THE FRAUD
LAWYERS ASSOCIATION

LAW COMMISSION CONSULTATION ON CORPORATE CRIMINAL LIABILITY

RESPONSE OF THE FRAUD LAWYERS ASSOCIATION

Introduction

1. The Fraud Lawyers Association was founded in 2012 to educate and train its members in all matters relating to their practice as fraud lawyers. Its membership consists of several hundred solicitors and barristers who practice mainly in the area of criminal and/or civil fraud.

2. This response reflects the wide range of experience accumulated by our members, from both branches of the legal profession; including public prosecutors (past and present) and defence lawyers as well as advocates who both prosecute and defend.

Question 1: What principles should govern the attribution of criminal liability to non-natural persons?

3. The reason for the Criminal Law Commission's review of corporate criminal liability is because of a general dissatisfaction amongst lawyers and the public regarding the ease with which corporate convictions seem to be avoided.

4. This is only partly true. Whilst there have been some well-publicised financial crime cases in which corporate defendants have either been acquitted or not prosecuted by the Crown Prosecution Service ("CPS"), Financial Conduct Authority ("FCA") or Serious Fraud Office ("SFO") (some of which followed Deferred Prosecution Agreements ("DPA")), corporate liability has been very

well-established in many other areas of criminal law. In so-called "regulatory crime" (a term which we do not agree with[1] but which is still used in some case-law), Parliament has successfully drafted provisions which create positive duties on non-human defendants, breach of which attracts criminal liability.

5. The *Health and Safety at Work, etc. Act 1974* may be the best-known example, which works very well in creating a series of statutory duties to ensure safety in the workplace so far as reasonably practicable, with the ability to implement further regulations creating separate offences. These are combined with an extensive scheme of Approved Codes of Practice to provide detailed guidance from the regulator in order to assist companies to comply with their duties.

6. This statutory scheme of creating positive duties upon corporates combined with extensive guidance should be contrasted with the recent "failure to prevent" offences created in s.7 of the *Bribery Act 2010* and s.45 and s.46 of the *Criminal Finances Act 2017*, and the generalised guidance provided on the meaning of "adequate procedures" and "reasonable prevention procedures".

7. Ultimately, the purpose of the criminal law is to maintain public confidence in the criminal justice system. The Law Commission's objective should be to develop a coherent system of corporate criminal liability that enables companies that the public would view as culpable to be convicted and punished, whilst those which are not provably guilty of wrongdoing to be acquitted. In most cases, we envisage guilt will involve the company having improperly benefitted from the actions of those with whom it is associated, although culpability could be established in cases where the company has caused some societal harm (e.g. environmental offending).

8. Companies which can be shown to have taken all reasonably practicable steps to avoid the commission of an offence should avoid conviction. A company should not be vicariously responsible as a matter of criminal law for the actions

[1] The Law Commission did not appear keen on the term either: *Law Commission Consultation Paper No 195: Criminal Liability in Regulatory Contexts (2010)* at §§3.39-3.50.

of a rogue employee, who acts contrary to his training and for his own benefit. In those circumstances, the company should not be viewed as culpable. By way of example, a company should not be guilty of fraud because one of its employees defrauded the company itself.

9. We believe there are five guiding principles that should govern the criminal liability of non-natural persons:

   a) The law should generally require companies to comply with positive duties, rather than penalising them for failing to prevent the commission of crime by others;
   b) The company's conduct, when viewed as a whole, must be blameworthy;
   c) The conduct in issue should be for the benefit of the company or the harm of society;
   d) A company's criminality should not depend on attributing the entirety of criminal conduct to any particular individual but could be aggregated by reference to facts the company could reasonably be expected to know; and
   e) The company should have a defence of "reasonable practicability", "adequate procedures" or "due diligence".

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?

10. No, the identification principle does not provide a satisfactory basis for attributing criminal liability to non-natural persons. There is obvious benefit to providing an improved basis for corporate criminal liability (i) by reference to improved corporate social responsibility and (ii) in appropriate cases by contribution to Treasury funds.

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?

11. Yes. We agree that there is merit in statutory reform to widen the scope of the identification principle. Attributing fault to a corporate by attributing the fault element of a member of senior management will go some way, in our opinion, to closing the lacuna between the potential liability of large and small corporates.

12. We consider that the definition of "High Managerial Agent" (Australia) is more appropriate than that of "Senior Officer" (Canada) especially as we note that it is proposed to be adopted into the US Modal Penal Code by the American Legal Institute over concerns about overbroad liability resulting from the current US approach of strict vicarious liability (Discussion Paper §6.10).

13. The definition of High Managerial Agent is an employee, agent or officer with duties of such responsibility that his or her conduct may fairly be assumed to represent corporate policy (Discussion Paper §6.24(2)). The definition of "senior officer", combined with the definition of "representative", in Canada is an individual who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities (Discussion Paper §§6.42 and 6.43).

14. We consider there is a significant difference between these definitions. Firstly, we note that there is little authoritative jurisprudence in Canada interpreting the term "senior officer" but that which there is demonstrates that the Canadian model appears closer to a model of vicarious liability than the Australian definition. Simply put, it opens up the larger corporate to liability as a result of the conduct of a wide range of individuals who manage important aspects of the activities of the corporate and who have committed an offence. We do not recommend such an approach to the Law Commission (see answer to Question 5 below). In contrast, we consider that the definition of "High Managerial Agent" attributes liability to the corporate from the conduct of individuals who have such responsibility as to identify them as representative of corporate policy.

15. We consider that an extension to include High Managerial Agents is consistent with the existing attribution model of corporate criminal liability in England and

Wales but will widen the scope of potential liability. The definition will be instructive to corporates and is very likely to have a demonstrably beneficial impact on the corporate culture of compliance. It is relevant to the director community and easy to explain to Boards. We emphasise the importance of striking the right balance between incentivising good corporate governance without creating a system so strict and immovable that businesses are disincentivized from commercial operations in England and Wales. We consider this proposed reform strikes the right balance.

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?

16. Whilst we agree that there is a real difficulty attributing fault to a large corporation where responsibility is diffused, we invite the Law Commission to treat the "corporate culture" method of attribution with real caution for three reasons: first, we consider that the term "corporate culture" is nebulous; second, there are practical evidential difficulties in seeking to prove a "culture"; and, third, we consider that it overlaps with the failure to prevent offences in the *Bribery Act 2010* and *Criminal Finances Act 2017*.

17. "Corporate Culture" is a difficult concept clearly to define in law. To convict on the basis of a "culture" may be something on which a sociologist could provide a better understanding but would certainly be novel in court. Based on our experience, we do not consider that this is a concept which can easily be understood by a jury.

18. We have considered how a prosecuting authority could evidentially prove "corporate culture" to a jury and we conclude that it would be practically unworkable. Presently, large corporates invariably have good policies and procedures in place so the evidence relied upon may be that which demonstrates poor implementation of good policy, weak leadership or

management styles. We consider that this could improperly conflate a deficient system within a corporate with the fault elements of knowledge or intention. We also consider that there is a risk that evidence could be called which amounts to little more than material relied upon to play to implicit bias against big corporates. Insofar as a corporate's misconduct arises from the inadequate implementation of good policies and procedures or poor systems and controls, it might be said that civil or regulatory redress is appropriate.

19. Despite these conclusions, we asked ourselves how attribution of fault through "corporate culture" could sit in our existing statutory framework of failure to prevent offences. We consider there is real overlap and the introduction of such would have the effect of adding confusion to those seeking to implement good corporate governance. Whilst "adequate procedures" may afford a defence to one specific offence, inadequate implementation of those procedures may expose a risk of liability for attribution by "corporate culture".

20. We have considered some of the academic jurisprudential journal articles from Australia considering whether a corporate state of mind can be discerned through their adopted and implemented systems ("systems unconscionability" or "systems intentionality") and, whilst we consider this cutting edge thinking to be highly relevant, we do not consider that there has been sufficient academic debate in our jurisdiction for us wholeheartedly to recommend it.

21. We turn to the collective knowledge doctrine in the US system (Discussion Paper §6.8). As set out in our answer to Question 1, we do recommend this doctrine to the Law Commission but only in combination with the principle that extension of attribution should be limited to "High Managerial Agents". Whilst we note that the doctrine may lead to what traditionalists consider to be unusual results, when no single senior employee has the requisite intent under the applicable criminal statute, and we are aware that it has rarely been relied upon for a prosecution in the US, we find that it is a necessary and proportionate addition to a prosecutor's toolkit. We believe that it is artificial to say that a corporate only knows the facts known by one senior individual when it benefits from what is collectively viewed objectively by laypeople as its dishonest

conduct. By abolishing the subjective element of dishonesty, we believe that the decision in *Ivey v Genting Casinos [2017] UKSC 67*, conclusively applied to the criminal law by the Court of Appeal decision in *R v Barton and Booth [2020] EWCA Crim 575*, has made it more sensible for juries to collate knowledge for the purpose of assessing objectively whether a corporate acted dishonestly.

22. Our rationale for limiting the collective knowledge doctrine to "High Managerial Agents" is to avoid the effective implementation of vicarious liability by another name.

23. We have considered American legal writers who have been wary of aggregating knowledge in order to draw an inference of dishonesty, fearing that gross negligence for failing to maintain a line of communication is not dishonesty. We think that this fails to accord sufficient weight to the fact that the objective test for dishonesty in *Ivey* and *Barton* does not require the jury to draw an inference regarding dishonesty, but instead requires a jury to apply their own standard of honesty to the facts known by a defendant.

24. We emphasise that our view on aggregation of knowledge is premised on informative and detailed guidance on measures that a corporate should have in place to counter the effects of aggregation of knowledge, such guidance being given to businesses by the Ministry of Justice in a similar detailed manner to that currently provided by the Health and Safety Executive or the Environment Agency. We also believe that there should be consultation of businesses, prosecuting authorities and defence organisations prior to the issuance of such guidance.

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?

25. We are strongly against the adoption of strict vicarious liability in England and Wales.

26. We acknowledge that the perceived incentive to adopt a model of strict vicarious liability in place of the current approach to attribution of direct liability may be to replicate the significant successes of the US authorities in their ability to prosecute corporates. However, we note that the successes in the US come with the protection of the established provision for Non-Prosecution Agreements ("NPAs") which, in the face of strict liability, allows the corporate to make representations to the US prosecuting authority not to prosecute.

27. If strict vicarious liability were to be introduced for prosecuting authorities in England and Wales, corporates which had taken reasonable precautions to prevent the predicate offending would have no defence and would have to rely on the Code test of which they would invariably, in our view, come out on the wrong side. In addition, in our experience, US prosecutors may be receptive to arguments in the corporate's favour because they have the resources, funding and investigating powers of the Federal Bureau of Investigation ("FBI") to check and confirm the representations made by the defending lawyers. We consider that prosecuting authorities in England and Wales are disadvantaged in comparison and will be reluctant to rely on the defence lawyers 'on trust'.

28. We adopt the criticisms noted in §6.12 and §6.15 of the Discussion Paper. We consider that strict vicarious corporate liability, if adopted without the established provisions for NPAs and a system fined tuned to consider representations on behalf of the corporate, will adversely impact on a company's preparedness to exercise due diligence and implement good corporate governance. The associated expense would not provide a defence or protection from prosecution. The only incentives which would remain, other than a moral imperative, would be to mitigate the ultimate penalty in court and to prevent any employee or agent from committing an offence which we consider may be thought of as a promethean challenge. In short, without wider statutory reforms and changes to the operating models and resourcing of

English and Welsh prosecuting authorities, we consider that strict vicarious liability would be more punitive if adopted in our system than it is in the US and this would therefore have the effect of seriously discouraging large commercial enterprise in England and Wales.

29. We further adopt the criticism in §6.13 of the Discussion Paper and note that we find it problematic to hold a corporate to be criminally liable for the actions of an employee where the actions were not in the interests of the corporate. In other words, the corporate is both perpetrator and victim in a criminal court.

30. We have considered in what circumstances it would be appropriate to hold a company responsible for its employee's conduct. As set out above, we agree that the identification principle does not provide a satisfactory basis for attributing criminal responsibility to non-natural persons. Whilst we maintain that an attribution model of liability is the right approach, we see merit in statutory reform to widen the scope of the identification principle. We do not agree that the reform should extend to strict vicarious liability as per the US approach. We consider that the definition of "High Managerial Agent" as defined in the Criminal Code in Australia (with aggregation of such person's factual knowledge in appropriate cases) is a balanced and sensible extension of our current approach to corporate criminal liability with the addition of a defence of "reasonable practicability", "adequate procedures" or "due diligence".

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?

31. As we suggest in our answer to Question 1 above, we consider that defences of "reasonable practicability", "adequate procedures" and/or "due diligence" should be available to a commercial organisation.

32. We have further recommended, in our answer to Question 3 of the discussion paper, that the Law Commission should propose an extension in the law of corporate criminal liability through the adoption of the "High Managerial Agents" test as currently used in Australia.

33. In light of these recommendations, and whilst noting that each case will of necessity have to be determined on its precise facts, in our view a commercial organisation should not have liability attached to it on a vicarious or strict liability basis in consequence of the actions of those who would be within the definition of "High Managerial Agents".

34. Where those actions, after due investigation, could objectively be regarded as 'rogue' as opposed to forming part of a commercial strategy, in our view the company, or other organisation, should have the opportunity to avail itself of a prescribed defence.

35. The "reasonable prevention procedures" defence as provided for in relation to the failure to prevent the facilitation of tax evasion offence found in the Criminal Finances Act 2017, in our view would be sensible starting point for this defence. That provision could then potentially be further adapted to reflect specific aspects of the extended law as appropriate.

36. We would further recommend that guidance is given to businesses by the Ministry of Justice in a similar detailed manner to that currently provided by the Health and Safety Executive or the Environment Agency.

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)?

37. We consider that the economic and other consequences for companies of the extension of the identification principle to include "High Managerial Agents", as we recommend in our answers to Questions 3 to 5, will depend on the size and regulated status of the individual company.

38. Whilst larger companies will require and want to develop sophisticated systems, smaller companies are unlikely to need them and will simply want to ensure adequate economic crime controls.

39. For regulated companies, there should not be any economic consequences, as the systems and controls required by the Financial Conduct Authority should already be in place. For non-regulated companies, we consider that there is likely to be a burden but only a very modest one, and which should not be seen as unduly oppressive, especially in the context of large companies seeking, for their own commercial purposes, to mitigate fraud and other economic crime risks.

40. We have considered whether the reforms we recommend would create such an extra burden on companies that it could impact on economic competitiveness. We have concluded that they should not do so, certainly within the UK. On the contrary, we consider that the proposed reforms will demonstrate that the UK corporate space is not a place where economic crime can thrive and improve the UK's corporate and reputational positioning in a global market.

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?

41. As set out in our answer to Question 1, we consider that the law should generally require companies to comply with positive duties rather than penalise them for failing to prevent the commission of crime by others.

42. However, we accept that, if there is not a positive duty, there should be a failure to prevent offence as a backstop. We refer to the "Call to Evidence" published by the Ministry of Justice in 2017 when the Fraud Lawyers Association

addressed the more specific question of whether an offence should be introduced of "failure to prevent economic crime". We maintain our objection to the introduction of a wide, generic failure to prevent offence and repeat that it is a less attractive reform than that of the fundamental principles of corporate criminal liability.

43. If a failure to prevent offence is necessary to address a specific course of offending, as it currently does under the *Bribery Act 2010* and *Criminal Finances Act 2017*, we consider that the type of offences which could be addressed as a failure of the corporate to prevent are those set out in part 2 of schedule 17 of the *Crime and Courts Act 2013*, to which the Deferred Prosecution Regime applies.

44. We maintain our position that strict liability is not appropriate in the corporate criminal space and repeat that a defence of "reasonable practicability", "adequate procedures" or "due diligence" is necessary and appropriate.

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?

45. We consider that the risk of economic and other consequences for companies should not be any different under direct fault attribution or a failure to prevent offence and we refer to our answer to Question 7 above. A company is required to prevent any type of economic crime by ensuring that all its processes are fit for purpose; and that strong systems and controls are in place and are operated with the requisite degree of sophistication.

46. A positive and significant consequence of the reforms we recommend is to inspire the continued shift towards proactive and positive corporate cultural attitude in favour of progressive anti-financial crime measures.

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?

47. For any provable criminal conduct, the criminal prosecution route should be the default position. In our opinion, a civil penalty regime ought not to be the default position for any regulator or prosecutor.

48. There are, of course, different standards of proof in criminal and civil proceedings and, if the test for a realistic prospect of conviction is met, then it is important that the public have confidence that the corporate cannot avoid a criminal penalty. Of course, where the civil standard of proof is met but the criminal standard is not, we consider that the approach of regulators to take civil action, as they so often do, is appropriate.

49. We note the experience of the Department of Justice ("DOJ") instituting civil proceedings against a corporate for certain criminal offences under the *Financial Institutions Reform, Recovery and Enforcement Act 1989* (Discussion Paper §6.17); and we note that it has been a popular tool in the available armoury of US prosecutors. In such cases, we observe that corporates are often encouraged into early settlements before the courts consider any of the underlying legal questions, and that these settlements have generated very substantial recoveries. We consider that the incentive for a large corporate to accept an early civil penalty is to avoid suffering additional and potentially highly punitive consequences in the marketplace from the reputational damage of a criminal penalty. These unpredictable consequences range, *inter alia*, from share price falls, delayed or failed IPOs to long-term loss of investor confidence.

50. However, we consider that this argument to create the incentive for early settlement is problematic. The incentive and ability to settle is much easier for the larger corporate than it is for the smaller corporate. Larger corporates are more likely to feel the unpredictable reputational damage through stock markets or in competitive marketplaces. Larger corporates are also better able to offer

substantial settlement figures whereas, for smaller corporates, a high value early settlement may have more devastating consequences than subsequent reputational damage.

51. We consider that the introduction of a civil penalty regime could accordingly create a two-tier system. As we note above, we consider that there is public interest in having full confidence that larger corporates will face criminal sanction. The deterrent of such sanction is also significant. However, we acknowledge that the economic stability of large corporates may be in the wider public's interest as shareholders and pension funds can be detrimentally affected by both substantial financial penalties suffered by a company in which they have a significant holding and wider instability in the markets.

52. If a civil penalty regime is considered further, we would invite the Law Commission to offer some guidance on the how to mitigate the two-tier system and how the Prosecutor's Code Test may be impacted.

Question 11: What principles should govern the sentencing of non-natural persons?

53. In our view, the current provisions by which non-natural persons can be sentenced are broadly satisfactory.

54. Whilst in the form of Deferred Prosecution Agreements, the sanctions imposed on *Rolls-Royce* and more recently *Airbus* demonstrate that the courts are able to deploy a range of tools, including substantial financial penalties, that were close, or equal to, those routinely imposed on corporations in the United States of America. It will be appreciated that in arriving at those sanctions, the courts concerned followed the process mandated by the Guidelines laid down by the Sentencing Council, which would similarly have been followed in the event of a conviction as opposed to a DPA.

55. However, we agree that there may be value in conducting an exercise to determine whether the sentencing provisions for non-natural persons could be

further enhanced. In this regard we see some merit in having a statutorily defined purpose of sentencing as found in s.57 of the *Sentencing Act 2020*. Equally we agree that any sentencing framework adopted should not enable commercial organisations to approach criminal sanction as being the "cost of doing business".

56. We have considered the three possible additional sentencing tools proposed by Professor Richard Macrory as alternatives to financial penalties that are referenced in §§7.13 – 7.17 of the Discussion Paper.

57. We note that, within the context of DPA's, the imposition of a monitorship and the publication of detailed judgments are common features. The Corporate Rehabilitation and Publicity Orders suggested by Professor Macrory would appear to seek similar outcomes. We can therefore see that there may be benefit in provisions of this nature being enacted that are available to be utilised in all, or a broader range of, corporate offences, should a court determine that the facts of the case merit the use of such powers.

58. We are less convinced as to the need for a stand-alone Profit Order as also advocated by Professor Macrory, in that we consider this is broadly covered by the process prescribed by the Sentencing Council and reflected at §7.11 of the Discussion Paper and the overarching guideline cited at §7.12.

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?

59. The FLA's response is premised upon removal of the strict requirements of the identification principle, meaning that a corporate offender can be convicted without proof of a director's state of mind. That is not to say that directors who are principal offenders or otherwise complicit in the criminal actions of corporate

offenders should escape prosecution. In particular, disqualification under ss2 and 5 of the *Company Directors Disqualification Act 1986* should continue to be available as a punishment in the criminal courts in order to maintain public confidence in directorships.

60. The principle of consent, connivance and neglect is broader than liability under the *Accessories and Abettors Act 1861* as it does not require a positive act by the director and criminalises what often happens in reality, namely the culpable failure of a director to take any steps to prevent the commission of the crime by the company. Consent, connivance and neglect are well-established principles governing directors' criminal responsibility, familiar in many statutory regimes expressly providing for corporate offending. The criticism is that directors of smaller companies are far more likely to face prosecution under these provisions that directors in larger companies, simply by virtue of the relative ease with which the prosecution is able to prove personal consent, connivance or neglect in smaller companies.

61. The principal unfairness in such circumstances is that small and medium-sized enterprises ("SMEs") comprise the overwhelming majority of businesses in the UK. Where a single-director company is prosecuted, there will almost inevitably be consent, connivance or neglect by a director, which may have devastating personal consequences (e.g. disqualification, confiscation proceedings and custodial sentences).

62. Published detailed guidance on when a prosecutor will prosecute individuals can be very helpful: see for example Operational Circular 130/8 version 2 setting out the circumstances the Health and Safety Executive will take into consideration in deciding whether to prosecute a director as well as the corporate offender. In serious cases, the possibility of making an application for a director's disqualification may determine whether the individual alongside the corporate offender.

Question 13: Do respondents have any other suggestions for measures which might ensure the law deals adequately with offences committed in the context of corporate organisations?

63. As reflected in our answer to Question 5 above, we consider that commercial organisations might have greater incentive to engage more constructively with investigators if a Non-Prosecution Agreement process, as in the United States of America, was available in England and Wales. As noted, the application of the test in the Code for Crown Prosecutors is unlikely to lead to cases not being prosecuted, in circumstances where, on an informed and objective consideration of all facts, a prosecution might in all the circumstances have not been warranted.

30th August 2021