Response to the Law Commission's Consultation on Corporate Liability

Submission by the Transparency Task Force, September 2021

About the Transparency Task Force

The Transparency Task Force is a Certified Social Enterprise, meaning that we exist to make an impact, not profit.

The mission of the Transparency Task Force is to promote ongoing reform of the financial sector, so that it serves society better. Our vision is to build a large, influential and highly respected international institution that helps to ensure consumers are treated fairly by the financial sector.

The primary beneficiaries of our work will be consumers; but the sector itself will also benefit through improved market conduct and increased trust in the services it provides.

Our objective is to carry out a broad range of activities that help to drive positive, progressive and purposeful finance reform, such as:

- Building a collaborative, campaigning community; the larger it is the more influence it can have in driving the change that is needed
- Raising awareness of issues; so that society better understands the problems that exist in the financial sector and how they can be dealt with
- Engaging with people who can make change happen; because through such dialogue we can influence thinking, policy making and market conduct

Much of our focus is on rebuilding trustworthiness and confidence in financial services. To make this possible we are busy developing a framework for finance reform which we describe as a "whole system solution for a whole-system problem" as described in our recently published book

Our response to you has been produced by a highly collaborative group of TTF volunteers, our "Response Squad," working together to build consensus, whilst always remaining true to our "North Star" question: "What is best for the consumer?"

For further information about the Transparency Task Force see:
http://www.transparencytaskforce.org

Question 1:

What principles should govern the attribution of criminal liability to non-natural persons?

In our view, the principles should include:

1. Fairness and equality before the law
2. Credible deterrence for corporate offending
3. A reflection of the reality of how decisions are made in modern, large multinational companies
4. Encouraging responsible corporate behaviour, including implementation of preventative measures such as compliance systems
5. Harm caused by corporate criminality is effectively remedied

Question 2:

Does the identification principle provide a satisfactory basis for attributing criminal responsibility to non-natural persons? If not, is there merit in providing a broader basis for corporate criminal liability?

The identification principle does not provide a satisfactory basis for attributing criminal responsibility to corporate bodies. The Barclays judgement has significantly narrowed how the principle applies in a manner which in the view of legal professionals, puts large corporate bodies beyond the reach of prosecutors when they commit wrongdoing. This is not a sustainable situation, if:

- Companies are to be properly deterred from committing wrongdoing and
- Companies are to be encouraged to shoulder their responsibility for preventing wrongdoing and

- The UK is to have credibility on the global stage as a business centre that values integrity.

Question 3:

In Canada and Australia, statute modifies the common law identification principle so that where an offence requires a particular fault element, the fault of a member of senior management can be attributed to the company. Is there merit in this approach?

While the Canadian and Australian statutes would offer an improvement on the UK's current situation, it would not go far enough in our view to deter corporate criminality. The very low rates of corporate prosecutions in Canada and Australia are testament to this. Furthermore, only attributing liability to a company where a member of senior management is involved may encourage poor corporate governance standards, and may not reflect the reality of decision-making in large multinational companies.

Question 4:

In Australia, Commonwealth statute modifies the common law identification principle so that where an offence requires a particular fault element, this can be attributed to the company where there is a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant law. Is there merit in this approach?

While the corporate culture approach is attractive, in that it recognises that corporate wrongdoing can be the result of more than individual actions, it has not, as far as we are aware, been effectively tested. It is possible that having to prove the existence of a corporate culture could add an additional hurdle for prosecutors where there is corporate criminality and may not be easily understandable to a jury.

Question 5:

In the United States, through the principle of *respondeat superior*, companies can generally be held criminally liable for any criminal activities of an employee, representative or agent acting in the scope of their employment or agency. Is there merit in adopting such a principle in the criminal law of England and

Wales? If so, in what circumstances would it be appropriate to hold a company responsible for its employee's conduct?

We support the introduction of a modified version of vicarious liability to cover substantive offending alongside the introduction of a failure to prevent offence for serious corporate crime.

The US model has proven an effective tool for corporate prosecution, as has this model in other jurisdictions such as the Netherlands. A modified version of vicarious liability, which attributes liability where a person acts with authority on behalf of a corporation for substantive offending would better reflect the reality of decision-making in large corporate bodies than other proposals suggested.

Question 6:

If the basis of corporate criminal liability were extended to cover the actions of senior managers or other employees, should corporate bodies have a defence if they have shown due diligence or had measures in place to prevent unlawful behaviour?

Yes – this would help encourage corporate bodies to put such measures in place and play a strong preventive role.

Question 7:

What would be the economic and other consequences for companies of extending the identification doctrine to cover the conduct along the lines discussed in questions (3) to (5)?

In our view, the benefits of preventing corporate criminality vastly outweigh potential costs to companies of putting in place compliance measures. Additionally, companies regulated by the FCA are already under a duty to have systems in place that would prevent them from being used to commit financial crime. Full guidance from the government of how companies can meet this requirement, and recognition of their regulatory requirements may go a long way to help reduce this burden.

Corporate criminality has the potential to cost huge sums to society – this harm must be recognised when assessing the economic costs to companies of putting in place preventative compliance systems.

Question 8:

Should there be “failure to prevent” offences akin to those covering bribery and facilitation of tax evasion in respect of fraud and other economic crimes? If so, which offences should be covered and what defences should be available to companies?

There should be a failure to prevent offence for economic crimes. This has proved effective for bribery and tax evasion in raising awareness and encouraging companies to put in place better compliance systems. The range of offences should reflect Schedule 17 of the Crime and Courts Act.

Question 9:

What would be the economic and other consequences for companies of introducing new “failure to prevent” offences along the lines discussed in question (8)?

Please see our answer to question 7 above.

Question 10:

In some contexts or jurisdictions, regulators have the power to impose civil penalties on corporations and prosecutors may have the power to impose administrative penalties as an alternative to commencing a criminal case against an organisation. Is there merit in extending the powers of authorities in England and Wales to impose civil penalties, and in what circumstances might this be appropriate?

We do not think that imposing civil penalties is an adequate substitute to the criminal law for deterring and penalising corporate criminality. Civil or regulatory penalties do not carry the stigma or the consequences of a criminal conviction. We note that jurisdictions such as Germany are moving away from administrative penalties as a result of inadequacies in this approach. Furthermore it is not clear that the UK regulatory regime is sufficiently robust to rely on it to provide adequate deterrence for corporate criminality, with several recent major regulatory failings.

Where a company cannot be prosecuted however because evidence to the criminal standard is not forthcoming, using civil penalties would be appropriate and should be used far more regularly and effectively. Repeated use of civil penalties for the same offending by the same corporate entity however risks becoming a cost of doing business for those entities and the UK should consider adopting a criminal penalty for repeated regulatory breaches.

Question 11:

What principles should govern the sentencing of non-natural persons?

The introduction of remediation orders at sentencing would be a very useful addition to the sentencing armoury of the courts. It would also help ensure that convictions following prosecution are on a par with Deferred Prosecution Agreements.

Additionally, it would be very useful if there were publicity orders, so that accurate statistics and information can be gathered about corporate prosecutions – information which is currently extremely difficult to find in an accessible, centralised location.

Question 12:

What principles should govern the individual criminal liability of directors for the actions of corporate bodies? Are statutory “consent or connivance” or “consent, connivance or neglect” provisions necessary or is the general law of accessory liability sufficient to enable prosecutions to be brought against directors where they bear some responsibility for a corporate body’s criminal conduct?

Directors should be responsible where they neglect or fail to prevent criminality as well as where they are actively involved in it. Provisions should reflect this, and there should be much more robust use of director disqualification where a prosecution cannot be mounted.

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