

THE MAGISTRATES' ASSOCIATION

Response to Law Commission consultation paper 195, *Criminal Liability in Regulatory Contexts*

General response

Overall we are concerned that if many regulatory offences are decriminalised, larger companies in particular may not pay much heed to being penalised again and again. The sanction of going through the criminal courts and the attendant publicity can be a strong deterrent to companies. This is particularly so with the powerful world wide web. Offences, once publicised, are in the public arena for ever. Regulatory penalties presumably would be largely hidden from public view. We are also concerned that the size of the penalties will not be large enough to provide a deterrent to large companies.

As magistrates we wish to highlight the responsibility of the prosecution in particular to assist the court in sentencing by drawing attention to appropriate guidelines and guidance — this is the approach that the Association took when promoting the publication *Costing the Earth* on environmental offences.

Responses to specific proposals and questions

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

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

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

(a) in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or

(b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences.

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

Proposal 3: Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure) is likely to do as much to secure appropriate levels of punishment and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

In general, we agree. However, it should be noted that civil penalties are not necessarily at a lower level than criminal sentences and may be extremely inflexible. For example, — the introduction of regulations to enforce what is known as continuous licensing for motor vehicles, ie. that vehicles have either to be licensed for use on the road or a *Statutory Off-*

Road Notification made to the DVLA, which must be renewed annually. A registered keeper who fails to conform to this is first sent a reminder with a penalty of £80, reduced to £40 if paid promptly. The next stage of enforcement is an 'excise penalty' of £1000. This is a fixed sum, and if not paid has to be enforced by the courts, who have no power to reduce in line with the offender's means, and it is of course not at all a proportionate penalty in relation to other offences. It is such a draconian penalty that in practice the DVLA do not enforce it, after considerable protest from all sides when that was first attempted. It became law after the DVLA wrote the legislation (s31C Vehicle Excise and Regulation Act 1994), and the DCA, then in charge of criminal justice, failed to spot the flaw.

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

Agree.

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

Agree.

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

Agree.

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

Agree.

Proposal 8: Criminal offences should be created and (other than in relation to minor details) amended only through primary legislation. Putting aside factors such as whether the individual has previous convictions for other offences, and so on.

Agree strongly.

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

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.

Proposal 10: Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate. This means that the more remote the conduct criminalised

from harm done, and the less grave that harm, the more compelling the case for higher-level fault requirements such as dishonesty, intention, knowledge or recklessness.

This seems to reduce the importance of harm or potential harm in arriving at an appropriate decision. Harm should be the first consideration before considering conduct.

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

As long as a business which is being intentionally obstructive can fall foul of the Fraud Act 2006, then agree with this proposal.

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

This proposal does not mention harm or potential harm. It should.

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

This proposal will be helpful. It is too easy for an officer in a large company either to turn a blind eye to conduct or not to make proper enquiries of employees thereby possibly avoiding prosecution as one of the company's officers.

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

Agree.

Proposal 15: If proposal 14 is accepted, the defence of due diligence should take the form of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence. However, we recognise 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, we ask the following questions:

Agree.

Question 1: Were it to be introduced, should the due diligence defence take the stricter form already found in some statutes, namely, did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence?

Yes.

Question 2: If the power to apply a due diligence defence is introduced, should Parliament prevent or restrict its application to certain statutes, and if so which statutes?

No, there should be no restriction.

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

Disagree. If the company's offence is attributable to neglect on the part of an individual director, the directors should still be liable for the offence committed by the company.

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

Agree. This could be a useful provision.

Question 4: Should the doctrine of delegation be abolished, and replaced by an offence of failing to prevent an offence being committed

We would not want the doctrine of delegation to be abolished. If it is possible, the provision of an alternative offence of 'failing to prevent an offence being committed' could be useful addition.

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