1306 Q4: This is likely to have an impact only on the very smallest undertakings. Nevertheless, we would agree that, even if there were sound reasons in the past for an office or licence holder to be liable for an offence committed by an appointed manager, this is no longer appropriate. The suggested new offence of "failing to prevent the commission of an offence" therefore appears to have merit.

34 [2005] Crim LR 234, CA.

35 The principle of "extensive construction" (where servant's act regarded in law as that of master) – well covered by Smith & Hogan, 11 ed. p. 180-1 – is not mentioned. It may not be relevant to this area. I would apply the same principle there. However that may be too easy for the owner / manager of a business to avoid then by absenting themselves from a premises and simply leaving instructions to comply with the rules.

Michelle Welsh, Monash University

1.1307 This recommendation is supported by responsive regulation theory. This theory, which is represented graphically by the pyramid model, was developed and expanded by John Braithwaite and Ian Ayres.[36] Responsive regulation theory relies on the premise that the actions of individuals will be motivated by different factors and therefore, regulatory agencies dealing with these individuals will need to have a range of enforcement mechanisms at their disposal. Those enforcement mechanisms should range in severity from persuasive techniques to severe punitive sanctions.[37] Ayres and Braithwaite argue that compliance is most likely to be achieved when a regulatory agency is able to display an explicit enforcement pyramid that contains a variety of enforcement measures that escalate in severity and are able to be employed in proportion to the nature of the contravention that has been committed.[38]

1.1308 Regulatory agencies who utilise the range of sanctions available to them in a manner envisaged by responsive regulation theory will consider whether or not the less severe enforcement mechanisms at their disposal provide an appropriate regulatory response prior to moving up the enforcement pyramid and considering the more severe enforcement options. The number of enforcement activities undertaken by the agency should decrease in accordance with the severity of the sanction sought. According to responsive regulation, criminal sanctions will be positioned above civil penalties in the enforcement pyramid. It follows that, if the regulator utilises civil penalties and criminal sanctions in a manner envisaged by responsive regulation, it will consider whether or not a civil penalty application will provide an appropriate regulatory response prior to commencing a criminal prosecution in most cases. It also follows that a regulator will issue more civil penalty applications than criminal prosecutions in relation to the same types of contraventions. For a discussion of responsive regulation theory in the context of overlapping civil penalty and criminal enforcement regimes see Michelle Welsh, 'Civil penalties and strategic regulation theory: the gap between theory and practice' (2009) 33(3) *Melbourne University Law Review* 908.

36 See for example see John Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (1985) and Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992).

37 Ibid, 24.

38 Ibid, 35.

1.1309 Care must be taken if the intention that underlies proposal 6 is that regulators who are provided with overlapping civil penalties and criminal sanctions will use those enforcement regimes in a manner envisaged by responsive regulation theory. It should not be assumed that this will be the case. This issue was examined in the empirical study undertaken by the author. The civil penalty regime contained in Part 9.4B *Corporations Act 2001*(Cth) was designed to provide the regulator with an enforcement regime that complied with responsive regulation theory.[39] The empirical study examined ASIC's use of the civil penalty regime for the purpose of determining whether or not it utilised the regime in a manner envisaged by responsive regulation. The examination was limited to a consideration of criminal and civil penalty applications issued in relation to alleged contraventions of the directors' duties contained in *Corporations Act 2001* (Cth) ss 181, 182 and 183. These provisions were selected because they fall into the first category of civil penalty provisions and civil penalty applications and criminal prosecutions are available for their enforcement.

1.1310 If ASIC utilised these overlapping regimes in accordance with responsive regulation theory two consequences would follow. First, prior to issuing a criminal prosecution ASIC would consider whether a civil penalty application provided an adequate regulatory response and secondly, more civil penalty applications than criminal prosecutions would be issued in relation to the same types of contraventions. Neither of these events has occurred. The empirical study revealed that in all cases a criminal prosecution is considered and ruled out before a civil penalty application is considered. In situations where ASIC had the choice of criminal sanctions or civil penalty applications ASIC commenced criminal prosecutions in the vast majority of cases. The process of determining whether to institute a criminal prosecution or a civil penalty application involves consultation with the Commonwealth Director of Public Prosecutions ('DPP').[40]

1.1311 ASIC commenced court based enforcement actions alleging a contravention of the directors' duty provisions on 88 occasions between 1 July 2001 and 30 June 2009. ASIC had the choice of a criminal prosecution or a civil penalty application in all of those cases. Eighty-Five criminal prosecutions and three civil penalty applications were commenced. This is not what would have been expected had the civil penalty regime been utilised in a manner envisaged by responsive regulation.

39 George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties'(1999) 22 (2) University of New South Wales Law Journal 417, 425, ALRC, above n 7 [2.60] and Michael Gething, 'Do we really need Criminal and Civil Penalties for Contraventions of Directors' Duties?' (1996) 24 Australian Business Law Review 375, 379-80.

40 An explanation of the processes and procedures followed by ASIC and the DPP is contained in Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' above n 1.

1.1312 The finding of the empirical study and an explanation of those findings are reported in Michelle Welsh, 'Civil penalties and strategic regulation theory: the gap between theory and practice' (2009) 33(3) *Melbourne University Law Review* 908-33 and Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company and Securities Law Journal* 370.

1.1313 It would be a mistake for legislatures to assume that the introduction of overlapping criminal sanctions and civil penalties will automatically result in a reduction in the use of criminal sanctions for regulatory offences. If overlapping civil penalties and criminal sanctions are introduced with the intention that regulators will utilise them in a manner envisaged by responsive regulation theory then the provisions should be drafted in such a way as to encourage regulators to do this. One way of attempting to ensure that this occurs is for legislatures to direct regulators that they must consider whether a civil penalty application provides an adequate regulatory response prior to considering a criminal prosecution. In order to ensure that criminal prosecutions are reduced it might be necessary to repeal criminal sanctions for those regulatory contraventions for which civil penalties have been introduced. If these regulatory contraventions occur, a civil penalty application would be the most severe enforcement action that could be instigated by the regulator. An example of such a provision under the Australian civil penalty regime is the statutory duty of care contained in s180(1) *Corporations Act 2001* (Cth).[41]

41 ASIC has issued many successful civil penalty applications alleging contraventions of this section. See Michelle Welsh, 'Civil penalties and strategic regulation theory: the gap between theory and practice' above n 1.

The Law Society

1.1314 We agree with this proposal. One of the difficulties here is what action by a director amounts to consent or connivance? The case law seems to suggest that there is presently a differing approach depending on the particular offence and the distinctions between consent, connivance and neglect are not clear cut. In some cases, it seems that consent may be established by inference - where the director knew the relevant facts and turned a blind eye. If it were clear that an individual must know that wrongdoing is taking place or will do so, to be shown to be consenting or conniving, that would be very helpful. However, that may not go far enough and it may also be necessary to make it clear that an offence cannot be committed unless the director is able to prevent the offence from taking place. There will be cases where a director will be aware of what is proposed but will be unable to prevent it taking place. It would be helpful to make it clear that consent or connivance will not be established just because a director participates in a board meeting where a decision is taken. Directors will be concerned to understand whether, to show they did not consent or connive at an offence, it is enough to show that they voiced their opposition, even if this is not recorded in the minutes (typically minutes only record the decision, which is usually taken on a majority basis, and not anyone who dissented and a director may not be able to insist on how the minutes are recorded). Directors may also wish to understand whether they must resign in order to show they did not consent or connive. A director may feel that it would be better not to do this to try to protect the shareholders' interests. Another grey area is the extent to which directors (particularly non-executive directors) can rely on information provided to them.

1.1315 Q2: We feel strongly that a director should not be liable for negligently failing to prevent the commission of an offence by the company. Liability should only be imposed if the director could have taken action to prevent the commission of an offence and did not do so. As explained above, it is not always clear what action a director can take to prevent a company committing an offence. We do not think mere awareness that an offence will be committed should be a ground for liability as a single director may not be able to prevent the conduct.

1.1316 Q4: We are not entirely clear how the delegation principle applies and how it applies to companies. We do not think criminal liability should be imposed for failing to prevent an offence being committed by someone to whom the running of the business has been delegated. If someone has delegated to a person who appears to be suitable and has appropriate procedures in place to check if the delegation is working appropriately, liability should not be imposed merely because the person to whom the delegation was made committed an offence. We do not think the argument that the stigma attaching to such an offence would be less is a good one.

1.1317 We note that there are also other general criminal law offences, such as conspiracy in the case of a criminal agreement, which could also be used to prosecute a person who fails to prevent an offence by someone to whom the business has been delegated, where there is a positive agreement.

Financial Services and Markets Legislation City Liaison Group

1.1318 We support this proposal.

1.1319 Q3: We do not agree that an individual director should be held criminally liable for failing to prevent an offence committed by the company. Directors can already be held responsible under the Directors Disqualification Act 1986. However, we recognise there may be potential problems to such powers in relation to equivalent officers such as partners in a partnership and member of a limited liability partnership.

1.1320 Q4: We do not support the suggestion.

Judges of the Court of Session

1.1321 We agree.

1.1322 Q1: We are of the view that this may be appropriate.

1.1323 Q4: Yes, although some attention may require to be given to the appropriate mens rea of the replacement offence.

Kingsley Napley LLP

1.1324 There are a number of offences which can be committed by companies for which directors can be liable if committed with the directors' consent, connivance *or neglect*. Section 23 of the Private Security Industry Act 2001 is an example.

1.1325 The common law is well established that the director of a company is not under a general duty to exercise some degree of control over the company's affairs, to acquaint himself with all the details of running a company or to supervise the running of the company or his co-directors. Therefore, neglect requires more than proof of a simple failure to see that the law is observed. It requires the identification of a particular duty falling to an individual director to undertake a particular act and their failure to do so (*Huckerby v Elliot* 1 All ER 189 DC).

1.1326 Within these common law boundaries, criminally culpable offences should arise in circumstances where a director fails to act to prevent an offence being committed. When compared against "connivance", defined as being "well aware of what is going on … but letting it continue and saying nothing about it," there are circumstances in which failing to discharge a particular duty may in fact give rise to a greater degree of moral culpability. Numerous examples arise within the context of health and safety law, whereby the failure to observe particular obligations upon specific director may result in serious injury or loss of life.

1.1327 Q3: As indicated above, it is believed that there are circumstances in which this should amount to criminal conduct although whether or not this is a separate offence does not seem important, other than to the extent that it attracts different maximum penalties. We consider that director liability for the commission of an offence by connivance or neglect do not represent different levels of severity in general but rather, the gravity of the offending will depend on the specific circumstances of the offences. In these circumstances, it would not seem sensible to create a different offence with a separate maximum sentence solely for offences committed by negligence.

1.1328 Q4: The example given in the consultation paper is a compelling illustration of the difficulties within the doctrine of delegation and it is agreed that the culpability of the licensor and the licenses in these circumstances should be reflected in separate offences. A new offence of "failing to prevent an offence being committed" would need to be very carefully considered. In circumstances where the licensor themselves will be deterred from committing the offence by reason for their own liability, it seems that the licensor's obligations should only extend to firstly, undertaking due diligence to ensure that no offending behaviour takes place and secondly, upon learning that offending is taking place, taking steps to prevent that behaviour. It is agreed that an individual's liability arising from their responsibility for another's actions must be based on subjective knowledge rather than "reasonable suspicion".

Criminal Bar Association and Bar Council

1.1329 The CP rightly identifies how the wording in s18(1) Theft Act 1968 of providing liability for a company's offence, "where it is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate or to have been attributable to neglect on his part" appears in a number of statutes. It does not identify in this regard its long history (not least in the Finance Act 1966, s17 of the Fire Precautions Act 1971, s87 Control of Pollution Act 1974, s37 HSWA 1974 and s 196(1) of the Banking Act 1987). Such a similarly worded provision does have a very long statutory history and where the CP discusses the ambit of "consent and connivance" it notes "The matter has not been judicially determined".

1.1330 The five provisions cited in the paragraph above have been judicially considered, most recently in respect of s37 of HSWA by Latham LJ, in the Court of Appeal in *R v P* [2007] All ER (D) 173 (Jul), in a judgment cited with approval in the speech of Lord Hope in *Chargot*, when considering the very same provision. We set out a summary of the position below.

1.1331 In *Att-Gen's Reference (No 1 of 1995)* [1996] 2 CR App R 320 the Court of Appeal was asked to rule upon what state of mind was required to be proved against a director to show "consent", pursuant to the Banking Act 1987 s 96(1), in relation to a strict liability offence committed by a company contrary to the Banking Act 1987 s 3.The Court concluded that a director must be proved to have known the material facts which constituted the offence by the company and to have agreed to its conduct of its business on the basis of those facts[17]. The fact that a director may be ignorant that the conduct of the business in that way will involve a breach of the law can be no defence.

1.1332 In *Huckerby v Elliot* [1970] 1 All ER 189 (DC), Ashworth J commented in passing that the formulation of connivance as a state of mind in which a director is "well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it" (at 193 to 194), was one with which he did not disagree.

1.1333 In that case, the Court of Appeal was concerned with a prosecution in relation to failure to hold the requisite gaming licence under the Finance Act 1966, which contained a provision similarly worded to the other "consent and connivance" provisions. The appellant, a director of the company, was charged with an offence against the Finance Act 1966 s305(3), in that the offence was attributable to her neglect.

1.1334 Lord Parker CJ stated that a director of a company is not under a general duty to exercise some degree of control over the company's affairs, nor to acquaint himself with all the details of the running of the company. Nor is a director under a duty to supervise the running of the company or his co-directors. Lord Parker CJ quoted the judgment of Romer J in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 497 at 428 to 430, where it was held that amongst other things, it is perfectly proper for a director to leave matters to another director or to an official of the company, and that he is under no obligation to test the accuracy of anything that he is told by such a person, or even to make certain that he is complying with the law.

1.1335 The decision demonstrates that "neglect" requires proof of more than a mere failure to see that the law is observed and requires the identification of a duty or responsibility resting upon an individual to do a specific act and failure so to do.

1.1336 In the Scottish Court of Judiciary decision in *Wotherspoon v HM Advocate* 1978 JC 74, the managing director of a company had been convicted together with the company of health and safety offences relating to machinery guarding. The judgment of the Court (which was approved by Lord Hope in *Chargot*) held that, in considering in a given case whether there has been neglect within the meaning of HSWA 1974 s37(1) on the part of a particular director or other particular officer charged, the search must be to discover whether the accused has failed to take some steps to prevent the commission of an offence by the corporation to which he belongs if the taking of those steps either expressly falls or should be held to fall within the scope of the functions of the office which he holds.

1.1337 However, the court added: "In all cases accordingly the functions of the office of a person charged with a contravention of section 37(1) will be a highly relevant consideration for any Judge or jury and the question whether there was on his part, as the holder of his particular office, a failure to take a step which he could and should have taken will fall to be answered in light of the whole circumstances of the case including his state of knowledge of the need for action, or the existence of a state of fact requiring action to be taken of which he ought to have been aware." (*Wotherspoon v HM Advocate* 1978 JC 74 at 78).

1.1338 In *R v P and another* ([2007] All ER (D) 173 (Jul) the Court of Appeal was concerned with a preliminary ruling of a judge upon the meaning of neglect in s 37 HSWA in a trial where a director of a company was charged as co-defendant to the company. Latham LJ, in a judgment approved by the House of Lords in *Chargot*[25], endorsed the approach set out in *Wotherspoon v H M Advocate*, and rejected the notion that neglect in s37 amounted to "wilful neglect" and thus required either actual knowledge by the director of the material facts of a company's breach or whether the defendant had "turned a blind eye". To so require, would equate the test of neglect with that to be applied where the allegation was consent or connivance, whereas Parliament had chosen to apply a distinction between the words consent, connivance, and neglect. The question was whether, if there had not been actual knowledge of the relevant state of facts, nevertheless the officer of the company should have, by reason of the surrounding circumstances, been put on enquiry.

1.1339 The Court stressed how the extent of any company officer's duty would depend on the evidence in every case and endorsed the judgement in *Wotherspoon* quoted above. Latham LJ described how the word "neglect" in its natural meaning presupposed the existence of some obligation or duty on the part of the person charged with neglect.

1.1340 Finally, in relation to the ambit of the persons "caught" by such provisions, in *Boal* (1992) 95 Cr App R 272 (a Court of Appeal case concerning the provision in the Fire Precautions Act 1971), Simon Brown LJ, having reviewed earlier authorities concerned with similar statutory provisions, held that the intention of the section was to fix the criminal liability only on those who were in a position of real authority: the decision-makers within the company who had both the power and responsibility to decide corporate policy and strategy (at 276), Its purpose was to catch those responsible for putting proper procedures in place; "it was not meant to strike at underlings" (at 276).

1.1341 The Court cited with approval the judgment of Lord Denning in *Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd* [1969] 3 All ER 1065 and in particular a passage at p 1069:The word "manager" means a person who is managing the affairs of the company as a whole. The word "officer" has a similar connotation … the only relevant "officer" here is an officer who is a "manager". In this context it means a person who is managing in a governing role the affairs of the company itself" (at 1069).

1.1342 In *Woodhouse v Walsall MBC* [1994] 1 BCLC 435 the Divisional Court was concerned with the identical provision in the Control of Pollution Act 1974 s87. The Court confirmed that whether a person came within the ambit of someone who is managing the affairs of the company was a question of fact[34]; but stressed the importance of applying the full words of Simon Brown LJ in *R v Boal* (1992) 95 Cr App R 272, which were the proper test. That test was whether such a person was in a position of "real authority", and that phrase meant: "The decision makers within the company who have both the power and the responsibility to decide corporate policy and strategy" (at 443).

1.1343 We have set these matters out in order for our response to this part of the CP to be understood, which is as follows:

> The “consent, connivance or neglect" provision has been uniformly interpreted across criminal statutes, particularly in the context of regulatory offences by companies. In no statute does any reverse burden of proof apply to such a provision. Consent requires proof against a director of knowledge of the material facts that amount to the company’s offence but not that such a state of affairs amounts to an offence
>
> Directors do not owe a free-standing duty to ensure that the company does not commit an offence. A director owes only the fiduciary duties to the company, to act honestly and bone fide, and under s 172 Companies Act 2006 "to promote the success of the company for the benefit of its members as a whole". A director owes no duty of care to any person in respect of how the company conducts its business simply by holding the office of director.
>
> “Neglect" in the sense used in these provisions requires proof of a responsibility for the relevant conduct or state of affairs or involvement in the same; the provisions require the corporate offence to be in some way attributable to such a director’s neglect.
>
> Despite the apparent ambit of those caught by such provisions, the courts have consistently interpreted such provisions as limited to those directors or very senior managers effectively within the identification doctrine.
>
> The three bases of liability, “consent", “connivance" and “neglect are often particularised in one count as alternatives (though not mutually exclusive). This is akin to „knowledge and belief" in the offence of theft. Splitting neglect as a true alternative would lead to a multiplicity of unnecessary counts on indictments.

1.1344 The true threshold of criminal neglect pursuant to these provisions, as set out above, is higher than is suggested in the CP. The proposed new provision of “negligently failing to prevent" a company offence, arguably, is of the most uncertain and nebulous ambit: beyond corporate offences concerned with dishonesty or conduct not in the interests of the company’s members, it is difficult to envisage what duty (and owed to whom) a director could neglect so as to fail to prevent an offence.

1.1345 *Question 4:* We doubt whether the doctrine of delegation, as set out in *Allen v Whitehead* [1930] 1 KB 211 remains relevant to any offence. It appears that it was last relied upon in relation to offences under the, now repealed, Licensing Act 1964. The Licensing Act 2003, in Part 7, provides for various offences, none of which closely follow those in the 1964 Act. The 2003 offences appear drafted in a way either that requires personal knowledge or recklessness (and can be committed by any person, not just the licensee); or to include a due diligence defence (s 139).

1.1346 A different concept is that of the personal duty which cannot be delegated. Health and safety duties are such personal duties, where the dutyholder remains liable unless all that was reasonably practicable was done to ensure safety, either by the dutyholder or on his behalf.

1.1347 Lord Hoffman described in the single speech in *Associated Octel*, in relation to the employer's general duty, which, "is not concerned with vicarious liability. It imposes a duty upon the employer himself. That duty is defined by reference to a certain kind of activity, namely, the conduct by the employer of his undertaking. It is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it.

1.1348 How such a personal duty is discharged is different to the operation of vicarious liability and the operation of the doctrine of delegation. Again, Lord Hoffman described in relation to the employer's duty to conduct his undertaking „in a way which, subject to reasonable practicability, does not create risks to people's health and safety. If, therefore, the employer engages an independent contractor to do work which forms part of the conduct of the employer's undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. He cannot, having omitted to do so, say that he was not in a position to exercise any control. ….the question of whether an employer may leave an independent contractor to do the work as he thinks fit depends upon whether having the work done forms part of the employer's conduct of his undertaking. If it does, he owes a duty under s 3(1) to ensure that it is done without risk--subject, of course, to reasonable practicability, which may limit the extent to which the employer can supervise the activities of a specialist independent contractor."

1.1349 We see no need for a new statutory provision to replace the doctrine of delegation.