

Corporate Criminal Liability

Summary of the
options paper



**Law
Commission**
Reforming the law

Introduction

Corporations, and other “non-natural persons”,¹ have a distinct legal personality separate from their owners, officers and members. As such, corporations can be subject to criminal and civil liability.

In the year to September 2020, there were over 5,000 convictions of non-natural persons. Many of these were for offences, such as breaches of environmental or trading regulations, which are created with corporations in mind. However, corporations can also commit offences such as fraud which have typically been created with natural persons in mind.

The difficulty for the law is that many of these criminal offences require a particular state of mind (or “mental element”) such as an intention to do the act or to bring about some result, knowledge of certain matters, recklessness or dishonesty. The question that then arises when a corporation is prosecuted is whose state of mind is to be attributed to the corporation?

The general rule of criminal liability applied to corporations is the “identification doctrine”. This provides that a corporation will generally only be liable for the conduct

of a person who had the status and authority to constitute the body’s “directing mind and will”.²

There are exceptions to the application of this doctrine – for instance, in the case of offences of strict liability, which do not have a mental element, the courts are often content to hold corporations liable for the conduct of their employees and agents. In respect of some other offences, the courts have held that applying the identification doctrine would make the law wholly ineffective against large corporations, and so Parliament must have intended the required mental state to be that of the person acting for the corporation at a more junior level.³

In some cases, Parliament has provided an alternative route to corporate criminal liability where an employee or agent of an organisation has committed a criminal offence intended to benefit the body or one of its clients. In particular, in recent years “failure to prevent” offences have been created in respect of bribery⁴ and the facilitation of tax evasion.⁵

¹ Other legal persons include limited liability partnerships, incorporated friendly societies, and bodies incorporated under statute or royal charter such as universities. Charities may be incorporated as charitable companies or charitable incorporated organisations. Trade unions have quasi-corporate status and may be the subject of criminal proceedings in their own name (Trade Union and Labour Relations (Consolidation) Act 1992, s 10).

² *Tesco v Natrass* [1971] UKHL 1 AC 153.

³ For instance, *Tesco v Brent LBC* [1993] 1 WLR 1037, 2 All ER 718.

⁴ Bribery Act 2010, s 7.

⁵ Criminal Finances Act 2017, ss 45-46.

The consultation

In November 2020, we were asked by the Government to review the law on corporate criminal liability. We were asked to consider “the challenges faced by the criminal justice system under the current law relating to corporate criminal liability”. We were asked to explore options for reform that would avoid “disproportionate burdens upon business.” Our remit included consideration of the suitability of the identification doctrine, the relationship between criminal and civil corporate liability, and other ways the criminal law can be used in relation to corporations.

The project has had a particular focus on economic crime, such as fraud, tax evasion, bribery or money laundering, because these are offences that are particularly likely to be committed in a corporate context. Companies remunerate and reward employees in order to align their employees’ personal interests with corporate objectives. However, this can also create incentives for employees to break the law with a view to benefitting the employer financially.

We have also examined the way in which directors and other senior officers of a corporation can be fixed with personal criminal liability where a corporation is convicted of a criminal offence and the director consented to or connived in the offending, or in some cases where it was simply attributable to their neglect.

We published our discussion paper considering the present law in these areas and possible approaches to reform in June 2021. In the discussion paper, we set out the law relating to several areas of corporate criminal liability, including the identification doctrine, and suggested possible ways of reforming the law. We launched a three-month public consultation on the 13 questions we asked in the discussion paper. Over the summer of 2021 we held a series of virtual round table consultation events. We received 45 written responses to our consultation.

In this options paper, we are not making recommendations, but detailing options for reform – and ruling some out. In chapters 2-7 we consider the identification doctrine and alternative methods of attribution. In chapter 8 we consider possible “failure to prevent” offences. In chapter 9, we consider directors’ individual liability under “consent or connivance” provisions. In chapter 10 we consider the options available when sentencing corporations.

In chapters 11-14 we consider various options for civil law measures to address criminal offending carried out on behalf of corporations. These options focus on administrative monetary penalty regimes, civil actions and disclosure and reporting regimes.

Attribution of criminal liability to corporations

According to the leading House of Lords decision in *Tesco v Nattrass*, the general rule for offences, at least for offences requiring a particular mental state, is that a corporation will only be guilty of an offence if a person representing its “directing mind and will”⁶ had the requisite mental state. This must be a person with the required “status and authority”.⁷ This would normally be members of the board of directors of the corporation, although in some circumstances, where there had been a “total delegation”⁸ to another person, that person might represent the directing mind and will of the corporation.

Prosecutors have generally therefore sought to find a director – or sometimes another senior officer, such as a chief executive⁹ – with the necessary mental state. However, in the case of *Barclays*,¹⁰ criminal courts applied a narrow reading of the “directing mind and will” rule in *Tesco v Nattrass*, finding that even a corporation’s managing director and financial director, acting jointly, might not constitute the corporation’s directing mind and will if they did not have authority to engage in the conduct in question.

Even before the judgments in *Barclays*, the identification doctrine had been criticised by some observers as being too narrowly focused, failing to reflect the way

corporations operate, and unfair – because it is easier to convict small businesses than large, complex organisations where the most senior managers and directors will often be further removed from criminal conduct carried out on behalf of the corporation.

In the paper we examine various alternative ways in which attribution to a corporate body might work, including:

- The doctrine of *respondeat superior* (“let the master answer”), under which the criminal acts of any employee can be attributed to the corporation, where they were committed in the course of their employment and with an intention to benefit the corporation.
- Models which enable a corporate body to be convicted on the basis of its “corporate culture” or systems. For instance, under Australian Commonwealth law, some fault elements – such as intent – can be attributed to a corporation on the basis that its corporate culture or policies and procedures encouraged or permitted commission of the offence by employees.
- Legislation in Canada and Australia allowing the acts and mental states of “senior managers” or “high managerial agents” to be attributed to a corporation.

⁶ *Tesco v Nattrass* [1972] AC 153.

⁷ *R v Andrews Weatherfoil* [1972] 1 WLR 118.

⁸ *Tesco v Nattrass* [1972] AC 153.

⁹ In many corporations the Chief Executive will be a member of the Board. However, for some corporations, the Chief Executive will sit outside the Board. In particular, this is usually the case for charities, because, with limited exceptions, the Board of Trustees cannot be remunerated.

¹⁰ *R v Barclays Plc* [2018] 5 WLUK 736 and *Serious Fraud Office v Barclays Plc* [2015] EWHC 3055 (QB), 11 WLUK 873.

Ultimately, we reject *respondeat superior* and approaches based on corporate culture. *Respondeat superior* would represent a fundamental change in corporate criminal liability, and in view of criticisms of the doctrine in the United States, lack of support from stakeholders and practical concerns about the lack of prosecutorial safeguards, we could not recommend it as an alternative to the identification doctrine. We conclude that a corporate culture (or similar) approach, while interesting and potentially promising, could not be recommended as a model for wholesale reform of criminal liability.

The options we present are therefore:

1. Retention of the identification doctrine as at present.

2A. Allowing conduct to be attributed to a corporation if a member of the corporation's senior management engaged in, consented to, or connived in the offence. A member of senior management would be any person who plays a significant role in the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.¹¹

2B. As 2A, with the addition that the organisation's chief executive officer and chief financial officer would always be considered to be members of senior management.¹²

In the absence of reform to the identification doctrine itself, we conclude that the case for additional measures to tackle economic crime such as failure to prevent offences, would be even more compelling.

We also conclude that for crimes of negligence, it should be possible to convict on the basis that the corporation was collectively negligent, even if it is not possible to identify a natural person who was individually negligent (for instance, where nobody had been given the necessary responsibility).

¹¹ This option is based on the principles of liability under Canada's criminal code, but using terms and definitions from the law of England and Wales (in particular the Corporate Manslaughter and Corporate Homicide Act 2007).

¹² This is based on a provision in Canada's criminal code.

“Failure to prevent” offences

In the options paper we look at the existing “failure to prevent” offences and draw some conclusions about general principles that should normally apply if other “failure to prevent” offences are introduced. The existing offences of failure to prevent bribery¹³ and failure to prevent facilitation of tax evasion¹⁴ have some common features, but also important differences. Both provide that where an “associated person” such as an employee or agent commits a relevant offence, the corporation is guilty of an offence, unless it can prove a defence related to the prevention procedures it had in place. Both offences can apply where the underlying criminal conduct occurs overseas. In the case of bribery, the bribe must be intended to obtain or retain a business advantage for the corporation. In the case of tax evasion, the associated person need only be “acting in the capacity” of an associated person, reflecting the fact that often an employee who facilitates tax evasion will do so to benefit an organisation’s client – and the employer only indirectly.

We conclude that some general principles for future “failure to prevent” offences are appropriate:

- Organisations should only be liable if the conduct was undertaken by the employee or agent with a view to benefitting the organisation directly, or benefitting a person to whom the employee or agent was providing services on behalf of the organisation. The organisation could therefore be liable if the conduct was intended to benefit it indirectly by assisting a client (but not if the intention was to harm the organisation itself).
- Organisations should have a defence if they can prove they had in place such prevention procedures as were reasonable in the circumstances, or if they can prove that it was reasonable not to have any such procedures in place.
- There should be a requirement for the Government to publish guidance on what prevention procedures an organisation might put in place to prevent the offence, and the possibility of the Government publishing or approving sector-specific guidance.
- There should not be a presumption that the failure to prevent offence would extend to conduct carried out by employees or agents overseas. Any decision to make the offence extraterritorial should be considered in the context of the specific offence.

¹³ Bribery Act 2010, s 7.

¹⁴ Criminal Finances Act 2017, ss 45-46.

We do not consider that “failure to prevent” offences should be introduced simply because it is in practice difficult to prove substantive offences against corporations which are alleged to be actually complicit in offending. That is, they should not be introduced simply because it is believed that corporations are actually involved in encouraging or directing the commission of criminal offences but there is insufficient evidence of this to prosecute them. They should only be introduced if there is a good reason to expect corporations to have put in place reasonable prevention procedures.

We reject the idea of a general “failure to prevent crime” offence. There are categories of crime (such as sexual offences) where it is highly unlikely that an offence would be committed in the interests of the corporation or its clients, and other categories (such as environmental and health and safety offences) where corporate failures to prevent employees from committing an offence are already capable of being enforced against corporations. Accordingly, we conclude that there is a stronger case in principle for introducing “failure to prevent” offences in respect of economic crimes than other categories.

However, we conclude that a broad offence of “failure to prevent economic crime” would overlap with existing offences relating to bribery and facilitation of tax evasion. We were also concerned that in order to enable organisations to put reasonable prevention procedures in place, the list of offences should not be too broad. Accordingly, we conclude that if a “failure to prevent” offence is introduced it should, at least initially, be limited to failure to prevent fraud by an associated person such as an employee or agent.

3. An offence of failure to prevent fraud by an associated person.

This offence would be committed where an associated person (who might be an employee or agent) commits an offence of fraud with intent to benefit the corporation, or to benefit a person (which might include another corporation) to whom the employee or agent provides services on behalf of the corporation.

The offence would cover a number of fraud offences, but would not extend to conspiracies or attempts. This is because conspiracies can be founded on a mere agreement, while a person can be guilty of attempting to commit an offence if they take any action that is more than merely preparatory to committing the offence. We concluded that it would be reasonable to expect corporations to put in place procedures to prevent employees and agents from carrying out a fraud, including by detecting conspiracies and attempts, but it would be difficult for corporations to prevent employees and agents from merely agreeing or attempting to commit fraud.

There would be a defence where the organisation could prove that it had in place such prevention procedures as was reasonable in the circumstances, or that it was reasonable not to have any such procedures in place. There would be a requirement for the Government to publish guidance on the procedures that organisations might put in place to prevent employees and other connected persons from committing fraud.

We also put forward as options three other offences which were raised in the consultation process as types of offence for which a failure to prevent model might be appropriate:

4. Failure to prevent human rights abuses. This reform was proposed by a coalition of human rights and development charities, and is largely intended to address human rights abuses overseas. In deciding whether to take this option forward, a key issue for consideration would be whether the case for extraterritoriality had been made out.

5. Failure to prevent ill-treatment or neglect. This would replace the existing “care provider” offence in section 21 of the Criminal Justice and Courts Act 2015. In an exception to our general principle, there would not be a requirement to demonstrate that the conduct was intended to benefit (directly or indirectly) the corporate body.

6. Failure to prevent computer misuse. This reform has been proposed by the Criminal Law Reform Now Network. We conclude that any such offence would have to take account of the complex extraterritoriality provisions in the Computer Misuse Act 1990. We consider that this option should be considered as part of the Home Office’s current review of the Computer Misuse Act 1990 rather than as a standalone measure.

If any of these options were taken forward, further work and consultation would be necessary on the scope of the offences which the “failure to prevent” offence should cover.



Liability of directors and senior managers

Many instruments¹⁵ creating criminal offences provide that when a corporation is convicted of the offence, its directors, managers and other officers may also be convicted if they consented to or connived in the conduct. Often those instruments also provide that the director, etc., may be convicted if commission of the offence by the body corporate was attributable to the director's neglect.

We have found that these provisions are inconsistent, and while generally there seems to be an understanding that neglect liability is only appropriate where the instrument creates offences which can be committed on the basis of strict liability or negligence, this is not consistently applied. Moreover, it is typical for there to be a single provision dealing with directors' liability which covers all offences in the instrument, so where the instrument creates a mix of offences, some requiring a particular mental state, some of strict liability, the directors' liability provision will usually extend to neglect.

This means that individual directors can be personally convicted of an offence requiring a particular mental element, even where they did not have that mental element, and the actual commission of the offence was by another person.

We conclude that, in principle, directors etc, should not be personally criminally liable on the basis of neglect if the offence is one which requires proof of a particular mental state. Liability for directors on the basis of neglect should be restricted to offences of strict liability or negligence.

We also consider that where a "consent, connivance or neglect" provision is in an existing statute creating offences which require proof of fault greater than negligence, provision should be made to ensure that a director can only be prosecuted for an offence requiring that mental element, if they consented to or connived in its commission. This could be done by a general legislative measure or by CPS guidance.



¹⁵ These include Acts of Parliament and other legislative instruments such as statutory instruments.

Sentencing of non-natural persons

In general, the only penalty available to courts when sentencing non-natural persons is a fine. Some specific legislation provides for alternative measures for particular offences, such as requiring the corporation to publicise its conviction¹⁶ or undertake remedial action.¹⁷

We endorse the principles in the current sentencing guidelines relating to the imposition of financial penalties on corporate defendants.

We consider, but reject, the idea that courts should have the option of winding up a company upon conviction for a serious offence. There are already powers to enable the Secretary of State for Business to seek the dissolution of a company in the public interest, and these provide for a broad range of public interest considerations to be taken into account. The sentencing guidelines on financial penalties on corporate defendants acknowledge that in some cases it may be an acceptable outcome for a fine to be imposed where this will have the effect of putting the corporation out of business.¹⁸

We also think there is unlikely to be substantial benefit in giving courts a general power to impose remedial orders, given that these are only likely to be viable where there is a regulatory body to oversee compliance, and in these cases the regulator is likely to have its own powers to take monitoring and compliance action.

We did conclude that there was value in making publicity orders more widely available. We consider that this could be especially useful in circumstances where the offender is a public body or charity and where imposition of a large fine would have a detrimental impact on public services or beneficiaries. They may also be of particular value in cases of smaller enterprises with a local, but not national, reputation, given the constraints on the ability of local media to cover court cases.

7. Make publicity orders available in all cases where a non-natural person is convicted of an offence.

¹⁶ Corporate Manslaughter and Corporate Homicide Act 2007, s 10; Criminal Justice and Courts Act 2015, s 23.

¹⁷ Health and Safety at Work Act 1974, s 21.

¹⁸ See for instance, Sentencing Council (2015) Health and Safety Offences, Corporate Manslaughter and Food Safety Offences: Definitive Guideline.

Civil options

As part of our programme of consultation, a number of stakeholders suggested options under which corporations might be subject to civil procedures or requirements in relation to economic crime, including the imposition of administrative or civil penalties and requiring corporations to publish details of their anti-fraud policies.

There are several advantages to use of civil measures, including:

- It would avoid taking up the resources of the criminal justice system with cases that might be considered “regulatory”;
- An administratively imposed penalty might avoid some of the adverse consequences to a company of a criminal conviction, such as becoming ineligible to tender for public contracts in the UK and abroad. This might be appropriate where the decision makers did not act deliberately or dishonestly.

In chapter 11 we consider three options for the imposition of administrative penalties upon corporations. We consider:

- an approach based on the Financial Conduct Authority’s regulation of the financial services sector, under which there would be detailed obligations placed on corporations to prevent fraud, backed up by administrative penalties for non-compliance;
- a regime of general obligations, with flexibility as to how to comply, with administrative penalties for corporations which do not take reasonable measures to prevent fraud; and

- an approach based on amending the Regulatory Sanctions and Enforcement Act 2008 to allow the Crown Prosecution Service or Serious Fraud Office to impose penalties for failure to prevent fraud.

Of these, we conclude that only the second is a viable approach. We do not think it would be possible to introduce a system of detailed obligations applicable across all the sectors affected by economic crime. We conclude that amending the Regulatory Sanctions and Enforcement Act 2008 to apply it to offences created subsequently would be contrary to the spirit of that Act.

8. Introduction of a regime of administratively imposed monetary penalties. This could operate where a fraud is perpetrated by an associated person, which was intended to benefit the corporation. In such cases the corporation would be liable to pay a monetary penalty unless it can show it took reasonable precautions to prevent the wrongdoing.

However, we note that the Crown Prosecution Service (CPS) and Serious Fraud Office do not support this option. The CPS consider that this option, which would give the organisation a quasi-judicial function, would have resource and structural implications, while introducing administrative penalties in respect of fraud, which is a criminal offence, risks making the landscape for pursuing fraud unwieldy.

In chapter 12 we consider two possible options involving allowing authorities to bring civil actions in the courts. These are:

- introducing penalties for corporations which conduct themselves in a way likely to facilitate fraud by associated persons, based on features of Serious Crime Prevention Orders under the Serious Crime Act 2007; and
- introducing a statutory duty on corporations to take reasonable precautions to prevent fraud by associated persons, based on the USA's Financial Institutions Reform, Recovery and Enforcement Act 1989, section 951.

We also consider civil recovery orders under Part 5 of the Proceeds of Crime Act 2002 and the case for reform of the civil costs regime to ensure that concern about potential liability for the defendant's costs does not deter enforcement action against corporate bodies.

We conclude that enabling the High Court to impose penalties upon companies found to have conducted themselves in a way likely to facilitate fraud might have the advantage of avoiding the need to place issues of corporate compliance in front of a jury. Instead, the corporate defendant would have the benefit of a reasoned decision from a judge. Unlike a failure to prevent offence, there would be no need to show that a criminal offence had in fact been committed before the order could be obtained.

9. Civil actions in the High Court. This would be a regime based on Serious Crime Prevention Orders under the Serious Crime Act 2007, but involving a power to impose monetary penalties as well as punitive and preventative measures that the corporation would be required to take.

Finally, in chapter 13 we consider three possible models of placing obligations on larger corporations to disclose the measures they have put in place to prevent offending. These are based in turn on:

- the requirement on certain large corporations to report on steps taken to prevent modern slavery;
- requirements under the Companies Act 2006 for certain corporations to publish non-financial and sustainability information statements; and
- recent EU draft legislation concerning policy creation for human rights and environmental impacts.

Accordingly, we present two alternative options intended to encourage large corporations to institute anti-fraud measures by requiring disclosure of the steps that they are taking to prevent fraud by associated persons.

10A. A reporting requirement based on section 414CB of the Companies Act 2006 for public interest entities, requiring affected entities to report on anti-fraud procedures.

10B. A reporting requirement based on section 54 of the Modern Slavery Act 2015, requiring large corporations to report on their anti-fraud procedures.

Summary of options

1. Retention of the identification doctrine as at present.

2A. Allowing conduct to be attributed to a corporation if a member of its senior management engaged in, consented to, or connived in the offence. A member of senior management would be any person who plays a significant role in the making of decisions about how the whole or a substantial part of the organisation's activities are to be managed or organised, or the actual managing or organising of a substantial part of those activities.

2B. As 2A, with the addition that the organisation's chief executive officer and chief financial officer would always be considered to be members of its senior management.

3. An offence of failure to prevent fraud by an associated person. The offence would be committed where an associated person (who might be an employee or agent) commits an offence of fraud with intent to benefit the corporation, or to benefit another person to whom they provide services on behalf of the corporation.

4. An offence of failure to prevent human rights abuses.

5. An offence of failure to prevent ill-treatment or neglect.

6. An offence of failure to prevent computer misuse. If any of these options were taken forward, further work and consultation would be necessary on the scope of the offences.

7. Make publicity orders available in all cases where a non-natural person is convicted of an offence.

8. A regime of administratively imposed monetary penalties.

9. Civil actions in the High Court, based on Serious Crime Prevention Orders, but involving a power to impose monetary penalties.

10A. A reporting requirement based on section 414CB of the Companies Act 2006, requiring public interest entities to report on anti-fraud procedures.

10B. A reporting requirement based on section 54 of the Modern Slavery Act 2015, requiring large corporations to report on their anti-fraud procedures.

