Law Reform Committee

RESPONSE OF THE LAW REFORM COMMITTEE OF THE BAR COUNCIL AND OF THE CRIMINAL BAR ASSOCIATION TO THE LAW COMMISSION CONSULTATION PAPER 195

1. The Law Reform Committee of the Bar Council of England and Wales and the Criminal Bar Association welcome the opportunity to respond to the Law Commission Consultation Paper No. 195, Criminal Liability in Regulatory Contexts (the "Consultation Paper"), which sets outs a series of proposals upon which it is consulting. Those proposals are intended to fulfil the aims of introducing rationality and principle into the structure of the criminal law, especially when it is employed against business structures and to consider whether there should be introduced a statutory power for the courts to apply a 'due diligence' defence to all regulatory offences. The Law Commission have added three very specific issues connected with the topic;

   a. the scope of consent and connivance and directors' personal criminal liability;
   b. the status of the identification doctrine; and
   c. the status of the doctrine of delegation.

Conclusion

2. We broadly welcome the Law Commission's stated 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.

General principles: the limits of criminalisation

3. **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.**

4. Proposal 1 is said to be a suggested 'general statement of principle'. Our response requires that the two sentences comprising proposal 1 be separately considered.

5. **It should not be used as the primary means of promoting regulatory objectives:** the second part of the proposal, that criminal prosecution should not be used as the primary means of promoting regulatory objectives, appears uncontroversial. However, there is a powerful argument that, whilst not the primary means, nonetheless prosecution is an important means of promoting regulatory objectives, with **c**onviction for a regulatory offence providing public recognition of breach, publicity and deterrent support of a regulatory regime[1].

[1] The cartel offences introduced by the Enterprise Act 2002 are a good example. The OFT have made it clear that they consider the sanction of a criminal offence

6. The number of prosecutions for regulatory offences in the Magistrates' Courts and Crown Court appear to have remained relatively constant since 1997[2]. This is in spite of 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, namely health and safety and environmental; others that involve regular prosecution, namely trading standards, food/ hygiene/ consumer /fire safety/animal welfare/alcohol licensing; with other regimes rarely involving prosecution at all[3].

   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.

7. It is our submission that both these factors are relevant to a consideration of many of the proposals of the Law Commission. In the context of the second part of proposal 1, in our submission they underpin the importance of criminal prosecution as a means of promoting the objectives of some regulatory regimes, particularly health and safety and environmental.

8. **Only employing the criminal law to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in**

---

to be important in the context of what they describe as "*a particularly damaging form of anti-competitive behaviour*".

[2] Cited at para 1.26 of the Consultation Paper

[3] These areas coincide with the National enforcement priorities identified by the Rogers' Review available at http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file44604.pdf

seriously reprehensible conduct: the response to the first part of proposal 1, depends upon what is encompassed by the term 'seriously reprehensible conduct'.

9. If 'seriously reprehensible conduct' is limited to what the Consultation Paper describes as 'higher-level fault requirements such as dishonesty, intention, knowledge or recklessness'[4] 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).

10. In this regard, our response is developed in regard to Proposals 2, 10 and 11, which are related to this issue.

11. **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[5]**

12. Our response to Proposal 2 is that 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).

13. 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**".

---

[4] Cited at para 4.61 (Proposal 10) of the Consultation Paper

[5] The Consultation Paper here includes a footnote to this definition stating, "Putting aside factors such as whether the individual has previous convictions for other offences, and so on."

14. **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.**

15. Subject to the important caveats set out above 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.

General principles: avoiding pointless overlaps between offences

16. **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.**

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.

17. We respectfully agree with these proposals and the supporting paragraphs of the Consultation Paper.

General principles: structure and process

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

19. Paragraph 1.45 of the Consultation Paper states, in regard to this proposal: "Our discussion leads us to propose that the criminal law is best employed as a measure to target the worst examples of non-compliance, as when an offender has deliberately not complied with an obligation, or has made a fraudulent application for a grant, or the like."

20. Our response is to broadly agree with general principle of a hierarchy of

seriousness. We repeat how 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.

21. **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.**

22. This proposal 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*[6], 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.

23. 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.

24. There is an argument that all enforcing authorities should be required to not

---

[6] [1998] C.O.D. 373 DC

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.

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

26. Arguably the practical impact of adoption of this proposal could be paralysis of regulatory regimes. We also fear that the restriction introduced by this proposal would result in the criminal law being unable to respond effectively and quickly to a constantly changing regulatory environment. We invite consideration of the following.

27. The Health and Safety at Work etc Act 1974 (HSWA 1974) creates an offence, contrary to s 33(1)(c) of the Act, 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?

28. 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?

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

30. We respectfully agree. A potential model could be based on the provisions in the Regulatory Reform (Fire Safety) Order 2005 , (themselves based upon the appeal procedure to an Employment Tribunal against improvement and prohibition notices in HSWA 1974), that provide for appeal by way of complaint to a Magistrates' Court against enforcement notices.

31. **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.**

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

32. In summary, underpinning proposal 10 (and proposal 11) is the following argument taken from the Consultation Paper, paras 1.53 – 1.54:

"As a general rule, criminal offences created in regulatory contexts prohibit conduct that creates unnecessary and undesirable risks….. Conduct that poses an unjustified risk of harm may in many instances be very remote from harm done... the remoteness of an act that creates risk from the harm that may result provides a reason to include stringent fault requirements – such as intention or dishonesty – in the relevant offence, to avoid over extension of

the criminal law. That is the explanation for proposal 10. Proposal 11 ...provides an example of how this works, in the key area of information provision"

33. The description of 'unnecessary and undesirable risks' and 'unjustified risk of harm' we have understood to include the general duties under HSWA, (thus a risk arising from a failure to ensure safety in breach of an employer's duty under ss 2 and 3 of HSWA), and to include a risk of environmental harm arising from a breach of a statutory duty.

34. As a general rule it must be that 'conduct that poses an unjustified risk of harm' is the starting point for criminal liability: the term '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.

35. 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 (one extreme example is nuclear safety and the approach to risk in that regime).

36. 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'.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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 paragraphs 4.62 – 4.80 of the Consultation Paper 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'[7].

42. 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.

43. 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.

44. It appears that 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.

45. **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**

[7] Cited at para 4.79 of the Consultation Paper

clarity in the use of such elements when the offence in question is to be used by departments and agencies for a similar purpose.

46. 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, we respectfully agree.

Doctrines of criminal liability applicable to businesses

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

48. The rationale for this proposal, we respectfully suggest, is best understood from a reading of the Consultation Paper para 5.103:

'In an ideal world, every criminal offence applicable to companies would include a provision indicating on what basis a company can be found liable for the offence. In a world that falls short of that ideal, in our view, the approach of Lord Hoffmann in the *Meridian*[8] case is the right one. It is clear from the decisions in *Pioneer Concrete*[9] and in *Meridian* that the courts now have the latitude to interpret statutes imposing corporate criminal liability as imposing it on different bases, depending on what will best fulfil the statutory purpose in question. Consequently, there is no pressing need for statutory reform or replacement of the identification doctrine. That doctrine should only be applied as the basis for judging corporate conduct in the criminal law if the aims of the statute in question will be best fulfilled by applying it.'

---

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

[9] *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456

49. In respect of the regulatory regimes that involve frequent prosecution (see para 5, above) there is settled case law that provides certainty and an unquestionable basis for interpretation of future statutory provisions enacted within these regimes.

50. Thus, the personal nature of health and safety duties is well established as is the manner in which this impacts upon corporations[10]. 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.

51. 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.

A general defence of due diligence.

52. **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.**

---

[10] See *R v Associated Octel* [1996] 1 WLR 1543; *R v Chargot* [2008] UKHL 73, [2009] 1 WLR 1

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.

53. 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 (i.e. which include serious offences) and in respect of which there is a body of settled case law.

54. 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 *R. v. Chargot* [11]. 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.

55. They are a great many health and safety provisions qualified by reasonable practicability or similar terms and subject to the operation of s.40 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.

56. 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

11 [2008] UKHL 73, [2009] 1 WLR 1

and the requirements of the Framework Directive on Health and Safety[12]).

57. At paragraph 1.80 of the Consultation Paper, 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.

58. 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.

59. 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.

60. 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.

The consent and connivance doctrine

61. **Proposal 16: When it is appropriate to provide that individual directors (or equivalent officers) can themselves be liable for an offence committed by**

[12] C-127/05 *Commission of the European Communities v United Kingdom of Great Britain* [2007] ECR I-4619

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.

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?

62. The Consultation Paper rightly identifies how the wording in s 18(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,s. 87 Control of Pollution Act 1974, s 37 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 Consultation Paper discusses the ambit of 'consent and connivance' it notes 'The matter has not been judicially determined'[13].

63. The five provisions cited in the paragraph above have been judicially considered, most recently in respect of section 37 of HSWA by Latham LJ, in the Court of Appeal in *R. v. P*[14], in a judgment cited with approval in the speech of Lord Hope in *R. v. Chargot* [15], when considering the very same provision. We set out a summary of the position below

64. In *Att-Gen's Reference (No 1 of 1995)*[16] the Court of Appeal was asked to rule

---

[13] See footnote 45 on page 141 of CP 195
[14] [2007] All ER (D) 173 (Jul).
[15] [2008] UKHL 73, [2009] 1 WLR 1 at para. 33
[16] [1996] 2 Cr App R 320

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.

65. In *Huckerby v Elliot* [18], 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'[19], was one with which he did not disagree.

66. 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 s 305(3), in that the offence was attributable to her neglect.

67. 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*[20], 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

---

[17] *Attorney General's Reference (No. 1 of 1995)* [1996] 2 Cr. App. R. 320 at 334
[18] [1970] 1 All ER 189 (DC) at 194
[19] *Huckerby v Elliot* [1970] 1 All ER 189 at 193 - 194
[20] [1925] Ch 497 at 428–430

of anything that he is told by such a person, or even to make certain that he is complying with the law.

68. 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.

69. In the Scottish Court of Judiciary decision in *Wotherspoon v HM Advocate*[21], 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[22]) held that, in considering in a given case whether there has been neglect within the meaning of HSWA 1974 s 37(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.

70. 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.'[23]

---

[21] 1978 JC 74

[22] [2008] UKHL 73 [2009] 2 All ER 645, at para 33

[23] *Wotherspoon v HM Advocate* 1978 J.C. 74 at 78

71. In *R v P and another*,[24] 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*[26] , and rejected the notion that neglect in s 37 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.

72. 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*[27] quoted above at paragraph 68. 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.

73. Finally, in relation to the ambit of the persons 'caught' by such provisions, in *R v Boal* [28] (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

[24][2007] All ER (D) 173 (Jul).

[25] [2008] UKHL 73 [2009] 2 All ER 645, at para 33

[26]1978 JC74.

[27] 1978 J.C. 74

[28] (1992) 95 Cr App R 272

power and responsibility to decide corporate policy and strategy.[29] Its purpose was to catch those responsible for putting proper procedures in place; 'it was not meant to strike at underlings'.[30]

74. The Court cited with approval the judgment of Lord Denning in *Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd*[31] 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[32].

75. In *Woodhouse v Walsall MBC*[33] the Divisional Court was concerned with the identical provision in the Control of Pollution Act 1974 s 87. 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*[35], 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.'[36]

76. We have set these matters out in order for our response to this part of the Consultation Paper to be understood, which is as follows:

    a. 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

---

29 *R v Boal* (1992) 95 Cr App R 272 at 276
30 *Ibid*
31 [1969] 3 All ER 1065
32 *Registrar of Restrictive Trading Agreements v WH Smith & Son Ltd* [1969] 3 All ER 1065 at 1069
33 [1994] 1 BCLC 435
34 Above at 442
35 (1992) 95 Cr App R 272
36 *Woodhouse v Walsall MBC* [1994] 1 BCLC 435 at 443

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

b. 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.

c. '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.

d. 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.

e. 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.

77. The true threshold of criminal neglect pursuant to these provisions, as set out above, is higher than is suggested in the Consultation Paper. 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.

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

78. We doubt whether the doctrine of delegation, as set out in *Allen v Whitehead*[37] 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).

79. 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.

80. 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.[38]

81. 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

[37] [1930] 1 K B 211

[38] *R v Associated Octel* [1996] 1 WLR 1543 at 1547 - 1549

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.'

82. We see no need for a new statutory provision to replace the doctrine of delegation.