# A bonfire of the criminal laws? A review of Law Commission Consultation Paper no195: Criminal liability in regulatory contexts?

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## Introduction

The Law Commission in the UK has called for a principled approach to creating new criminal offences and for unnecessary minor offences to be scrapped. This is very welcome and I will argue in this paper that the principles it sets out are correct. There can of course be discussion over the detail and that will be particularly relevant to legislative counsel[2]. The proposals and debate in the Commission's Paper are worthy of a wide discussion in the common law world. Indeed, the editor of the UK Criminal Law Review has gone so far as to state:

> "This Paper takes a radical look at the relationship between regulation and the criminal law, and comes up with a battery of far-reaching proposals. This major review should be read by all criminal lawyers with an interest in this important subject".[3]

In my commentary, I refer (unless stated otherwise) to the Commission's Overview Paper (which is 19 pages long) rather than directly to the full Consultation Paper (which is 244 pages long). 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 will not usually permit detailed perusal of the full Consultation Paper.[4]

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The author wishes to thank you to Nicholas Willmott MA for comments on a draft of this article, improving the English, and the clarity of some specific arguments. Errors remain my own.

2 In the UK and Ireland, almost all lawyers who draft legislation are called parliamentary counsel.

3 Ian Dennis, Editorial: 'Regulating (and) the criminal law' [2010] Crim LR 735.

4 The full Consultation Paper includes three papers as appendices. Appendix A: A Review of Enforcement Techniques – Professor Julia Black; Appendix B: Corporate Criminal Liability: Models of

The core proposals were summarised in a 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- "existing low-level criminal offences should be repealed where civil penalties could be as effective."

I specifically agree with these, but will comment on background issues relating to over-criminalisation and poor quality criminal law; on the rationale for the focus on the regulatory context (that is largely relating to businesses), and on some specific proposals and consultation questions. My main interest is how the criminal law affects natural persons, while also being concerned about effective action against harm caused by businesses.[5] Therefore I will argue on the need for both consistency of principles as they apply to corporations (this consultation) and natural persons (largely outside the scope of this consultation), and on the prospective benefits of the Law Commission carrying over the principles set out in this article to its projects on the criminal liability of natural persons. 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.

## *Background*[6]

The British Labour Governments of 1997 to 2010 were obsessed with creating new crimes to appear tough on crime, but it is questionable whether this is an effective way to solve social problems or change behaviour.[7]

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Intervention and Liability in Consumer Law – Professor Peter Cartwright; Appendix C: Corporate Criminal Liability: Exploring Some Models – Professor Celia Wells.

5 Many sources relevant to this field will be found in other fields of law and various disciplines of social science and business. Relevant starting points can be found in 'Corporate crime: opening the eyes of the sentry', Celia Wells (2010) 30 *Legal Studies* 370; *An Introduction to Law and Regulation*, Bronwen Morgan & Karen Yeung (Cambridge, 2007); For sources on environmental regulation Colin Reid 'Regulation in a Changing World: Review and Revision of Environmental Permits' (2008) 67 *Cambridge Law Journal* 126 at 126 - 7. Half of the chapters in a new collection are directly or indirectly relevant to topics discussed in this paper: *Regulation and Criminal Justice* H. Quirk, T. Seddon & G. Smith eds. (Cambridge, Cambridge, 2010).

6 Debate about the law is inherently political and this critique will touch on political context in places, while acknowledging that political comment is outside of the role of those who recommend law reform or draft legislation. By contrast the Law Commission's full Consultation Paper does contain a useful discussion of criminal prohibition, moral wrongdoing and harm (Part 4).

7 There is evidence of an improvement when Gordon Brown became Prime Minister and the pace of criminal justice legislation slowed, particularly in relation to new and amended police powers, June 2007 – May 2010.

Lord Judge in the Supreme Court recently declared "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."[8]

The statistics at para. 1.17 of the Overview Paper are telling. "Since 1997, more than 3000 criminal offences have come on to the statute book." Also "more than 2 and a half times as many pages were needed in Halsbury's Statutes to cover offences created in the 19 years between 1989 and 2008 than were needed to cover the offences created in the 637 years prior to that."

Peter Glazebrook has commented pointedly 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). 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.[9] 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]

While the Commission disagreed with my specific suggestion that a code of low level administrative 'offences' should be created (as in France), taking them outside the criminal law (see paras. 3.27 and 3.30 full report) the emphasis of the Commission's proposals leads to a similar effect in relation to the liability of businesses. The thrust of the Commission's Paper agrees with the sentiment of Professor Richard Macrory (quoted at p. 2):

> "there may be a case for decriminalising certain offences thereby reserving criminal sanctions for the most serious cases of regulatory non-compliance" (for regulatory 'offences' involving businesses).

The Consultation Paper argues that "the criminal law can and should be used for the most serious cases of non-compliance with the law."[12] Its analysis concludes that reliance on the criminal law

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8 *R. (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30, (2010) Times Law Reports, 2 July, SC, para. 80.

9 A few are cited at K. Reid 'Strict liability: Some Principles for Parliament' (2008) 29 *Statute Law Review* 173, n. 27. For a lively argument critiquing complaints of 'too many new offences' see 'Is it simply a question of numbers?' (Full Consultation Paper paras. 3.16 – 320).

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; J. R. Spencer 'The drafting of criminal justice legislation – need it be so impenetrable?' (2008) 67 *Cambridge Law Journal* 585. For background refer to Michael Zander *The Law-Making Process*, 6 ed. (Cambridge University Press, Cambridge, 2004), chap. 2 'Legislation - the Westminster stage'. Thank you to Jeremy Marshall for assistance with legal system references.

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

12 Para. 1.5.

by regulators may "be an expensive, uncertain and ineffective strategy" "as the main means of deterring and punishing unwanted behaviour".[13]

The Consultation Paper explains what the Commission mean by 'regulatory' contexts:

> "A regulatory context is one in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialised area of activity."[14]

The Consultation Paper expressly explains that the project is not concerned with the use of criminal law to improve standards of behaviour by the public at large. This is because that is "not the responsibility of an expert regulatory agency".[15] Regulation of business areas has often involved a licensing approach that includes a mixture of civil law measures and criminal law offences.[16] For example the Law Reform Commission of Hong Kong supported a licensing approach, based on their study of several other jurisdictions, in their 2002 report *The Regulation of Debt Collection Practices*.[17]

It is impossible to disagree with the argument that "the introduction of rationality and principle into the creation of criminal offences, when these are meant to support a regulatory strategy"[18] is vitally important. 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".[19] The piecemeal UK approach to legislation designed to tackle social problems is well illustrated by a quotation from Sidney Webb. In the 1910 preface to Hutchins and Harrison's *A History of Factory Legislation* he wrote:

> "This [past] century of experiment in factory legislation affords a typical example of English practical empiricism. We began with no abstract theory of social justice of the right of man. We seem always to have been incapable of taking a general view of the subject we were legislating upon. Each successive statute was aimed at remedying a single ascertained evil. It was in vain that objectors urged that other evils, no more defensible existed in other trades, or amongst other classes, or with persons of ages other than those to which the particular Bill applied. Neither logic nor consistency, neither the over-nice consideration of even-handed

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13 Para. 1.8.

14 At para. 1.9. The reasons for concentrating on this area are set out at paras. 1.9 and 1.11 – 1.12.

15 Para. 1.11.

16 R. Glover 'Regulatory Offences and Reverse Burdens: The Licensing Approach' (2007) 71 JCL 259.

17 The report proposed a mixture of criminal and civil measures to deal with the problem of abusive debt collection, including ones aimed at alleviating the level of bad debts in the first place. [2002] HKLRC 4 (July 2002), Conclusion, para. 10.101. Accessed via the Hong Kong Legal Information Institute database HKLII.

18 Para. 1.13.

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

> justice nor the Quixotic appeal of a general humanitarianism, was permitted to stand in the way of a practical remedy for a proved wrong.[20]"

A piecemeal or incremental approach to law reform can have both negative and positive aspects, but coherence and adherence to principle cannot be numbered among the latter.

The Commission's Paper says 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".[21] However, if the Law Commission is suggesting restricting the use of criminal law, it has to consider alternatives; it is not working in a vacuum, as its 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. (The measures in the *Regulatory Enforcement and Sanctions Act 2008* are described, including stop notices). If more cost-effective civil methods are used there will have to be more emphasis on enforcement by regulators to ensure compliance. 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".[22]

Although the new coalition Government's 'bonfire of the QANGOS' may reduce the exponential growth of secondary legislation (see para. 1.20), it is also likely to lead to pressure on the budgets of regulators.[23] MPs and peers on all sides should be concerned that regulatory bodies and, potentially, local authorities have the training, staff and legal support to do their jobs when their role is enhanced. Reference is made in the full Consultation Paper to the important role of local authorities and specifically to trading standards. One would expect their umbrella body, Local Authorities Co-ordinators of Regulatory Services (LACORS), to have significant input into the consultation process.

Critics of the over-implementation ('gold plating') of European Union (EU) law will welcome the emphasis that "there is too much reliance on direct criminalisation to implement European law" and that other strategies to ensure compliance will be explored.[24] The Commission, using a consumer protection example, give a short and incisive critique of using direct criminalisation to

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20 B. Hutchins and A. Harrison *A History of Factory Legislation*, 2nd ed. (King, London, 1911) p. ix - x. I am grateful to John Anderson for this quotation.

21 Note 10.

22 '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, Liverpool, 2010). Hereafter Tombs & Whyte 2010a.

23 The scale of the growth in regulatory agencies set out was not appreciated by this writer. "There are now over 60 national regulators with the power, subject to certain limitations or checks, to make (criminal) law." Para. 1.21.

24 Full Consultation Paper, para. 3.20.

enforce EU regulations.[25] Another example could be "translation of the Temporary or Mobile Construction Sites Directive (92/57/EEC) of 24 June 1992 into the Construction (Design and Management) Regulations 2007." Health and safety expert John Anderson pillories the UK result "in translating 17 pages of the Directive into 119 pages of UK legal text".[26] This reining in of British Government reliance on criminalisation to enforce EU measures could also in part alleviate concern that there are inadequate constitutional safeguards at both EU and UK level over the creation of criminal legislation by the European Union.[27]

Specific reform ideas and suggestions for improvement will be discussed below. The content regarding quality of legislation (at proposal 12) appears naive. Suggesting that the Ministry of Justice is the authoritative source of guidance on the law after Parliament (with no mention of the courts) appears to ignore the basis of the British legal system. But perhaps, in 'the real world' of the British civil service, the writers are correct; maybe in practice Government departments see the Ministry of Justice as the place they should go with their legal queries. This may save on costly fees for legal advice but appears rather to overstate the role of the Ministry.

## Principles and consultation questions

The Commission's 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."[28] In other words, wrongdoing is regarded as serious if *mens rea* is required. Although I would agree with that principle, I question whether it is sufficient 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 accompanied by a fault element unless specifically and deliberately legislated for otherwise. (Whether serious wrongdoing includes

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25 Full Consultation Paper p. 50 – 51 and conclusion at para. 3.106. The example is the Consumer *Protection from Unfair Trading Regulations 2008*. These regulations implement the *Unfair Commercial Practices Directive* (Directive 2005/29/EC) and article 6.2 Directive 1999/44/EC. The official position is set out and explained in detail in the 125 page long *Explanatory Notes* to the Regulations, along with background evidence.

26 Draft LL.M dissertation 'Critique of the UK health and safety legislation with international comparisons' October 2010, para. 4.4.14. This is one of two 'case study' examples of over-implementation of two EU Directives. The other is a detailed deconstruction of the much derided "Work at Height Directive" (Section 4.4.1). Also see the Davidson Review on simplifying EU legislation: *Implementing EU legislation* (Better Regulation Executive, London, 2006). I am grateful to Frank Wright for this reference.

27 For example Bleddyn Davies's 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).

28 Para. 1.14. These categories of fault, known as *mens rea*, are considered to ensure moral blameworthiness.

conduct with a serious potential of causing more minor harm is a possible area for further discussion).[29]

Proposal 1 basically sets out the above principle and proposal 2 does indeed broadly relate the justification for criminalisation to a level of harm (based on potential penalty). Proposal 3 says—

> '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.'[30]

This is appropriate in relation to regulatory measures where an alternative method could be used, such as a penalty notice but with breach or repeat conduct leading to a criminal offence. These are described as two-step prohibitions or indirect criminalisation (full Consultation Paper para. 3.105) similar to the much overused, but not inherently objectionable, harassment, ASBO (Anti-Social Behaviour Order) or Penalty Notice for Disorder (PND) model.[31] A 'non-crime' example is an enforcement order for breach of a provision of the *Consumer Protection from Unfair Trading Regulations 2008*, under Part 8 of the *Enterprise Act 2002*. One argument in favour of Proposal 3 is that the criminal offences created are often punished by low fines and are not 'worth it' on a cost-benefit analysis. It should be noted that this consideration is outside of the control of the draftsmen charged with drawing up legislation. Para. 1.35 highlights the flexibility of measures available under the *Regulatory Enforcement and Sanctions Act 2008*. "It is only if these measures are not complied with that criminal prosecution will be contemplated: breach of a stop notice is itself a criminal offence".[32] 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 is also a concern that

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29 For example, in the inappropriately named 'Assault Guideline: Professional Consultation' (the paper covers the main range of serious offences under the *Offences Against the Person Act 1861*), the Sentencing Council for England and Wales determines the "offence category by assessing the offender's culpability in committing the offence and the harm caused, or intended to be caused" (Sentencing Council, London, October 2010) p. 15. This follows the structure set out in s. 121 Coroners and Justice Act 2009 'Sentencing ranges'.

30 Subsequently in a submission to the Commission, Tombs and Whyte argued: "There is little evidence that there is a need for 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." 'The Law Commission Consultation Paper No 195 *Criminal Liability in Regulatory Contexts*: A response by Steve Tombs & David Whyte', Institute of Employment Rights, Liverpool, p. 6. Available at <http://www.ier.org.uk> as at 12/01/2011. (Tombs & Whyte 2010b). They also specifically dissent from many of the Law Commission's starting assumptions, set out above, see p. 3. Their views can be contrasted with Sally Simpson *Corporate Crime, Law, and Social Control* (Cambridge University Press, Cambridge, 2002).

31 Commentators on their development include Geoff Pearson, 'Hybrid Law and Human Rights - Banning and Behaviour Orders in the Appeal Courts' (2006) 27 *Liverpool Law Review* 125. See *passim* the sources referred to in the debate between Simon Hoffman & Stuart Macdonald, and Peter Ramsay at [2010] Crim LR 761-66 'Substantively Uncivilised ASBOs' and the earlier article by Hoffman and Macdonald at 457.

32 Para. 1.36.

fixed penalties would not adequately take account of the greatly varying size and resources of businesses. "The regulator will not be able to exercise discretion in determining the amount of the fixed monetary penalty in any individual case."[33] Tombs and Whyte call for a unit fines system which would take account of "both the gravity of the offence *and* the ability to pay on the part of the defendant".[34] There can therefore be legitimate concerns both about safeguards for businesses as the targets for civil measures, including fixed penalties, and whether such penalties would be punitive enough compared with a fine after prosecution.

The Commission's Paper argues logically that new specific inchoate offences should not be created when these are already covered by existing general legislation on conspiracy, attempt or assisting and encouraging crime (proposal 4). 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. Similarly (Proposal 5), the Commission rejects the need for new fraud offences. The wide-ranging recent *Fraud Act 2006* provisions should cover both pre-existing offences and any conceivable areas where new specific offences might be required.

Halfway through the Law Commission's Overview Paper is, for me, one of the three key principles that should be adopted from this report. (The others are Proposals 1 and 3). Proposal 6 declares:

> "Criminal offences should, along with the civil measures that accompany them, form a hierarchy of seriousness." (Para. 1.44).

This should be adopted by the Law Commission as a principle in its criminal law work for both corporations and natural persons. Preferably this hierarchy should be set out in a Code (or, as I would prefer, separate but related Codes). However, if not in a coherent planned Code, the Law Commission and parliamentary counsel could implement the principles in new legislation as the opportunities arise.[35]

Due process is highlighted in Proposal 7. Regulators should have to formally "warn potential offenders that they are subject to liability" and courts should be granted a power to stay proceedings until after non-criminal regulatory steps have been taken. While a power of the court to stay proceedings in appropriate cases is not objectionable, this appears to miss the point. What is needed is a clear and simple process of regulatory enforcement rather than recourse to court actions. For example, a simple and effective enforcement process 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. The full Consultation Paper points out that since—

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33 *Regulatory Enforcement and Sanctions Act 2008* explanatory notes on s. 39.

34 Tombs & Whyte 2010b, p. 4 – 5.

35 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. Obviously there are also eloquent arguments against from purist supporters of the Common Law tradition. A summary can be found at Zander, *op. cit.* chap. 9.

> "... the *Regulatory Enforcement and Sanctions Act 2008*, there are now clearer duties on regulatory authorities to warn offenders ... This can be through the use of warnings, enforcement undertakings or stop notices".[36]

As a matter of best practice, enforcement officers often do warn before taking action and, in many cases those prosecuted are ones who have a degree of *mens rea* (see Reid 2008, p. 180). Putting this into statute generally would formalise Horder's recommendation (summarised by Reid, *ibid.*) "that courts should take account of the prosecution policies of enforcement agencies." For example, there is discussion about truancy and prosecution of parents as a method to target poor school attendance by children.[37] On this issue, the Commission's Paper takes a balanced view. It says—

> "We broadly commend the approach to offence construction in this field, and the way in which it has been related to the regulatory element. On this approach, an Act creates an offence ladder."[38]

It also says "the introduction of the more serious offence casts serious doubt on the value of continuing with the less serious one … not simply because there is already a range of non-criminal regulatory steps that the authorities can take [but] also because there may be scope in this area for the introduction of formal [civil measures]."[39]

I believe that there is nothing wrong in principle with prosecution and that those dealing with welfare and enforcement on the ground probably have a better insight as to what is appropriate in a particular case. The need to have clear procedures and mechanisms to try to solve problems before recourse to the criminal law is important. There must be coherent and consistent policies across the country and work by co-ordinating bodies to encourage a uniform approach at local levels to avoid "the risk of widely varying justice in different areas". At the same time, local inter-agency cooperation in problem-solving for public agencies and partners should also take account of differing local circumstances. The criminal offences themselves should require an appropriate level of fault, with punishment related to fault and potential harm.

The Law Commission's crime team bury an important statement of principle for legislators on page 13 of the summary paper:

> "The creation of a criminal offence should be regarded as a law-creating step of great (arguably, of something approaching constitutional) significance. That significance can only

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36 Para. 1.47.

37 See the full discussion in full Consultation Paper 'Context 1: truancy and the *Education Act 1996*' paras. 3.53 – 3.71. Section 444(1) provides that the parent commits an offence if a school-age child who is a registered pupil fails to attend regularly at school. A more serious offence was added in 2000, 444(1A). The new offence is committed if "the parent knew that the child was not attending school regularly but failed without reasonable justification to cause the child to do so." (Para. 3.61).

38 Para. 3.70.

39 At para. 3.66.

> adequately be reflected in a commitment to create criminal offences in primary legislation (statutes)."[40]

Their Proposal 8 is that "Criminal offences should be created and (other than in relation to minor details) amended only through primary legislation." This would presumably assist legislative counsel by reducing the need for some secondary legislation. The adoption of this approach would reflect the urging of Andrew Ashworth and show a commitment to act on the well-intentioned and coherent answer of Lord Williams of Mostyn (then a Home Office Minister) to Liberal Democrat peer Lord Dholakia early on in the British Labour Government.[41]

> "In considering whether new offences should be created, factors taken into account include whether—
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> - the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
> - the mischief could be dealt with under existing legislation or by using other remedies;
> - the proposed offence is enforceable in practice;
> - the proposed offence is tightly-drawn and legally sound; and
> - the proposed penalty is commensurate with the seriousness of the offence.
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> The Government also takes into account the need to ensure, as far as practicable, that there is consistency across the sentencing framework." This principle seemed to have been followed only rarely during the succeeding 10 years.

While the debate and references in this article are about the position in the UK, I would argue that this is a fourth principle from this English and Welsh Consultation Paper that could have much wider relevance for other countries with legal systems based on both freedom and the rule of law. It may assist legislators to concentrate on what is and what is not important in a penal statute, and give breathing space to resist populist proposals by considering whether or not they will make good law.[42]

With lofty aims the Commission's Paper tries to ensure fairness by recommending that court action not be restricted in challenging the new civil penalties suggested.

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[40] Para. 1.49. See also discussion of this issue in 'editor's notes' *The Loophole* August (2010), pp. 4 – 6 (Journal of the Commonwealth Association of Legislative Counsel), including discussion of views by Irish broadcaster, Vincent Browne, law lecturer Tom O'Malley (NUI Galway), and then Lord Chief Justice of England and Wales, Lord Judge.

[41] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review 225; question by Navnit Dholakia at HL Debs Vol. 602, Col. WA58, 18 June 1999 brought to my attention by Janet Dine & James Gobert *Cases & Materials on Criminal Law* 4 ed., (OUP, Oxford, 2003) p. 5, themselves citing Ashworth.

[42] The issue of criminalisation is discussed in the introductory chapters of very many good criminal law textbooks and case books. Some of the best arguments and sources are summarised in Jonathan Herring *Criminal Law: Texts, Cases, and Materials*, 4 ed. (OUP, Oxford, 2008), chap. 1 'An Introduction to Criminal Law'.

> "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."[43]

This could lead to bureaucratic and costly delay. This system might mean justice for large firms that can afford specialist lawyers, not for small ones. Challenge by way of a hearing of the allegation that was made subject to the penalty etc. would appear to be the reasonable way forward. This is not a rehearing but, instead, a recipient choosing, rather than accepting a civil penalty, to face a court with potential criminal consequences. An appeal on a point of law or judicial review if appropriate always remain options, but these should be exceptional, not the norm. At the same time the safeguards suggested above will be more important in practice if a comparison is accurately made with natural persons and PNDs. Natural persons almost never challenge receipt of a PND from a police officer. Therefore safeguards are vitally important (but hardly exist) at the stage at which a PND is given. Perhaps businesses will be more likely to challenge a civil measure imposed by a regulator, given possible financial or other adverse implications, such as poor publicity.

Along with Proposal 7, perhaps the reason for these overt statements of reliance on the court system is the Commission making plain that it is not proposing a civil system of penalties that will restrict free access to the courts; it is seeking to head off criticism in advance with these recommendations. The label of a penalty as 'civil' (or regulatory or administrative) and not 'criminal' will not, of course, prevent the application of European Convention on Human Rights (ECHR) requirements for a fair trial if the substance is that the penalty is a criminal one. Under Article 6 the European Court of Human Rights will consider the substance of a measure as to whether it is classed as criminal law (requiring more safeguards) or civil law, regardless of how domestic law says it is categorised.[44]

In setting out *General principles [on] fault in offences supporting a regulatory structure*, we can see stepping stones for what legislation should include, and most of them are welcomed by this commentator. These include—

> 'Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate' (Proposal 10)
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> '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' (Proposal 11).

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[43] Proposal 9, para. 1.50.

[44] App. No. 5100/71 *Engel v Netherlands* (1996) 1 EHRR 647. Davies has discussed this in analysing EU competition law as criminal law enforcement, *loc. cit.*, chap. 'Criminal Law Enforcement and the Community Pillar', pp. 152-153. See *Stennuit v France* (1992) 14 EHRR 509 on French competition law amounting to a criminal charge, *Garyfallou AEBE v Greece* (1999) 28 EHRR and *Schmautzer v Austria* (1996) 21 EHRR 511 confirming that labelling a provision as administrative does not automatically prevent it from being considered a criminal charge. This is analysed extensively by Arianna Andreangeli *EU Competition Enforcement and Human Rights* (Edward Elgar, Cheltenham, 2008).

Proposal 10 should also be adopted as a general principle across the law, not just for this area. My interpretation of what the Commission is saying about the justification for this is, the greater the harm the less fault (*mens rea*) that is required. The Commission says (para. 1.54) that criminalisation of remote harm with an appropriate fault element can be justified. This is not necessarily simple. Does the Commission mean that a low level of fault can be required if the risk is of serious harm (albeit remote) because of the potential damage of the consequences, or that it is proportionate to penalise the actor only if the risk of the result is serious? If someone takes a risk of serious harm occurring, albeit a remote risk, it appears reasonable to penalise them under the criminal law if there is no good reason for taking that risk.

The Consultation Paper's concern in Proposal 11 "is with the simple provision of the wrong or incomplete information, and so forth, to a regulatory agency."[45] Its argument at the end of para. 1.56 is particularly compelling:

> "Businesses and others who faithfully seek to comply with regulatory requirements to provide information should not be penalised by the criminal law simply because they fall short of the precise requirements."

Again, I would extend this principle to cover other areas, not only business's dealings with regulators. There is no reason why the same principle should not apply generally. However, the Commission's Paper makes clear that those who deliberately or knowingly mislead could be liable to prosecution under the *Fraud Act 2006*.

Under these proposals, the travel agent in *Wings v Ellis Ltd*[46] would now not be prosecuted, for a false description under the *Trade Descriptions Act 1968* when supplying a travel brochure with false information in that it thought it had corrected. Although there is today a defence in the current provisions, and the trader would also now have a defence under the Commission's default 'due diligence' defence recommendation (below), this solution is clearer.[47] It is a more principled solution that a trader who had made an accidental mistake should not have been exposed to potential criminal liability in the first place. This proposal would achieve that. In my initial reading and my response to the consultation I thought the provision was intended to be narrower; no offence would be committed if the trader had not been negligent. In fact, Proposal 11 would itself put into practice the restriction that criminal offences be reserved for serious wrongdoing and therefore even a negligent mistake may not lead to criminal liability (but could lead to a civil penalty, which arguably would provide adequate protection for consumers). Consequently, a person who was negligent, although not liable for a criminal offence, could be liable for a civil penalty. As an aside we can ask: 'Does *mens rea* in this context include constructive knowledge,

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45 Note 32.

46 [1985] AC 272, HL.

47 The Consumer Protection from Unfair Trading Regulations 2008 replaced most of the Trade Descriptions Act 1968 in May 2008. See advice leaflets 'Accurately describing goods and services' and 'A guide to the Consumer Protection from Unfair Trading Regulations 2008' Gloucestershire County Council March 2010 and July 2009 respectively, accessed via the website of the Trading Standards Institute 29/12/2010 <http://www.tradingstandards.gov.uk/cgi-bin/glos/bus1item.cgi?file=*BADV670-1111.txt> See also full Consultation Paper p. 50 – 51.

'wilful blindness' 'closing his mind' and other similar formulations? I do not agree that these are the same as knowledge or are the equivalent of recklessness but *Smith & Hogan*, Ashworth[48] and many others take the contrary view.[49] Although the Law Commission does not express a view on this, neither does it dissent from the general consensus.

Paragraph 1.57 highlights the blameworthiness of businesses that give untrue or misleading information. In effect, they gain an unfair advantage over those businesses that try in good faith to give honest information. As a matter of drafting, any 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. This meshes with the broader discussion on the forms of business liability below.

## Doctrines of criminal liability applicable to businesses

In the regulatory context, the Commission considers the appropriateness for the 21st century of legal doctrines created piecemeal during previous centuries. There is much political and popular support for small businesses which are a significant element of countries' economies and provide a very large proportion of the jobs.[50] Therefore the Commission's evaluation of "whether or not particular doctrines of liability applicable to businesses are unfair to [them], and in particular, whether or not they are unfair to small businesses" is both topical and economically important.[51] Jeremy Horder has highlighted that strong support for strict liability against businesses is often based on the image of 'big corporations' and ignores the different situation of small businesses.[52]

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48 *Smith & Hogan Criminal Law, Cases and Materials* 6th ed. (Butterworths, London, 1996) 117, Ashworth *Principles of Criminal Law* (5th ed 2006), p. 191 cited by the full Consultation Paper at p. 191.

49 Sir John Laws doubts whether the 'ought to know' category is sufficient: "It may be doubted whether the condition of a person who merely belongs to the common law's comfort zone, where all that can be said is that he *ought to know* the likely consequence of his act, can really pass muster as a mental state. Does not the very idea of a mental state imply the presence of *consciousness*?" Lord Justice Laws 'Mental States and the Law', lecture at the Royal Society of Medicine, 25 May 2010, para. 40. See also paras. 13, 19. (Link courtesy of the Inner Temple website as at 19/10/2010).

50 For example *The path to strong, sustainable and balanced growth*, HM Treasury & Department for Business, Innovation and Skills, November 2011. "The UK's 4.8 million small and medium-sized enterprises (SMEs) are vital to the economy. They provide 60 per cent of private sector jobs and account for half of all private sector turnover. The Government is committed to ensuring that the UK has an environment where it is easier for new companies and innovations to flourish and where people who aspire to be entrepreneurs are encouraged." Para. 1.6, see also para. 1.7. In the US "small firms ... account for about 41% of total employment" 'The perils of being small: New data confirm that small firms are dragging on the job market' *The Economist*, 11 May 2010 viewed online 17/01/2011 at: <http://www.economist.com/realarticleid.cfm?redirect_id=16113306>

51 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, draft LL.M by research, dissertation, above, p. 61.

52 J. Horder 'Strict liability, statutory construction, and the spirit of liberty' (2002) 118 LQR 458 at pp. 472 – 5.

Much needed clarity is recommended in laws spelling out the basis of fault for companies.

> "Legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable" (proposal 13).[53]

Legislative counsel may need to give direct advice to ensure that the legislation is in fact suitably clear with specific wording.

Paras. 1.64 and 1.65 set out a very clear and compelling short critique of the identification principle. "This doctrine requires a controlling officer of the company him or herself to be proved to have had the fault element of the offence" before the company can be found liable.[54] A key problem with the 'identification principle' is that the controlling mind and will of a company are said to be the directors, but large companies delegate management to subordinates. Consequently, a problem of fairness arises involving discrimination against small companies. Because, according to Simester & Sullivan, boards of large companies do not in most cases have 'hands on' management of the business,[55] serious defects in procedures can occur without any individual being at fault in terms of specifically being at least reckless. The identification principle transfers the *mens rea* doctrine of personal liability to the corporate body with an analysis of the conduct of the corporate entity as a whole, but without considering the totality of blameworthiness.[56] There is no 'aggregation' principle in common law, by which I mean that if several managers or directors of a company were at fault to some extent that the blameworthiness of each of them could be added together to form the total *mens rea* for the offence (irrespective of whether each of them individually had sufficient *mens rea).* A director, individually, has to have the *mens rea* for the offence.[57] Therefore, for the emotive crime of manslaughter, for example, there have been successful prosecutions only against small companies. While the law has been reformed for corporate manslaughter by the British Labour Government in 2007, the difficulties in principle remain in establishing liability for all other offences.[58]

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53 I have recommended that this be done generally in relation to whether liability is strict or not, (K. Reid, 2008, p. 188, discussed further below.

54 Para. 1.63. This writer has lectured regularly and written about the flaws of the identification principle but will adopt this summary from now on. See also the concluding point made at the end of para. 1.66 (although there is no empirical evidence for the specific concern in the paragraph).

55 Simester & Sullivan, as cited by Zhou, below. The legal problem is best illustrated by *A-G's Reference (No. 2 of 1999)* [2000] 3 All ER 182, CA, the Southall rail crash case.

56 The basis of this passage is adapted from Xuanyu Zhou LL.M dissertation 'Shaping corporate manslaughter liability: a hard and unfinished task', Sept. 2010.

57 See further Smith & Hogan *Criminal Law* 8th ed. (Butterworths, London, 1996) p. 189. The same principle applies in Scotland: Pamela Ferguson 'Corporate culpable homicide' (2004) *Scots Law Times* 97 at p. 101.

58 *Corporate Manslaughter and Corporate Homicide Act 2007:* As of December 2010 there have not yet been any successful prosecutions. While prosecutions for corporate manslaughter will be rare, the use of imprisonment for health and safety offences has potentially been extended. Under the Health and Safety Offences Act 2008 nearly all offences under the Health and Safety at Work Act can, in serious cases, be dealt with by up to 12 months' imprisonment. This may render health and safety law more of a deterrent.

Careless language appears to creep in with the idea that "the courts should treat the question of how corporate fault may be established as a matter of statutory interpretation". 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 with all its flaws. Ideally, to avoid this, the basis of liability – or this proposed anti-presumption - needs to be clearly spelt out. This could possibly be included in the Act that would put into place the proposed general defence of due diligence. The suggestions made in the Paper to achieve this are too vague to have the desired effect.[59] A clear statement in legislation is needed or, at the very least, a clear statement by the Minister responsible in Parliament in introducing legislation. This is similar to the point made about ensuring clear statutory words if Parliament creates actual strict liability offences. An argument can be borrowed from Glanville Williams that he deployed talking about omissions:

> "First…, omissions liability should be exceptional, and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language."[60]

Further parts of Williams' argument about omissions could also be applied by analogy to strict liability: a statutory provision that creates an offence of strict liability should contain a clear statement to this effect, and penalties for such offences should be rethought in each case. The latter point is similar to various arguments by the Commission, in effect that penalty should reflect the level of blameworthiness and harm.

## A general defence of due diligence

One of the most far-reaching, simple and persuasive reforms advanced is that the courts should be given a power to apply a due diligence defence to any statutory offence that would otherwise be strict liability (Proposal 14). There would be a reverse burden of proof (the burden of proof would be on the defendant to establish the defence). This idea had previously been proposed by Horder, prior to his becoming the Criminal Law Commissioner responsible for this paper.[61] This "would make the law more principled. In effect it would make negligence the default *mens rea* requirement in English law." (Reid, *ibid.*). This should be clearly put in statute. The detail of how to frame the defence is a little trickier and the paper discusses technicalities that may be of more interest to CALC members than to the general reader.

The proposal would modernise and rationalise the law and help provide consistency.[62] The criminal law team highlight that modern statutes usually include a due diligence defence but that

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59 At para. 1.67: the court should look at the underlying purpose of the statute to decide "on the right basis on which to hold companies liable for offences committed relating to that scheme".

60 Glanville Williams, 'Criminal Omissions – The Conventional View' (1991) 107 *Law Quarterly Review* 86. Thank you to the City University London criminal law team for this quotation.

61 See reference to Horder and discussion at K. Reid (2008) p. 180.

62 Para. 1.77, see reasoning in paras. 1.75 – 1.76. On the form of the defence, proposal 15 questions 1 and 2, see below. For the current law in Ireland see Marc Coen 'Whither strict liability' (2007) 25 Irish Law Times 77.

there are a large number of statutes created before this policy became common. Clarkson & Keating highlight that steps ameliorating the harshness of strict liability were developed in both Canada and Australia, some similar to those proposed for England and Wales.[63] The Commission criticises the common law presumption in favour of *mens rea* if a statute is silent (the presumption of fault). This is misplaced. There is nothing wrong with the presumption of fault *per se*, what is wrong is that it is inconsistently applied and lacks objective criteria. "The presumption thus adds persistent uncertainty to the process of interpreting the scope of criminal offences".[64] Therefore the wording of statutes about fault should be clearer, as it suggests. The examples in the full Consultation Paper of when the courts have interpreted some cases as strict liability and others as not illustrate the inconsistency very clearly. The Commission incisively illustrates the absurd nature of the distinction drawn between 'true crime' and 'merely regulatory' offences. It does this by using examples of well known cases to highlight the illogical nature of the accepted distinction between offences requiring *mens rea* and those where strict liability may be appropriate.

> "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."[65]

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 the authors make obvious of the inconsistency in criteria and application (except in relation to the extreme example of liability for individuals in drug possession cases).[66]

The consultation authors are alert to the risk of management being able to escape liability by blaming a junior employee, in relation to the due diligence defence proposed.[67] Their solution, that the courts have a discretion not to apply the due diligence defence, risks creating just as much uncertainty.

> "... the concern is that the company may officially tell managers not to enter into prohibited restrictive agreements and they might yet have an unofficial policy of turning a blind eye to such practices." (Para. 6.85)

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63 See C. Clarkson & H. Keating, *Criminal Law: Text and Materials*, 5th ed., (Sweet & Maxwell, London, 2003) p. 235, 246. Their conclusions foreshadow several of the Law Commission's recommendations (at p. 246). The discussion and sources cited throughout the second half of their section on strict liability are useful background to the debate (found in 5th ed. pp. 232-246).

64 Para. 1.72.

65 Full Consultation Paper, para. 3.50.

66 K. Reid (2008), at 185. Reed, Fitzpatrick & Seago comment "it is extremely unlikely that the drafters of nineteenth-century legislation had any clear cut views that the use of certain words in statutes would lead the courts to impose strict liability." *Criminal Law* 4th ed. (Sweet & Maxwell, 2006) p. 86.

67 They show this using discussion based on the case of *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456, see full Consultation Paper paras. 6.81-6.85.

In such situations "the case for a defence of due diligence in all the circumstances would be weak because it would undermine the protection the relevant legislation gives to the public from restrictive trade practices." (Para. 6.84)

Even if it is "too difficult in practice for any company to police the conduct of local managers with a view to ensuring that offences concerned with restrictive trade practices were not committed" this is surely a matter that the court can evaluate as a question of fact in distinguishing genuine from dishonest cases and give a defence if all reasonable precautions have in fact been taken. The courts would presumably take a commonsense view on the facts.

It is assumed that courts could invoke the defence where they felt that imposing strict liability would not help to achieve the purpose of the statute. However, on grounds of fairness, it surely would have to apply to a particular statute or not – 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.[68] The Law Commission would leave it to the court to decide taking account of the statutory context.

Some argument may be clear to those who deal with this type of criminal law every day or those who deal with the precise meaning of words. Proposal 15 is that "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." The authors explain by contrast that modern statutes—

> "... commonly have a narrower version of it, less favourable to the defendant, a defence of having taken *all* reasonable precautions and having exercised *all* due diligence to avoid commission of the offence. We believe that this is somewhat stricter than is really necessary". (Para. 1.79).
>
> Is this really different? I defer to experts on these areas of law, but can see little difference myself. The two alternative formulations sound the same. If one has taken some reasonable steps but not others, would a court really conclude that the defendant has taken reasonable steps when some reasonable steps were not taken? If you have taken steps that are due diligence, how is all due diligence different? If one must take *every* step, is that not unreasonable? Or might it be the case that some steps are more reasonable than others and therefore interpretations of all reasonable precautions will vary, even for the stricter defence? Maybe relevant case law could be supplied to explain the difference.[69]

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[68] The cases of *Sherras v De Rutzen* [1895] 1 QB 918, and *Cundy* v *Le Cocq* (1884) 13 QBD 207 are famously contrasted. The full Consultation Paper notes this issue at para. 6.14, and discusses the former case. *Sherras* is on s. 16(2) supplying liquor to a police constable on duty, *Cundy* is on s 13, unlawfully selling liquor to a drunken person.

[69] There is discussion in the full Consultation Paper at pp. 116 – 30 including examples from Australia and Canada. Important cases on a similar concept, 'reasonably practicable' in the health and safety context are: *Commission of the European Communities v United Kingdom* (C-127/05) ECJ (Third Chamber), [2007] 3 CMLR 20 (14 June 2007) and *R v Chargot Limited (t/a Contract Services)* [2008] UKHL 73. The latter is noted by Celia Wells at C.49. I am grateful to Professor Frank Wright for these references.

The Consultation Paper asks whether for some statutes Parliament should prevent or restrict the application of the defence (Question 2). This respondent specifically agrees with an exclusion in relation to road traffic offences, the example given in the Paper (para. 1.80). 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.[70] Lord Hoffman was recently scathing about the human rights bandwagon in a different context: "This case is another example of the regrettable tendency to try to convert the whole system of justice into questions of human rights."[71] Clarity in the law may help prevent unmeritorious appeals.[72] For new statutes it should clearly state in the text if the defence is *not* to apply. For completeness a criminal statute should either clearly set out the fault required, or specify whether a due diligence defence will apply, or specify if any offence created is strict liability if that is what is required by the legislature.

In responding to the consultation paper I put forward contradictory views, that the due diligence defence "should be clearly put in statute. This would modernise and rationalise the law" (as stated above) but subsequently "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." This confusion on my part reflects overlapping issues of principle. For the avoidance of doubt, for penal statutes involving 'general' individual criminal liability the presumption should definitely apply.[73] Where there is a risk of imprisonment, mens rea[74] should be required unless Parliament has clearly specified otherwise. The Law Commission's proposal would apply largely to offences aimed at companies so this concern is likely to be rhetorical in relation to the proposals under consideration. At the same time, there is no reason why Parliament could not improve the law generally by enacting that such a defence would apply in other statutes generally where the statute is silent on *mens rea*. If the statute would not require mens rea a due diligence defence would be available. That could give a defence to an individual who tried to avoid committing a crime, but ensure others could not escape liability for minor offences by their own inadvertence. Such defences by no means ensure that only those who are blameworthy are convicted – they seem seldom to succeed in relation to drugs, public order or knife crime offences. However that may be because magistrates or juries simply do not believe defendants' stories of innocent reasons for possession, allegedly violent behaviour etc. and therefore reject the defence.

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70 Specifically, regarding a speeding driver, *O'Halloran v United Kingdom* (2008) 46 EHRR 21 summarised by the *Times Law Report*: 'Compulsion to identify driver does not prejudice right to fair trial' *The Times* 13/07/2007.

71 *R v G* [2008] UKHL 37 at para. 10. In this case the Law Lords threw out a challenge on behalf of a 15 year old boy to conviction of an underage sex offence.

72 By contrast in *Bulale v Secretary of State for the Home Department* [2008] EWCA Civ 806 Waller LJ praised a barrister for assisting *pro bono* with a test case while using human rights language to reject an appeal against deportation by a foreign criminal due to the necessity to protect society from his propensity to commit robbery.

73 A recent significant example is *Crown Prosecution Service v M and B* [2009] EWCA Crim 2615 regarding the Prison Act 1952. I am grateful to junior counsel for Ian Boyes for discussing this case with me. See also the arguments at K. Reid (*supra*) p. 193.

74 I .e. intention, recklessness or knowledge.

The final part of the Paper considers "the basis on which directors can be made individually liable for offences committed by their businesses".[75] Specifically the 'consent and connivance' doctrine is discussed. In certain circumstances "individual directors ... 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" (para. 1.82). It is proposed "instances in which the company's offence is attributable to neglect on the part of an individual director" should be excluded. While the type of offence is outside this writer's knowledge, some obvious questions come to mind that are put forward here.

Perhaps personal liability for negligence could act as a deterrent to offences being committed by companies if directors *know* about the existence of the type of offences. I do not like gross negligence as a concept as it is vague and ill defined, but if such offences were created then perhaps gross negligence as clarified by *Misra*[76] could work as the fault element rather than simple negligence? This would set the bar at a higher standard before criminal liability could be imposed. It is possible though 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. The Commission asks whether specific 'negligently failing to prevent' an offence by the company liability might be created instead (Question 3). This would be more principled (more clearly labelling the fault) and clearer overall but it may be difficult to decide when such offences should be created. My view is that such offences should not be the norm. They should be used only for specific problems and if the potential harm is serious enough; perhaps health and safety infringements, fraud, money laundering or (though not relevant for this consultation) complicity in violence. However, the underlying aim, which is to drive up standards of management and conduct in businesses, is laudable.

The Law Commission finally turns "to what we regard as an antiquated doctrine: the so-called doctrine of delegation." It summarises the delegation principle as follows:

> "where the running of a business is delegated from X to Y, X still remains liable to be convicted of an offence committed, in relation to the running of the business, by Y."[77]

It proposes abolition and replacement "by an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated" (Question 4). The proposed solution is a more principled approach, and here, unlike the above, it is much more reasonable: that the owner or operator be liable on a negligence basis. They have, after all, deliberately chosen to delegate running the business and taken the risk of harm being caused by that decision. The penalty should be able to reflect serious cases that are more akin to complicity or wilful blindness, although these may already be covered by the Proposals or the scope of the existing law. The reasoning put forward for this proposed offence is persuasive and reflects a key aim of the law reformers in this Paper – to make the law more coherent and more rational.

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75 Para. 1.81. In full Consultation Paper, Part 7: Businesses and Criminal Liability.

76 [2005] Crim LR 234, CA, 'clarifying' the circular and unclear test set out by the House of Lords in *Adomako* [1995] 1 AC 171.

77 Para. 1.88. They give an absurd example of potential liability in para. 1.89.

> "It would be possible to focus on whether the original owner of the business (X) failed to prevent the offence being committed by the person to whom it was delegated (Y). A conviction for this separate offence would perhaps more fairly represent what X has done wrong than individual liability for the offence itself."[78]

Presumably the evaluation of this would include a regulator and perhaps a court considering what steps were taken by the original owner to prevent offences being committed, and whether they had actual knowledge or suspicion that they should have acted on.

## 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 Consultation Paper: use of reverse onus clauses (similar to the types of liability discussed above); use of constructive liability; use of civil administrative penalties.

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."[79]

The authors of this Paper highlight difficulties with this "generating as many problems as it solves".[80] I disagree with one specifically, their claim that the application of the ECHR would be problematic. ECHR fair trial rights in no way limit the use of strict liability or of administrative codes, as long as there are appropriate procedural safeguards in place.[81] For example, their use causes no 'human rights' difficulties in France.[82] I put that difference aside here. The due

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78 Para. 1.90. Curiously the principle of "extensive construction" (where the servant's act is regarded in law as that of the master) – well covered by *Smith & Hogan*, David Ormerod, 11 ed. p. 180-1 – is not mentioned. May it not be relevant to this area? However if the same principles were applied it may be too easy for the owner/manager of a business to avoid liability by absenting themselves from premises and simply leaving instructions to comply with the rules.

79 K. Reid 2008, pp 188-91. Another example of use of the latter is the Administrative Code in Moldova where, by chance, much of this article was written, November 2010.

80 Full Consultation Paper para. 3.28. See paras. 3.28 – 30 for their arguments. Colin Scott's analysis of the law in Ireland is that "we may see further use of administrative penalties within regulatory regimes" but "whatever may happen with the development of administrative penalties we are likely to be stuck with the presence of a range of serious strict liability offences, policed by specialized agencies." 'Regulatory Crime: History, Functions, Problems, Solutions' (July 14, 2009). University College Dublin Law Research Paper No. 13/2009. Available at SSRN: http://ssrn.com/abstract=1433817 Accessed 10/02/2011.

81 A point explored more fully, using the example of young people and sexual offences, in K. Reid (2009) 'Strict Liability, Young People and the Sexual Offences Act 2003' Web Journal of Current Legal Issues issue 4, see '*R* v *G*: the Legal Arguments'. http://webjcli.ncl.ac.uk/2009/issue4/reid4.html viewed at 09/01/2011.

82 J. R. Spencer & M-A Brajeux 'Criminal liability for negligence: a lesson from across the Channel?' (2010) 59 ICLQ 1.

diligence defence put forward would certainly ensure compliance with required safeguards in appropriate cases.

Overall 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 by the previous Government, the new one, and the Law Commission. This paper takes an innovative approach to the problem but arguably could go further in some respects. While specifically outside the scope of the consultation, the same principles should form a basis for the body's future criminal law work. The quote from para. 2.24 of the full Consultation Paper, below, illustrates that the links are equally obvious to the Commission team. After, as I would hope, 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 natural persons.[83] Better enforcement of the law is needed, not more law. Similar principles should be developed for non-business liability as well. I said at the outset that it is impossible to disagree with the argument that "the introduction of rationality and principle into the creation of criminal offences" is vitally important. The Commission itself recognises this in its 'Conclusion on public interest offences' (reproduced in full below due to its importance to the argument advanced in this article).[84] That must apply to both regulatory and general criminal law. The implementation of some rational and consistent principles would surely help legislative counsel also. Writing a hundred years ago, Frederick Pollock commented—

> "Both the matter and the form of legislation depend on the will of the legislator, and in almost all English-speaking communities legislative power has been exercised by assemblies which cannot well be learned as a whole, and which may or may not be disposed to take the advice of competent persons as to the workmanship of their productions."[85]

While for many issues in this article I would apply the same principles to natural persons, I would not do so in relation to the Commission's Proposal 3. That is because of the high degree of nuisance and detriment to people's 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 the business-related areas covered but (and the Commission does not argue this) it cannot be inferred

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83 This could complement the present UK Conservative and Liberal Democrat Coalition Government's policy of a Freedom (Great Repeal) Bill to restore civil liberties. See 'Queen unveils coalition programme' BBC news online 25 May 2010.

84 Full Consultation Paper, para. 2.24 "Public interest offences are not our main concern in this CP. However, it should be obvious that many of the issues we discuss are of equal relevance to such offences. That is important, given the overlap in many areas between such offences and a regulatory domain. For example, there may be just as strong a reason to have fault elements, or a due diligence defence, in a public interest offence as there is to have such elements in an offence that directly supports a regulatory scheme. Similarly, there may be just as much reason to adopt a civil penalty approach to wrongdoing in the public interest sphere as in the regulatory sphere."

85 *A First Book of Jurisprudence*, (Macmillan, London) here quoted from the 6th ed. (1929), p. 356 – 357. Pollock's chapter VII 'Ancient and Modern Statutes' repays re-reading.

about natural persons that the cost of prosecution, as against any fine levied, should be an overriding concern. Non-criminal penalties can be very useful in dealing with low level problems. Use of intrusive surveillance or anti-terrorist powers (such as the *Regulation of Investigatory Powers Act 1997*, 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 use of police powers, adequate safeguards are needed. My research suggests that the police may be giving penalty notices for disorder when no offence has been committed that could be proved in court. 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 by the Coalition Government. This returns us to the argument that criminal legislation should be based on principles, and new criminal offences should not be created unless genuinely needed. A little less criminal law might allow for better quality law-making.