

## ***Corporate liability and the criminalisation of failure***

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### **Abstract**

Defining and prosecuting corporate criminality has long been fraught with difficulty. As a result, the UK legislature is turning to an indirect form of omissions liability, by criminalising failure to prevent certain crimes like bribery and the facilitation of tax evasion. This article charts the development of indirect omissions corporate liability in the UK, and examines its rationales and benefits. Existing commentary has not explicated the implications of extension to other offences; I consider possible objections, regarding due process rights; reliance on omissions liability; effectiveness; and the use of the measures to date. Though its likely impact is less than clear, I conclude that, on balance, corporate liability for failure to prevent crime is justifiable and warrants being extended to economic offences and beyond.

### **A. Introduction**

Under common law, the imposition of criminal liability on corporate entities<sup>2</sup> has long been fraught with difficulty. Corporate offending, like crimes involving individuals, runs the gamut

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from small-scale offences against property through to bribery, tax evasion, manslaughter, and human rights abuses. However, as distinct from the situation regarding natural persons, corporations range from single person firms, through to small and medium enterprises (SMEs) and to vast multinational corporations (MNCs) with complex management structures, operation and production processes, supply chains, and systems. These organisational structures create unique opportunities<sup>3</sup> for unlawful behaviour to occur and to be concealed, and day-to-day business activities may entail considerable risk or potential harm.<sup>4</sup> This is often compounded by the size, location and sophistication of the entity.

The development of corporate criminal liability<sup>5</sup> from the 19<sup>th</sup> century onwards sought to address the commission of crimes by corporate entities through their anthropomorphising, with the management as the mind and the workers as the hands. Since then, despite having ‘neither bodies to be punished, nor souls to be condemned’,<sup>6</sup> throughout the UK corporate entities may be found criminally liable, both for and through the acts and states of mind of their employees.<sup>7</sup> Though there is no procedural obstacle to prosecution, the means by which criminal responsibility can be ascribed and conviction attained are not straightforward nor realised often in practice. In essence, corporate entities are unlikely to be prosecuted for suspected criminal behaviour, and if so, unlikely to be convicted. The growing complexity and multi-jurisdictional nature of modern corporations and the current legal framework contribute to this, in addition to an ideological aversion to

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<sup>2</sup> This term is employed broadly, to denote corporations, banks, public limited companies, limited companies and partnerships.

<sup>3</sup> Of course, not all opportunities are exploited, and opportunities do not equate to criminality.

<sup>4</sup> P. Bucy, ‘Corporate Criminal Liability: When Does It Make Sense?’ (2009) 46 *American Criminal Law Review* 1437.

<sup>5</sup> I use this term to denote corporate criminal liability, corporate criminal responsibility, and entity criminal liability.

<sup>6</sup> Baron Thurlow, as cited in J.C. Coffee, ‘“No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79(3) *Michigan Law Review* 386.

<sup>7</sup> The UK comprises three jurisdictions: England and Wales, Scotland, and Northern Ireland.

contested cases.<sup>8</sup> So the reasons for this paucity of prosecutions and convictions are not just pragmatic and practical, but also ideological and normative.

To remedy concerns about the ability of the existing legal scheme to address problematic corporate behaviour adequately, the UK legislature is turning to an indirect form of omissions liability: the Bribery Act 2010 introduced the corporate offence of failure to prevent bribery, and this provision has now been emulated in respect of the failure to prevent the facilitation of tax evasion, domestic and otherwise, in the Criminal Finances Act 2017. This article analyses the extension of this approach to a wider range of offences.

In this article I chart the development of indirect omissions liability for corporate entities in the UK, and examine its rationales and benefits. Existing commentary has not explicated possible objections to its extension. I consider the implications of extending this to other offences and focus on: due process rights; reliance on omissions liability; effectiveness; and the use of the measures to date. In articulating and addressing a number of conceivable counterarguments, I seek to bring further normative clarity to the debate and to provide detailed analysis which is crucial in whether to justify (or to oppose) a wider scheme of indirect corporate criminal liability. Though its effect is unclear, I conclude that such corporate liability is justifiable and warrants being extended.

## **B. The problems with direct corporate criminal liability in the UK**

Issues with the extant scheme of liability in the UK have prompted consideration of less conventional ways of pursuing corporate criminality. In general, the current framework can

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<sup>8</sup> N. Lord, 'Responding to transnational corporate bribery using international frameworks for enforcement: Anti-bribery and corruption in the UK and Germany' (2014) 14 *Criminology and Criminal Justice* 100; N. Lord, 'Detecting and investigating transnational corporate bribery in centralised and decentralised enforcement systems: discretion and (de-)prioritisation in the UK and Germany' (2014) 25 *Policing and Society* 579.

appear fragmented and complex, with co-existing models: as Celia Wells remarks, 'There has been no blueprint or underpinning design'.<sup>9</sup> Depending on the particular substantive offence, corporate criminal liability may be vicarious, attributed through the doctrine of identification, or stem from management failure, and the rules governing it may be statutory or derive from common law.

The two overarching models of corporate criminal liability in the common law world can be described as derivative/nominalist on the one hand, and realist/organisational on the other. The former perspective regards the corporation as a collection of individuals; thus, criminal responsibility derives from that of human actors. As is outlined below, this encompasses the concept of vicarious liability and the attribution of liability through the identification doctrine. By comparison, the realist or organisational interpretation views the corporate entity as more than the sum of its parts, and so as capable of acting aside from and beyond its constituents. This is evident in Australia's 'corporate culture' provision under which the creation of a certain culture is relevant in determining whether that entity has committed a fault offense,<sup>10</sup> and in liability for omissions. These different approaches are outlined briefly, as their perceived flaws are driving the move towards indirect omissions liability.

A company is vicariously liable for an employee's criminal acts committed with the scope of the latter's employment.<sup>11</sup> Granted, vicarious liability is of relatively limited

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<sup>9</sup> C. Wells, 'Corporate Responsibility and Compliance Programs in the United Kingdom' in S. Manacorda, G. Forti and F. Centonze (eds) *Preventing Corporate Corruption: The anti bribery compliance model* (Dordrecht: Springer 2014) 505-513, 506.

<sup>10</sup> Criminal Code 1995 (Cth) §12.3(2); see J. Clough and C. Mulhern, *The Prosecution of Corporations* (Oxford: Oxford University Press, 2002) 138; O. Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' in J. O'Brien and G. Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (London: Hart 2013) 251-268. Though, it is important to note, this provision has never been applied (see Dixon).

<sup>11</sup> *R v British Steel* [1995] ICR 586.

application in English criminal law (in contrast to the situation in the US<sup>12</sup>), and is imposed under statute generally.<sup>13</sup> Crucially, and depending on the crime, vicarious liability may entail proof of fault on the part of the employee before it is ascribed to the corporate entity, thereby limiting liability in some respects. Nonetheless, it may also draw liability widely in linking corporate responsibility to the acts of all employees. Indeed, this is the reason for the perception that the US has considerable success in terms of pursuing corporate crime when compared with the UK.<sup>14</sup>

Co-existing with this for offences requiring proof of *mens rea* is the principle of identification, whereby those persons who control or manage the affairs of a company are deemed to embody the company itself. This principle permits criminal liability to be imposed on a corporation for an offence that requires proof of *mens rea*. As Denning LJ noted in the civil context, the 'state of mind' of 'directors and managers who represent the directing mind and will of the company, and control what it does' is 'the state of mind of the company and is treated by the law as such'.<sup>15</sup> The leading authority is *Tesco Supermarkets Ltd v Natrass*,<sup>16</sup> though regrettably, there was some divergence between the Law Lords as to the principle's precise content.<sup>17</sup> This lack of clarity compounds practical problems of prosecution. Subsequently, the strictness of the directing mind test was tempered

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<sup>12</sup> *New York Central & Hudson Railroad Co. v United States* 212 U.S. 481 (1909); P. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095; J. Arlen and W. Carney 'Vicarious Liability for Fraud on Securities Markets: Theory and Evidence' (1992) *University of Illinois Law Review* 691.

<sup>13</sup> *Mousell Bros Ltd v London and North-Western Railway Co* [1917] 2 KB 836, 845, Atkin J.

<sup>14</sup> See TRAC report, 'U.S. Prosecution of Corporate Crime Varies Widely by Location, Program and Agency' <http://trac.syr.edu/tracreports/crim/411/> (last visited 18 December 2017). Though, of course, most alleged corporate crime is addressed civilly and does not involve judicial adjudication; rather it is settled in advance with little judicial oversight. For how this works in practice, see the University of Virginia database: <http://library.law.virginia.edu/corporate-prosecutions/> (last visited 26 February 2017).

<sup>15</sup> *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, Denning LJ.

<sup>16</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

<sup>17</sup> *ibid* Lord Reid 170-1, Viscount Dilhorne 187, and Lord Diplock 199-200.

somewhat by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*,<sup>18</sup> holding that attribution of liability for an individual's actions to a corporate entity was a matter of construction on a case-by-case basis, thereby extending the range of persons who could be identified with the company.<sup>19</sup> This development was considered in *Attorney-General's Reference (No 2 of 1999)*, and the identification doctrine reaffirmed.<sup>20</sup>

The enduring and crucial issue lies in the difficulty in determining who is the directing mind, and then ascertaining whether s/he controls what the entity does. The irony is that this doctrine serves to insulate larger and more sophisticated companies from criminal investigation and prosecution, notwithstanding the greater power and capacity for harm given their (deliberately) myriad layers of management. In contrast, the smaller the company, the easier it is to determine who is the controlling mind and thereby ascribe criminal liability. As a result, the identification doctrine has been described as 'highly unsatisfactory'<sup>21</sup> and 'inadequate ... unfair ... [and] unhelpful'.<sup>22</sup> Furthermore, it cannot encompass agents and service providers (e.g. auditors, consultants, and contract manufacturers), who play ever more important and influential roles in contemporary corporate structures and practices.

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<sup>18</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7.

<sup>19</sup> See J. Payne, 'Corporate Attribution and the Lessons of Meridian' in P. Davies and J. Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift for Leonard H Hoffmann* (Oxford: Hart 2015).

<sup>20</sup> *Attorney-General's Reference (No 2 of 1999)* [2000] QB 796.

<sup>21</sup> B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press 1993) 47.

<sup>22</sup> A. Milford, SFO General Counsel, 'Control Liability – Is it a good idea and does it work in practice?' Cambridge Symposium on Economic Crime 2016, Jesus College, Cambridge, 6 September 2016: <https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/> (last visited 18 December 2017).

For these reasons, the identification doctrine was viewed as deficient and problematic for corporate manslaughter in particular<sup>23</sup> and was replaced (though some would say less than adequately<sup>24</sup>) by the Corporate Manslaughter and Corporate Homicide Act 2007.<sup>25</sup> Corporate criminal liability here is predicated on the failure to adhere to a duty of care, resulting in a gross breach causing death.

Despite their differences, these modes of ascribing liability may be classified as direct, in that a corporate entity may be charged with and found to be criminally liable for a substantive offence through one of these routes. In addition to this, liability may be indirect, by which I mean for failing to prevent or report an offence, as opposed to liability for the offence itself.<sup>26</sup>

### **C. Failing to prevent: indirect corporate criminal liability**

Currently there are two offences in the UK that entail corporate criminal liability for failure to prevent certain forms of crime, namely bribery and the facilitation of tax evasion. As is explored below, it is likely that soon these will be replicated more widely, though for other economic crimes only.

Nicholas Lord and Rose Broad characterise this as a 'transition' in corporate

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<sup>23</sup> See Law Commission, *Involuntary Manslaughter* (1996) Law Com No 237 Part IV; Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform* (March 2005) Cm 6497, 8-9.

<sup>24</sup> See D. Ormerod and R. Taylor, 'Legislative Comment: The Corporate Manslaughter and Corporate Homicide Act 2007' [2008] Crim LR 589; C. Wells, 'Corporate criminal liability: a ten year review' [2014] Crim LR 877, 854; S. Field and L. Jones, 'Five years on: the impact of the Corporate Manslaughter and Corporate Homicide Act 2007: plus ça change?' [2013] *International Company and Commercial Law Review* 239.

<sup>25</sup> Section 1 of the Act, which applies across all of the UK, provides that an organisation is guilty of corporate manslaughter if the way in which its activities are managed or organised causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. The way senior management organises or manages its activities must be a substantial element in the breach.

<sup>26</sup> This is also referred to as 'preventive fault': R. Gruner, 'Preventive Fault and Corporate Criminal Liability: Transforming Corporate Organizations into Private Policing Entities' in H. Pontell and G. Geis (eds) *International Handbook of White-Collar and Corporate Crime* (Dordrecht: Springer 2007) 279-306.

liability;<sup>27</sup> whether the trend is as embedded as they claim, certainly it is gaining traction. This is not a radical break from convention: as Jonathan Clough reminds us, the earliest corporate prosecutions were for omissions causing a nuisance,<sup>28</sup> and failure to act is a well-established basis of liability in the area of workplace safety.<sup>29</sup> Moreover, as outlined, the Corporate Manslaughter and Corporate Homicide Act 2007 provides that corporate criminal liability for manslaughter derives from a failure to adhere to a duty of care, resulting in a gross breach causing death. Be that as it may, in all of these instances the corporate entity's liability derives from a duty of care or its duty to maintain a safe working environment, whereas the recent failure to prevent offences involve a wider understanding of corporate duties, in assigning criminal liability for the behaviour of non-employees, who may not be acting to further the company's interests. So, while these health and safety and manslaughter examples are cognate, they are conceptually distinct. What is happening in respect of corporate liability in the UK is more expansive and engages corporate entities in a preventive way in contexts that hitherto were beyond their reach and responsibility. A critical question is why this approach fell into abeyance and why it is now being re-energised, in a normative change that both state and the judicial system are addressing in a somewhat ad hoc way. That aside, it is to the two existing offences that I now turn.

#### **a. Failure to prevent bribery**

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<sup>27</sup> N. Lord and R. Broad, 'Corporate Failures to Prevent Serious and Organised Crimes: Foregrounding the 'Organisational' Component' (2017) *European Review of Organised Crime* 27-52.

<sup>28</sup> J. Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18 *Criminal Law Forum* 267-300, 270, citing *Langforth Bridge* (1635) Cro Car 365 and *R v Birmingham & Gloucester Railway Co* [1842] 3 QB 223.

<sup>29</sup> J. Clough, 'Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses' (2008) 33 *Brooklyn Journal of International Law* 899-931, 919; see Health and Safety at Work etc Act 1974, s 3.



Section 7 of the Bribery Act 2010 made it an offence for a commercial organisation to fail to prevent bribery. This was a novel measure in the UK, and comprised part of a broader suite of reforms to the law of bribery, following various law reform proposals<sup>30</sup> and a series of negative reports from the Organisation for Economic Co-operation and Development.<sup>31</sup> Though a key driver of legal change was international, this form of liability has acquired a significant domestic character and momentum of its own. And as is explored below, there is a clear connection between the passage of the 2010 Act and the deployment of deferred prosecution agreements, the latter introduced primarily because their capacity to settle lowers the evidential bar.

Under section 7 a relevant commercial organisation<sup>32</sup> ('C') is guilty of the offence of failure to prevent bribery if a person ('A') associated with C bribes another person intending to obtain or retain business for C, or to obtain or retain an advantage in the conduct of business for C. An 'associated' person is defined in section 8 as an individual or an incorporated or unincorporated body who 'performs services' for or on behalf of the organisation, and whether someone is performing services is to be determined by reference to all the relevant circumstances. This was framed in an intentionally broad way.<sup>33</sup>

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<sup>30</sup> Law Commission *Legislating the Criminal Code: Corruption* (LC248, 1998); Law Commission, *Reforming Bribery* (Law Com CP 185, 2007); Law Commission, *Reforming Bribery* (LC313, 2008).

<sup>31</sup> Organisation for Economic Co-operation and Development, *United Kingdom Review of Implementation of the Convention and 1997 Recommendation Phase I Bis Report*; *United Kingdom: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and The 1997 Recommendation on Combating Bribery in International Business Transactions*; *Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions* (2008).

<sup>32</sup> Section 7(5) states that a 'relevant commercial organisation' is a body which is incorporated under the law of any part of the UK and which carries on a business (including a trade or profession) there or elsewhere; any other body corporate (wherever incorporated) which carries on a business in any part of the UK; a partnership which is formed under the law of any part of the UK and which carries on a business there or elsewhere, or any other partnership (wherever formed) which carries on a business in any part of the UK.

<sup>33</sup> Ministry of Justice, *The Bribery Act 2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*:

There are a number of elements of note here. In the first instance, the Act has extraterritorial reach: A and/or the other person may be located outside the UK.<sup>34</sup> Also, intention to generate some benefit in the course of business is required – this element will be returned to in relation to the equivalent taxation offence in the Criminal Finances Act 2017. Moreover, A would need to satisfy the criteria of a bribery offence under the Act, whether or not A has been prosecuted for such an offence:<sup>35</sup> that is, this is not predicated on conviction.

Crucially, section 7(2) provides a defence for the entity to prove that it had in place adequate procedures designed to prevent persons associated with it from bribing.<sup>36</sup> As required by section 9, the Secretary of State published guidance about these procedures, which includes case study examples and outlines six principles: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including training); and monitoring and review.<sup>37</sup> Though highly significant, the parameters of the Guidance have not been examined in court.

So, a commercial organisation commits a section 7 offence when it fails to prevent a bribery offence by an employee or an agent and cannot show it had in place adequate procedures to prevent the bribery. There is no fault element for the organisation in this respect, contrary to the Law Commission recommendation which turned on a culpable

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<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [37] (last visited 18 December 2017).

<sup>34</sup> s 7(3)(b).

<sup>35</sup> s 7(3).

<sup>36</sup> cf the use of compliance in sentencing in the US: B. Garrett, 'Structural Reform Prosecution' (2007) 93 *Virginia Law Review* 853, 958.

<sup>37</sup> Ministry of Justice, *The Bribery Act 2010 Guidance* (n 33). For instance, the International Organization for Standardization is positioning its certification ISO 37001 on anti-bribery management systems as a means by which an entity could contend that it had adequate procedures in place: see <https://www.iso.org/standard/65034.html> (last visited 18 December 2017).

failure to prevent bribery.<sup>38</sup> The Commission had recommended the creation of an offence ‘of negligently failing to prevent bribery committed by a person performing services on behalf of the organisation’,<sup>39</sup> which is narrower than that enacted in the end. The Commission counselled against a strict liability ‘failure to prevent bribery’ offence on the basis that it ‘would run entirely counter to the normal approach to serious offences’. Accordingly, the recommended offence required proof of negligence in failing to prevent bribery on the part of an individual connected with the organisation, whose functions included the prevention of the commission of bribery by persons performing services for it.<sup>40</sup> The Parliamentary Joint Committee rejected this ‘narrow and complex solution’ because of its focus on whether a ‘responsible person’ was negligent, rather than on the collective failure of the organisation to ensure that adequate anti-bribery procedures were in place.<sup>41</sup> The Government accepted the Committee’s recommendation to remove this element of negligence. The only element of fault in section 7 relates to the individual commission of the substantive/predicate offence, not the failure to prevent it. Needless to say, this broadening of criminal liability is seen as a positive dimension of this offence, as a means of supplementing intentionality.<sup>42</sup>

The expressed purpose of section 7 is ‘to influence behaviour and encourage bribery prevention as part of corporate good governance.’<sup>43</sup> Moreover, the rationale for the

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<sup>38</sup> Law Commission *Reforming Bribery* (Law Com No 313, 2008) [6.19].

<sup>39</sup> *ibid* [6.1].

<sup>40</sup> *ibid* [6.101].

<sup>41</sup> Joint Committee on the Draft Bribery Bill, *First Report Draft Bribery Bill* 16 July 2009 [89], available at <https://publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11508.htm> (last visited 18 December 2017).

<sup>42</sup> For further elaboration see I.B. Lee, ‘Corporate Criminal Responsibility as Team Member Responsibility’ (2011) 31 OJLS 755, 761.

<sup>43</sup> Ministry of Justice and Department for Business, Innovation & Skills, *Insight into awareness and impact of the Bribery Act 2010 Among small and medium sized enterprises* (SMEs) (2015) 3:

‘adequate procedures’ defence is ‘to encourage companies to realistically assess the bribery risks they face and put in place proportionate procedures to mitigate them .... [and] to promote the establishment of a bribery prevention dynamic.’<sup>44</sup> This encapsulates a view of the criminal law in this instance as a preventative device and a mechanism to influence behaviour, rather than something that operates primarily in reactive mode.<sup>45</sup>

At the time of writing, four corporations have been charged with section 7 failures to prevent bribery: Standard Bank; Sweett Group; XYZ (an anonymised small-to-medium enterprise); and Rolls-Royce PLC.<sup>46</sup> All of these have been initiated by the Serious Fraud Office (SFO), though the Crown Prosecution Service can prosecute such cases also.<sup>47</sup> No other charge was indicted against Standard Bank and Sweett Group; XYZ was the subject of an indictment alleging conspiracy to corrupt, conspiracy to bribe, and failure to prevent bribery; and the Rolls-Royce PLC indictment alleged offences of conspiracy to corrupt, false accounting, and failure to prevent bribery. Critically, none of these cases was contested at trial: Sweett Group pleaded guilty to the section 7 charge, and the remaining cases involved Deferred Prosecution Agreements (DPAs).

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf) (last visited 18 December 2017).

<sup>44</sup> *ibid.*

<sup>45</sup> See J. Hill, ‘Corporate criminal liability in Australia: an evolving corporate governance technique?’ [2003] *Journal of Business Law* 1. Despite this potential capacity to influence corporate behaviour, empirical data shows that in fact this has not occurred, though whether by accident, incompetence or design is unclear: see G. Gilligan et al, ‘Penalties Regimes to Counter Corporate and Financial Wrongdoing in Australia: Views of Governance Professionals’ (2017) 11 *Law and Financial Markets Review* 4; also J. O’Brien, ‘Editorial: Just when will a corporation be prosecuted to a judicial conclusion?’ (2017) 11 *Law and Financial Markets Review* 1-3.

<sup>46</sup> See Standard Bank DPA: [https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank\\_Final\\_1.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf); XYZ DPA: <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>; SG guilty plea: <https://www.sfo.gov.uk/cases/sweett-group> and Rolls-Royce PLC DPA: <https://www.sfo.gov.uk/cases/rolls-royce-plc/> (last visited 18 December 2017).

<sup>47</sup> The SFO is a specialist prosecuting authority that pursues cases of serious or complex fraud, bribery and corruption in England, Wales and Northern Ireland. Notably it both investigates and prosecutes cases. See N. Garoupa, A. Ogus and A. Sanders ‘The investigation and prosecution of regulatory offences: is there an economic case for integration?’ (2011) 70 *Cambridge Law Journal* 236. The Director of Public Prosecutions or the Director of the Serious Fraud Office must give personal consent to a prosecution under the Bribery Act 2010 (s 10), and to a prosecution for failure to prevent facilitation of foreign tax evasion offences under section 46 of the Criminal Finances Act 2017 (s 49).

DPAAs have a close and special connection to indirect omissions liability. In England and Wales<sup>48</sup> a DPA is an agreement reached between the prosecutor and a corporate entity<sup>49</sup> that could be prosecuted for an economic crime,<sup>50</sup> but criminal proceedings are suspended automatically if the Crown Court approves the agreement. The DPA entails suspension of the prosecution for a certain timeframe, as long as the corporate entity meets certain specified conditions, such as paying a financial penalty or compensation and co-operating with future prosecutions of individuals suspected of involvement in criminality. The judge must be convinced that the DPA is 'in the interests of justice' and that its terms are 'fair, reasonable and proportionate'.<sup>51</sup> Leveson P noted in relation to the first English DPA that "the more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interest of justice."<sup>52</sup> Regardless, this does not appear to be a bar to the settling of DPAs: despite the gravity and extent of the systematic criminality in relation to Rolls Royce, for instance, Leveson P found the DPA to be justified on the grounds that significant changes had been made to management, policies, practices and culture; that there was allegedly full co-operation and willingness to expose potential criminal acts; and the adverse consequences

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<sup>48</sup> The DPA scheme does not apply in Northern Ireland or Scotland, though in the latter there is a self-reporting initiative for bribery offences with a view to consideration of civil settlement: see

[http://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Guidelines\\_and\\_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20on%20the%20approach%20of%20COPFS%20to%20reporting%20by%20businesses%20of%20bribery%20offences%20JUNE%202017.pdf)

<sup>49</sup> This is a body corporate, a partnership or an unincorporated association, but not an individual: Crime and Courts Act 2013, sch 17.

<sup>50</sup> Courts Act 2013, sch 17, pt 2. This includes theft, fraud, forgery, money laundering, bribery, and fraudulent evasion of VAT.

<sup>51</sup> Crime and Courts Act 2013, s 45 and ch 17; cf the US scheme: see R. Epstein, 'Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions' in A. Barkow and R. Barkow (eds) *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York: New York University Press 2011) 38; B. Garrett *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard: Harvard University Press 2014); J. Rakoff, 'Justice Deferred is Justice Denied', *The New York Review of Books*, 19 February 2015.

<sup>52</sup> *SFO v Standard Bank plc* [25].

of prosecution.<sup>53</sup> Moreover, the use of DPAs and the absence of a criminal trial mean that there has been no judicial articulation or confirmation of the terms of section 7, especially the meaning of adequacy: one could add that if the procedures fail to prevent bribery they are, by definition, inadequate! While the statements of facts in the DPAs include a narrative and thus indicate what failure to prevent looks like, there is no outline of the compliance procedures.

### **b. Extending indirect corporate criminal liability**

Failure to prevent has found purchase since 2010, in contrast to the statutory scheme for corporate manslaughter which has not been mooted as a prototype for any further reform. In 2014 David Green, the Director of the SFO, declared that 'a relatively simple amendment to Section 7 of the Bribery Act, creating the corporate offence of failing to prevent acts of financial crime by associated persons, has steadily gained traction amongst interested parties. Such a change would greatly increase the SFO's reach over corporate entities in appropriate cases.'<sup>54</sup> That same year both HM Revenue & Customs' consultation on 'Tackling offshore tax evasion' and HM Government's Anti-Corruption Plan emphasised the value and significance of section 7.<sup>55</sup> Action 36 of the Anti-Corruption Plan outlined that the Ministry of Justice would examine the case for a new offence of a corporate failure to prevent economic crime, as well as examining corporate criminal liability more widely. This proposal was taken forward by an interdepartmental group, but momentum faltered with

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<sup>53</sup> *SFO v Rolls-Royce plc & anor* [33]-[64]. See further discussion below at pp 32-33.

<sup>54</sup> SFO Speech, Pinsent Masons Regulatory Conference 2014: <https://www.sfo.gov.uk/2014/10/23/david-green-cb-qc-speech-pinsent-masons-regulatory-conference/> (last visited 18 December 2017).

<sup>55</sup> HM Government, *Anti-Corruption Plan* (2014)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388894/UKantiCorruptionPlan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf) (last visited 18 December 2017).

the collapse of the coalition government in May 2015.<sup>56</sup> Nonetheless, the leak of documents a few months earlier by the International Consortium of Investigative Journalists which implicated HSBC in tax evasion and avoidance ensured that corporate facilitation of tax offences maintained a high media and political profile.<sup>57</sup> These revelations and associated rhetoric have not been matched by steady policy and legislative action. As Celia Wells noted wryly, the UK Government's enthusiasm in this context has waxed and waned, in keeping with whether or not there is an impending international anti-corruption summit with associated news coverage.<sup>58</sup>

In December 2015, HM Revenue & Customs published the summary of responses to its consultation on offshore tax evasion, setting out that the UK government would legislate for, *inter alia*,<sup>59</sup> a new criminal offence for corporations that fail to take adequate steps to prevent the facilitation of tax evasion, in addition to tougher financial penalties for offshore evaders and enablers. So, while the proposed general offence had faded from view, the HSBC scandal and the revelations in the Panama Papers in April 2016 kept some attention on tax evasion and the desirability of indirect liability. These events were matched by

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<sup>56</sup> C. Wells 'Corporate failure to prevent economic crime – a proposal' [2017] Crim LR 426, 427.

<sup>57</sup> The Guardian, 'The HSBC files: what we know so far', 11 February 2015, <https://www.theguardian.com/news/2015/feb/11/the-hsbc-files-what-we-know-so-far> (last visited 18 December 2017). HSBC has its headquarters in London; its Swiss banking arm was revealed to have assisted customers in avoiding taxes and concealing millions of dollars of assets by providing untraceable cash and advising clients how to circumvent domestic tax authorities. It's worth recalling that the HSBC story dates back to conduct in 2007-8 after which HSBC substantively overhauled its procedures globally as a consequence of the resulting DPA in the US and associated publicity. In such circumstances its changes would fall into the reasoning adopted for the Rolls Royce DPA, as outlined above: see J. O'Brien 'HSBC: Will the sword of Damocles fall?' (2015) 9 *Law and Financial Markets Review* 63-73.

<sup>58</sup> Wells, 'Corporate failure to prevent economic crime' (n 56) 427.

<sup>59</sup> HM Revenue & Customs, *Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of tax evasion, Summary of Responses*, December 2015: <http://webarchive.nationalarchives.gov.uk/20170131155414/https://www.gov.uk/government/consultations/tackling-offshore-evasion> (last visited 18 December 2017).

numerous political commitments at the Anti-Corruption Summit in London, May 2016.<sup>60</sup>

Consequently, the Criminal Finances Bill was introduced in October 2016, after which the Ministry of Justice issued a call for evidence on corporate liability for economic crime, which closed March 2017.<sup>61</sup>

All that said, what has now been legislated for relates to the evasion of tax only.

Nonetheless, it is evident that this is a shifting legal landscape, with further change likely.

### **c. Failure to prevent tax evasion**

The Criminal Finances Act 2017 was enacted in April 2017, as the wider consultation was on-going. Part 3 of the Act, which came into effect on 30 September 2017, creates two new corporate offences of failure to prevent facilitation of tax evasion: one of failure to prevent facilitation of UK tax evasion and the other of foreign tax evasion. These broad offences, designed to target tax-planning consultants who enable criminal evasion and crossing of the contested line between avoidance and evasion,<sup>62</sup> are punishable by an unlimited fine.<sup>63</sup>

Section 45 relates to the failure to prevent facilitation of UK tax evasion offences. A 'relevant body' ('B') (which means bodies corporate and partnerships, not individual persons<sup>64</sup>) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B. 'Associated person' is defined widely and includes any individual or corporate who performs services for or on behalf of

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<sup>60</sup> see <https://www.gov.uk/government/topical-events/anti-corruption-summit-london-2016/about> (last visited 18 December 2017).

<sup>61</sup> see [https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting\\_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf](https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf) (last visited 18 December 2017).

<sup>62</sup> P. Alldridge, *Taxation and Criminal Justice* (Oxford: Oxford University Press 2017) ch 3.

<sup>63</sup> s 45(8).

<sup>64</sup> s 44(2).



B.<sup>65</sup> In any event the facilitation must have been carried out in the capacity of the association with B. Jurisdictionally, the relevant body and the associated person can be either in the UK or overseas, as long as UK taxes are evaded. Notably, the associated person need not evade tax but must facilitate this; the statute distinguishes between a 'UK tax evasion offence' and a 'UK tax evasion facilitation offence'.<sup>66</sup> This makes more remote the nexus between the corporate entity and the substantive offence. The Act does not require the associated person to have been convicted of the offence.

Section 46 covers the failure to prevent facilitation of foreign tax evasion offences, differing from section 45 in the location of the offences facilitated. In terms of territoriality B must be a body incorporated, or a partnership formed, under the law of any part of the United Kingdom, or it must carry on business or undertaking in the UK; alternatively, any conduct constituting part of the foreign tax evasion facilitation offence must take place in the UK. The foreign offence is subject to a 'dual criminality' test in that both the evasion and the facilitation must be criminal in the overseas jurisdiction but also in the UK had the conduct occurred there.<sup>67</sup>

Crucially, both section 45 and 46 are 'strict liability' offences: neither the relevant body nor its senior management need to have participated in, known about, or even suspected the facilitation or the evasion for the relevant body to be criminally liable. Reminiscent of the Bribery Act 2010, it is a defence for the body to prove that, when the UK tax evasion facilitation offence was committed, it had in place such prevention procedures

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<sup>65</sup> s 44(4).

<sup>66</sup> See ss 45(4) and 45(5) respectively.

<sup>67</sup> ss 46(5) and (6).

as it was reasonable in all the circumstances to expect it to do so, or it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.<sup>68</sup>

Also akin to the Bribery Act 2010, section 47 of the Criminal Finances Act 2017 requires the Chancellor of the Exchequer to prepare and publish guidance about procedures that bodies can put in place to prevent persons acting in the capacity of an associated person from committing tax evasion facilitation offences. The Guidance<sup>69</sup> centres on the same six Principles as those promulgated regarding bribery.<sup>70</sup>

The Bribery Act 2010 has had a clear influence on the tax evasion offences, albeit that the wording of the defence differs. Whereas the bribery defence refers to adequacy, the defence for tax evasion centres on reasonableness, and it remains unclear how we differentiate between these. Though one could question why the defences were not standardised, it seems to be the case that lobbying from financial institutions provided the driver to adopt reasonableness, as apparently a less onerous standard.<sup>71</sup> As discussed in analogous fashion above, what constitutes ‘reasonable procedures’ and how this is evidenced remain ambiguous. Notably, there is some slippage in the Guidance, which states ‘that merely applying old procedures tailored to a different type of risk (or clients-focused procedures) will not necessarily be an *adequate* response to tackle the risk of tax evasion

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<sup>68</sup> s 45(2).

<sup>69</sup> HM Government, *Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*, 1 September 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/642714/Tackling-tax-evasion-corporate-offences.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642714/Tackling-tax-evasion-corporate-offences.pdf) (last visited 18 December 2017); also see *The Facilitation of Tax Evasion Offences (Guidance About Prevention) Regulations 2017*.

<sup>70</sup> Namely: risk assessment; proportionality of risk-based prevention procedures; top level commitment; due diligence; communication (including training); and monitoring and review. Regarding the meanings of due diligence see J. Bonnitcha and R. McCorquodale ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28 *European Journal of International Law* 899.

<sup>71</sup> SFO presentation, Cambridge Symposium on Economic Crime, Jesus College, Cambridge, 6 September 2017.

facilitation' [my emphasis].<sup>72</sup>

In addition, there is no need for benefit to be intended or to accrue in respect of the taxation offence, in contrast to the bribery offence. Requiring proof of benefit or intention of this would ensure a nexus between the associated person's actions and the corporation, and would exclude those acting against the wishes or aims of it. Nonetheless, omitting this requirement increases corporate accountability by incentivising the introduction of robust compliance and preventive policies. It is understandable why Parliament did not include a requirement of benefit; instead the associated person must be providing services for or on behalf of the corporation.

#### **d. Further extension of the scheme**

Since enactment there have been proposals to emulate section 7 of the Bribery Act in respect of a range of economic offences. Celia Wells suggests that extending the organisational failure to prevent mode of liability to other economic crimes makes sense on the basis that the DPA and sentencing regimes already group these crimes together;<sup>73</sup> that financial and economic crimes are often international in scope and warrant such a reaction, and that harmonisation via international bodies like the OECD, the UN and the EU is under way already.<sup>74</sup> Beyond this context, the Joint Select Committee on Human Rights has recommended the introduction of an offence of failure to prevent human rights abuses,<sup>75</sup>

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<sup>72</sup> HM Government, *Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion* 27.

<sup>73</sup> See n 50.

<sup>74</sup> Wells, 'Corporate failure to prevent economic crime' (n 56).

<sup>75</sup> Joint Select Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44309.htm> [191]-[193] (last visited 18 December 2017).

though this has not gained equivalent political attention. A comparable suggestion has been made in relation to institutional child sexual abuse in Australia.<sup>76</sup>

Indirect omissions liability has many potential benefits. Instrumentally, it is likely to be more effective than orthodox criminal prosecution for substantive offences. Ascribing criminal liability to corporate entities in this way is more straightforward and therefore preferable to the identification doctrine and to the gross negligence route as in the Corporate Manslaughter and Corporate Homicide Act 2007. It is far less restrictive than the identification doctrine in its ability to penetrate the breadth of corporate entities and in its conception of the corporation as a multi-dimensional organisation.<sup>77</sup> Yet it is not as ‘indiscriminate as pure vicarious liability’ in allowing the organisation to show that it has addressed the risks of its employees and agents engaging in criminal activity on its behalf through the adequate procedures defence.<sup>78</sup> Moreover, indirect omissions liability and the associated defences aim to ensure that corporate management fosters a culture of compliance and communicates commitment to the prevention of bribery and tax evasion throughout the organisation. The extraterritorial dimension is also significant, as it would otherwise be difficult to criminalise and pursue behaviour overseas.

The expressive component of wider corporate liability is significant also, in its communication to the public and to the business community. Imposing criminal liability for failure to prevent certain crimes conveys a positive and important message about the expectations and responsibilities of corporate entities.<sup>79</sup> As is explored below, however, the

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<sup>76</sup> P. Crofts ‘Criminalising institutional failures to prevent, identify or react to child sexual abuse’ (2017) 6 *International Journal for Crime, Justice and Social Democracy* 104-122.

<sup>77</sup> Wells, ‘Corporate failure to prevent economic crime’ (n 56) 439.

<sup>78</sup> *ibid.*

<sup>79</sup> See P. Almond, *Corporate Manslaughter and Regulatory Reform* (Basingstoke: Palgrave Macmillan, 2013) 144.

potential symbolism of criminalisation may be muted somewhat by prosecution practice.

These benefits aside, there has been no academic analysis of possible objections to or queries about this approach. This article now addresses that gap.

#### **D. Critiquing indirect corporate criminal liability**

The enduring difficulties in prosecuting and convicting corporate entities means that any developments which enable or ease this will be received positively by the State and many commentators, if not by corporate actors. I do not disagree *per se* with the supportive arguments for indirect omissions offences outlined above: rather I want to explore some possible objections which have been neglected in the debate so far, centring on normative, rights-based, and empirical matters. A prerequisite to any further entrenchment is more detailed engagement with counterarguments. Next, I consider the implications for due process rights; opposition to omissions liability more broadly; effectiveness; and the way in which existing provisions has been used to date.

##### **a. Due process rights**

Failure to prevent offences may encroach on the due process rights of the corporate entity as well as individuals implicated in the problematic behaviour. The consequences of criminal conviction, for natural and legal persons, are great. While corporations cannot be jailed and there is no attached individual liability in this context, a conviction for failure to prevent crime will result in a fine and could damage personal and business reputations.<sup>80</sup> With this

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<sup>80</sup> That said, a section 7 conviction does not result in mandatory debarment from EU procurement contracts as occurs for other corruption and bribery offences. Regulation 57 of the Public Contracts Regulations 2015 (which give effect to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement) provides that direct bribery offences under ss 1, 2 or 6 of the Bribery Act 2010, *inter*

in mind, the rationale for due process rights is to offset, to some degree, the imbalance of power that exists between the state and the accused, and to ensure that negative outcomes are borne only by those found guilty to the requisite high standard. Of course, the economic and societal power of many modern MNCs is comparable that of the state,<sup>81</sup> and there is no possibility of imprisonment. Nonetheless, and though often overlooked, corporate entities enjoy many rights under the European Convention on Human Rights (ECHR), including due process rights.<sup>82</sup>

Proof of fault is not necessary in respect of the corporate entity's failure, and instead there is an onus to demonstrate reasonable or adequate compliance measures in what Celia Wells calls a 'reverse burden defence'.<sup>83</sup> One rights-based objection to this is that it encroaches on the presumption of innocence as protected by Article 6(2) of the ECHR. Ostensibly this seems problematic, but in certain circumstances Parliament may allocate legitimately a legal burden<sup>84</sup> to the accused in criminal trials. This is via 'reverse onus clauses', which require him 'to prove some matter the effect of which is that he is not guilty

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*alia*, trigger mandatory debarment from all EU public sector contracts for up to five years. Although section 7 is not included, a contracting authority still may exclude an entity from participation in a procurement procedure if it can demonstrate that it is 'guilty of grave professional misconduct, which renders its integrity questionable' (regulation 57(8)). See A. Webster 'Could a company be debarred following a conviction for failure to prevent bribery?' [2016] Crim LR 485.

<sup>81</sup> R. Grantham, 'The legitimacy of the company as a source of (private) power' 239-263 in K. Barker, S. Degeling, K. Fairweather and R. Grantham (eds), *Private law and power* (Oxford: Hart Publishing 2016).

<sup>82</sup> M. Emberland, *The Human Rights of Companies, Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press 2006). P.H. Van Kempen, 'The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?', in M. Pieth & R. Ivory (eds), *Corporate Criminal Liability. Emergence, Convergence, and Risk* (Dordrecht: Springer 2011) 355-389. For a critique of what is viewed as the appropriation of human rights discourse to serve the interests of global capital see A. Gear *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Basingstoke: Palgrave Macmillan 2010).

<sup>83</sup> Wells, 'Corporate failure to prevent economic crime' (n 56) 435. See also J. Stanton-Ife 'Strict Liability: Stigma and Regret' (2007) 27 OJLS 151.

<sup>84</sup> A probative or legal burden requires the party who bears it to prove the matter at issue or else lose on that point, whereas the evidential burden requires sufficient evidence to be adduced to raise an issue at trial (*Jayasena* [1970] AC 618, 622-23).

of the offence charged', such as the absence of one of the elements of the *actus reus* of the offence, or the existence of a defence.<sup>85</sup>

The courts have resolved challenges to reverse onus clauses in a number of ways, in some instances 'reading down' provisions that otherwise would be incompatible with Article 6(2) so that they impose an evidential burden instead.<sup>86</sup> Beyond this, the Court of Appeal has upheld the imposition of a legal burden of proof in particular contexts and for important public ends. In *R v Davies*, the Court held that a legal burden of proof in the form of a defence of reasonable practicability in section 40 of the Health and Safety at Work Act 1974 for offences consisting of a failure to comply with a duty or requirement to do something 'so far as is practicable, or so far as reasonably practicable, or to use the best practicable means to do something' was justified, necessary and proportionate, and was not incompatible with Article 6(2).<sup>87</sup> This was founded on the regulatory nature and purpose of the Act; the choice of the duty holder to operate in a regulated sphere of activity with the concomitant acceptance of the activity's regulatory controls; the initial requirement on the prosecution to prove that the defendant owed the relevant duty and that the relevant safety standard had been breached; the defendant's knowledge of the facts relied on in support of the defence; and that the consequences of conviction did not involve the 'moral obloquy' of a truly criminal offence nor imprisonment.<sup>88</sup> A comparable conclusion was reached in relation to a defence to a drink driving charge under the Road Traffic Act 1988.<sup>89</sup> The Court emphasised that the ECHR did not outlaw presumptions of fact or law but required that they

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<sup>85</sup> I. Dennis, 'Reverse onuses and the presumption of innocence: in search of principle' [2005] Crim LR 901, 901.

<sup>86</sup> *R v Lambert* [2002] 2 AC 545.

<sup>87</sup> [2002] EWCA Crim 2949.

<sup>88</sup> [24]-[31].

<sup>89</sup> *Sheldrake v DPP* [2005] 1 AC 264. See A. Ashworth, 'Case Comment: *Sheldrake v DPP* [2004] UKHL 43' [2005] Crim LR 215, 219.

should be kept within reasonable limits and should not be arbitrary. The reverse onus provision was upheld on the basis that it was directed to a legitimate objective; that the defence gave the defendant an opportunity to exonerate himself; that it was more appropriate for him than the prosecution to prove the likelihood of his driving as it was a matter closely conditioned by his own knowledge and state of mind at the material time; and that the imposition of the burden did not extend past what was necessary and reasonable and was not arbitrary.

All of this indicates that the use of reverse onus defences here does not compromise Article 6. These defences are directed at a legitimate objective, namely the prosecution and prevention of serious criminality; they allow corporate defendants to exonerate themselves through articulation of compliance procedures; it is more appropriate for the entity than the prosecution to prove the details of internal procedures and implementation in practice; and the imposition of the burden is necessary, reasonable and not arbitrary. Moreover, and crucially, the reverse onus defences do not require proof of lack of guilt; what must be established only is the presence and use of adequate/reasonable procedures.

Despite doctrinal approbation, normative questions might remain about the impact on the presumption of innocence, when conceived of broadly.<sup>90</sup> Critiques of reverse onus provisions usually centre on the implications for autonomy of the individual,<sup>91</sup> and are informed by the potential imprisonment that follows conviction. Regardless of one's misgivings or otherwise as to reverse onuses in the individual sense, a convincing case can

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<sup>90</sup> L. Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76(4) MLR 681.

<sup>91</sup> J. Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?' in A. Duff, L. Farmer, S. Marshall, M. Renzo and V. Tadros (eds) *Criminalization: The Political Morality of the Criminal Law* (Oxford: Oxford University Press 2014) 124; R. Shiner 'Corporations and the Presumption of Innocence' (2014) 8 *Criminal Law and Philosophy* 485, 487.



be made that the situation regarding corporate defendants is separate and distinct. Unlike individuals, corporations have no autonomy right not to be treated as means, and cannot be imprisoned. I agree that reverse onus offences properly allocate the burden of proof for corporations and do not violate the presumption: the available defence meets any normative demands for 'legal innocence',<sup>92</sup> and the power dynamic leads to the conclusion that reverse onuses are just.<sup>93</sup>

This is a pragmatic acceptance of a possible encroachment on the presumption of innocence, justified by the purpose and benefits of indirect omissions liability and the nature of corporate entities and the business environment. Section 7 prompted companies to reconsider the character of and responses to bribery risks: this compliance incentive would be removed if the defence onus were to be altered.<sup>94</sup> Moreover, reverse onuses ease the burden on the prosecution significantly, both in terms of matters to be proven as well as costs.<sup>95</sup> While there is no need for a conviction for the substantive offence to prove failure to prevent it, part of the prosecution case is to establish to the relevant standard that the given offence occurred, which may be difficult. Overall, trials of this type are lengthy and complicated, risky and costly, not least given the political climate in which the prosecutor's very existence was in the balance for some time.<sup>96</sup> Though discussions about abolition seem to have abated, the SFO's 'value for money' still is foregrounded in speeches.<sup>97</sup> More contested and protracted trials would increase expenditure significantly.

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<sup>92</sup> Shiner (n 91) 493.

<sup>93</sup> *ibid* 495.

<sup>94</sup> Wells, 'Corporate failure to prevent economic crime' (n 56) 435.

<sup>95</sup> For this point regarding strict liability see A. Simester 'Is Strict Liability Always Wrong?' in A. Simester (ed) *Appraising Strict Liability* (Oxford: Oxford University Press 2005) 26.

<sup>96</sup> See Financial Times, 'Tories pledge to abolish Serious Fraud Office – manifesto', 18 May 2017.

<sup>97</sup> See SFO Speech, Ben Morgan, Joint Head of Bribery and Corruption, 'The future of Deferred Prosecution Agreements after Rolls-Royce', 8 March 2017: <https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/>; SFO News Release, 'Chief Operating Officer Appointment', 6

The second dimension of the due process argument relates to individual rights. In terms of direct legal effect, there is no individual liability under the two existing provisions, and no suggestions that any further development would include this.<sup>98</sup> No individual is charged or is on trial; therefore, Article 6 is not engaged for him. As for indirect legal effect, one could argue that conviction of a company for failure to prevent makes the pursuit and conviction of an employee, such as a compliance manager, more likely. Evidence gathered could be used in a subsequent individual trial, but this again would be for a separate, substantive offence with associated legal protections. One could envisage corporate liability in this context being used as leverage in respect of individual prosecutions, but this sort of manoeuvre would not compromise Article 6 necessarily.

Beyond all this, one could argue that as the Companies Act 2006 permits the incorporation of single-member companies<sup>99</sup> indirect omissions liability could be employed against a sole trader, resulting in *de facto* encroachment on his due process rights. Of course, under the *Salomon* doctrine the corporation is a single legal entity, distinct and separate from any or all the individuals who compose it.<sup>100</sup> Nevertheless, while the use of failure to prevent against a sole trader is possible, it is highly unlikely in practice, and so any due process worries here are mitigated.

Finally, and most critically, there may be due process implications for the individual on whom the omissions offence hinges (i.e. the apparent briber/bribee or facilitator). He will have evidence raised against him in the course of the trial, given that his misdeeds need

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October 2016: <https://www.sfo.gov.uk/2016/10/06/chief-operating-officer-appointment/> (last visited 18 December 2017).

<sup>98</sup> Though as Karl Laird notes, the Act is silent as to whether it is possible for an officer of the company to be guilty of ss. 45 and 46 offences on the basis of secondary liability: K. Laird, 'The Criminal Finances Act 2017 - an introduction' [2017] Crim LR 915, 938.

<sup>99</sup> Section 7.

<sup>100</sup> *Salomon v A Salomon and Co Ltd* [1897] AC 22.

to be established. This is not his criminal trial and there will be no individual conviction; nonetheless, he has no capacity to defend himself against these assertions. Though this may seem unpalatable, it does not breach his right to be presumed innocent.<sup>101</sup> He may regard his reputation and professional standing as having been compromised by virtue of the contentions in court that his behaviour constituted bribery or facilitation; that is beside the point as neither domestic nor ECHR jurisprudence precludes this, as he is not being tried, convicted or punished. Accordingly, I conclude that there are no due process objections to extension of the failure to prevent approach.

#### **b. Aversion to omissions liability**

The next challenge to indirect corporate criminal liability centres on a principled opposition to omissions liability in general. The conventional wisdom, or at least rhetoric,<sup>102</sup> is that unless one is under a duty to act, be that through a relationship, acquisition of responsibility or contract,<sup>103</sup> one can fail to respond to or remedy a given situation, notwithstanding how onerous this may be, without criminal liability.<sup>104</sup> All that said, the extent to which this understanding still holds true is questionable. Moreover, I suggest that concerns about omissions liability for individuals do not apply in this context. Essentially, any argument opposing indirect corporate criminal liability on this ground can be rebutted on two fronts: first, that we accept various forms of individual liability based on omissions, and second, that the justifications predicated on duty and opportunity are even more pertinent and tolerable for corporate entities.

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<sup>101</sup> Campbell (n 90).

<sup>102</sup> A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 299.

<sup>103</sup> A. Ashworth 'Manslaughter by omission and the rule of law' [2015] Crim LR 563.

<sup>104</sup> A. P. Simester, 'Why Omissions Are Special' (1995) 1 Legal Theory 311; P. Smith, 'Omissions and Responsibility in Legal Theory' (2003) 9 *Legal Theory* 221.

There is a wariness about omissions liability for individuals, and a sentiment that this should be in limited and particular circumstances only. Antony Duff speaks convincingly of a civic responsibility and moral duty 'to assist the law in achieving its proper purposes';<sup>105</sup> this falls far short of criminal liability for failing to do so. The legitimacy of imposing 'social responsibility'<sup>106</sup> on individuals through the criminal law can be questioned due to the encroachment on autonomy. In addition, when the offence is one of failing to prevent a crime, another matter in relation to individuals is that they may be connected to or intimidated by the offending party,<sup>107</sup> and thus further harm might result. These concerns about individual omissions liability do not transfer to the corporate context.

Even for individuals, omissions liability is justifiable where a duty exists, as long as there is capacity and opportunity to act, and where the extent of the legal obligation is limited.<sup>108</sup> In relation to corporate entities, duty accrues through voluntary participation in a regulated, profitable field, and the entity is placed ideally in this context; one could ask who or what else would have opportunity to prevent such criminality. Though this co-opting of legal persons could be regarded as their responsabilisation<sup>109</sup> in a displacement of policing obligations,<sup>110</sup> really it is a recognition of the imbalance of power, the opacity of business structures, and the impermeability to enforcement.

Furthermore, omissions offences come in different forms, with varying levels of what Andrew Ashworth calls 'intensity of criminalisation'.<sup>111</sup> The first level comprises the offence

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<sup>105</sup> R.A. Duff, *Trials and Punishments* (Oxford University Press 1986) 132.

<sup>106</sup> A. Ashworth, 'The scope of criminal liability for omissions' (1989) 105 LQR 424.

<sup>107</sup> See Scottish Parliament Justice Committee, *Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill*, SP Paper 334, 18th Report, 2009 (Session 3) [275].

<sup>108</sup> *Evans* [2009] EWCA Crim 650.

<sup>109</sup> D. Garland *The Culture of Control* (Oxford: Oxford University Press 2001) 124.

<sup>110</sup> See L. Campbell 'Dirty Cash (Money Talks): 4AMLD and the Money Laundering Regulations 2017' [2018] Crim LR 99.

<sup>111</sup> A. Ashworth, *Positive Obligations in Criminal Law* (Oxford: Hart 2013) 69.

of failure to report, then failure to prevent, next failure to protect, through to conviction for the substantive offence in which the *actus reus* is an omission.<sup>112</sup> So the legal onus on corporate entities is relatively limited in that it criminalises failure to prevent an offence, as opposed to requiring intervention to protect a given person or interest. All of this underlines the acceptability of omissions liability here.

### **c. Effectiveness**

Along with these rights-based and normative matters, which do not pose an impediment to indirect omissions liability, a critical issue lies in the fact that its effectiveness is unclear and unproven. There is no evidence that compliance programmes, as are required by these defences, are transformative in preventing or deterring crime, and in fact they may impact negatively in permitting the rationalisation of problematic behaviour. Moreover, internally the procedures can give a façade of compliance, and they may overlap with pre-existing recording obligations.

Empirical evidence is lacking as to the value of compliance programmes in inhibiting criminality and improving corporate culture more widely.<sup>113</sup> To my knowledge, there has been no reported causative or correlative decrease in corporate misdeeds anywhere since the introduction of compliance requirements whether through DPAs, sentencing provisions, or in defences, nor any qualitative indication from individuals in corporations that their

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<sup>112</sup> For instance, ss. 330 and 331 of the Proceeds of Crime Act 2002 requires employees in the regulated sector (such as in banks) to report where they 'know or suspect' or have reasonable grounds to know or suspect that another person is engaged in money laundering. Section 19 of the Terrorism Act 2000 imposes a duty to disclose information where a person believes or suspects that another person has committed an offence under the Act, based on information that comes to his attention in the course of employment or business, and s 21A creates an equivalent offence for those in the regulated sector. Section 31 of the Criminal Justice and Licensing (Scotland) Act 2010 makes it an offence to fail to report to a police constable one's knowledge or suspicion that another person is involved in or directs serious organised crime.

<sup>113</sup> Garrett, 'Structural Reform Prosecution' (n 36) 876; also W. Laufer, 'Corporate Liability, Risk Shifting, and the Paradox of Compliance' (1999) 52 *Vanderbilt Law Review* 1343, 1415.

behaviour is altered/improved. In essence, complex and costly compliance procedures will be constructed which may be yet not affect behaviour or practice positively.

Even if the programmes are worthwhile hypothetically, corporate entities might construct 'cosmetic' procedures so as to meet the requirements through unproductive 'ritualism'.<sup>114</sup> This could be for criminal or questionable purposes, or due to the perceived complexity of the undertaking. While reasonable procedures are proportionate to the size and nature of the entity,<sup>115</sup> bigger firms can absorb and adapt to these requirements more easily. Compliance will necessitate tax and legal risk assessments, the complexity of which is compounded by the global mobility of employees and associates and by diffuse and diversified corporate structures and supply chains. These factors may incentivise superficial compliance.

Furthermore, Kimberly Krawiec points out that 'differentiating real internal compliance structures from purely symbolic ones is a difficult task for legal decision-makers, particularly *ex post* when, by definition, the structures in question have failed to deter misconduct'.<sup>116</sup> Courts and agencies lack sufficient information about effectiveness,<sup>117</sup> leading to difficulties in ascertaining adequacy and/or reasonableness, a pronounced issue given the absence of contested cases. As a result, determination relies on the SFO's initial investigation and appraisal in deciding whether or not to charge, and the judicial oversight

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<sup>114</sup> J. Braithwaite, V. Braithwaite and T. Makkai *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar 2007) 220, 227-30; H. Charlesworth and E. Larking (eds) *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: Cambridge University Press, 2015).

<sup>115</sup> See Ministry of Justice, *The Bribery Act 2010 Guidance* (n 33).

<sup>116</sup> K. Krawiec, 'Organization Misconduct: Beyond the Principal Agent Model' (2005) 32 *Florida State Law Review* 571, 580.

<sup>117</sup> *ibid*; also K. Krawiec, 'Cosmetic Compliance and The Failure of Negotiated Governance' (2003) 81 *Washington University Law Quarterly* 486, 491.

provided in the conclusion of DPAs.<sup>118</sup> The defence standards' open-textured nature means there is considerable room for negotiation by corporate entities in establishing what is adequate and/or reasonable. Here the accused party can shape the meaning of the defence for the offence with which it is charged: in other words, business interests define, or at least influence, legality. Christine Parker would describe this as a form of 'meta-regulation' of corporate responsibility, which centres on internal governance processes in a way that allows entities to avoid the conflict between self-interest and social values, and therefore to avoid accountability.<sup>119</sup> And as Frank Pearce and Steve Tombs note in relation to regulatory compliance, 'strategies that stress consultation and conciliation typically end up with agencies endorsing the industry's own evaluations of what is reasonable and usually allow companies to negotiate their way out of penalties for violating even these agreements'.<sup>120</sup> Conversely, one could argue that allowing corporate entities to inform the content and parameters of defences surely is the whole point, if their behaviour is to be affected positively. This resonates with 'responsive' regulatory theory, which posits that regulation is most effective and legitimate where it is cooperative and engenders a perception that regulation is in the interest of the regulated.<sup>121</sup> The question is whether criminal law should be imposed on, or alternatively negotiated with, corporate entities. Fundamentally, our normative conclusion may depend on whether we view such actors as socially useful

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<sup>118</sup> N. Lord and C. King, 'Negotiating Non-Contention: Civil Recovery and Deferred Prosecution in Response to Transnational Corporate Bribery' in L. Campbell and N. Lord (eds) *Corruption in Criminal Enterprise: Law, Theory and Practice* (Abingdon: Routledge 2018).

<sup>119</sup> C. Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press 2007).

<sup>120</sup> See J. Rakoff, 'Justice Deferred is Justice Denied', *The New York Review of Books*, 19 February 2015; F. Pearce and S. Tombs 'Policing Corporate 'Skid Rows': A Reply to Keith Hawkins' (1991) 31(4) *British Journal of Criminology* 415, 419.

<sup>121</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press 1992). Though for critique see J. Braithwaite, 'Cultures of Redemptive Finance' in J. O'Brien and G. Gilligan, *Regulating Culture* (Hart, 2013) and W. Streeck, *How Will Capitalism End* (Verso 2016).

constructs that are essentially lawful albeit with capacity for criminality like any actor, or as inherently criminogenic.<sup>122</sup> One can remain neutral as to whether corporate bodies are non-moral or amoral: even a benign view of corporate behaviour and recognition of the merits of dialogue cannot remedy the nebulous quality of these defences.

In terms of judicial oversight, it is notable that all the DPA hearings and thus all the section 7 cases have been in the Crown Court at Southwark, before Sir Brian Leveson, President of the Queen's Bench Division. On one interpretation, this ensures consistency and cultivates a body of expertise. Contrariwise, it is dubious for the ascertainment of adequacy and/or reasonableness to rest solely with one judge, not least as DPAs are not judicially reviewable in England and Wales. Without wishing to impugn the work or the integrity of Sir Brian Leveson P or the SFO, one could surmise that the close 'relational distance'<sup>123</sup> between the state and the alleged corporate criminals may have an impact on the form and robustness of the enforcement response.

In addition, it is arguable that these defences may in fact encourage criminality by virtue of the opportunities that a compliance programme without true legitimacy presents to rationalise illegal behaviour.<sup>124</sup> Senior management may acquire a false sense of security due to their perception that the creation of certain procedures will insulate against criminality. This may detract from other initiatives that might be more impactful: though compliance systems may translate into good compliance practices, managerial oversight, planning, commitment to compliance values, and organisational resources are just as

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<sup>122</sup> Steve Tombs and David Whyte, *The corporate criminal: Why corporations must be abolished* (Abingdon: Routledge 2015).

<sup>123</sup> Donald Black, *The Behavior of Law* (Michigan: Academic Press 1976).

<sup>124</sup> See T. Haugh 'The Criminalization of Compliance' (2017) 92 *Notre Dame Law Review* 1215.



important.<sup>125</sup> Ultimately, the presence of adequate or reasonable procedures serves as a defence, not a mechanism for change. The failure to prevent approach perpetuates the perception that the misconduct is an aberration, or is done by someone extrinsic to or working at odds with the corporate entity. Despite the fact that corporate culture might have influenced or enabled the misbehaviour, the formal presence of a compliance framework may serve to counterbalance this in a legal sense.

It goes without saying that any effect on individual and corporate behaviour is predicated on knowledge of the legal provisions and their criteria, as well as a belief in the likelihood of detection and enforcement. A survey of more than 1,000 senior UK corporate decision-makers carried out in May 2017 found low levels of awareness of the failure to prevent tax evasion offences: 76% of respondents said that they were not aware of the new offences.<sup>126</sup> Awareness will no doubt improve now that the provisions are in force; nonetheless this may undermine claims about the likely alteration of corporate behaviour.

Finally, these defences may overlap in part with pre-existing recording obligations, such as under the 2017 Money Laundering Regulations which require 'obliged entities' in the financial sector and beyond to apply customer due diligence and other measures to prevent their services being used for money laundering. It is conceivable that potential overlap is helpful in reducing the costs and demands of compliance, not least given the enormous anti-money laundering (AML) compliance industry.<sup>127</sup> That said, Peter Alldridge

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<sup>125</sup> C. Parker and V.L. Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41 *Administration & Society* 3.

<sup>126</sup> Pinsent Masons, 'Survey finds low levels of awareness of new 'failure to prevent' tax evasion offences', 3 May 2017: <https://www.out-law.com/en/articles/2017/may/survey-finds-low-levels-of-awareness-of-new-failure-to-prevent-tax-evasion-offences/> (last visited 18 December 2017).

<sup>127</sup> P. Alldridge, *What Went Wrong with Money Laundering Law?* (Basingstoke: Palgrave Macmillan 2016) 1.

observed that AML policies have induced ‘defensive over-reporting’<sup>128</sup> and the cognate defences may ratchet up record-keeping similarly for debateable ends.

Brandon Garrett advocates scepticism about the policy, legal, and judicial focus on compliance in the US, given the lack of empirical evidence demonstrating whether compliance programmes create effective remedies.<sup>129</sup> I share his doubts, but suggest that a critical and mitigating difference is that the UK framework ‘frontloads’ compliance in its inclusion as a legislative defence rather than in later negotiation with the companies, and so may be more positively impactful. The defences provide an *ex ante* incentive to create and implement adequate/reasonable procedures, which, despite a dubious evidence base, should prompt at least incremental changes in corporate reflection and practice. Thus, on balance, debateable effectiveness is not fatal to the extension of indirect omissions liability.

#### **d. Failure to prevent in practice: from prosecution to prevention?**

The implementation of indirect omissions liability to date should give us pause before further expansion, given the absence of prosecutions of both legal and natural persons. As noted above, four corporations have been charged with section 7 failures to prevent bribery, resulting in one guilty plea and three DPAs.<sup>130</sup> No section 7 case has involved a contested prosecution. Through its focus on compliance, with a preference for settlement over contention,<sup>131</sup> the burgeoning failure to prevent scheme represents a fundamental reframing of the criminal law from a punitive to a preventive model. Though this might be

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<sup>128</sup> P. Alldridge, ‘Money Laundering and Globalization’ (2008) 35 (4) *Journal of Law and Society* 437, 443; also see Campbell (n 110).

<sup>129</sup> Garrett, ‘Structural Reform Prosecution’ (n 36) 876.

<sup>130</sup> See n 46 above.

<sup>131</sup> Lord and King (n 118); N. Lord and C. King, *Negotiated Justice And Corporate Crime: The Legitimacy Of Civil Recovery Orders And Deferred Prosecution Agreements* (Palgrave, 2018)

viewed as its most positive and potentially successful dimension, the objection raised here is that it could usurp substantive criminalisation, prosecution and punishment. Of course, the next question is whether this is objectionable.

The purposes of the criminal law are both preventive and reactive, encompassing punitive aims as well as rehabilitative and restitutionary ones.<sup>132</sup> In theory and practice the criminal law always has sought to deter as well as punish problematic behaviour. What is occurring in respect of corporate liability is an eschewing of the fundamental punitive component for preventative and remedial logics. The SFO states that 'DPAs enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction',<sup>133</sup> and describes them as 'a new kind of disposal of criminal risk in this jurisdiction, conceptually ... somewhere between a guilty plea and a civil recovery'.<sup>134</sup> These depictions are telling and are applicable to failure to prevent offences also, which occupy a comparable interim position: like so-called regulatory offences<sup>135</sup> they are characterised by strict and omissions liability and reverse-onus provisions, but the acts to which they relate are not 'morally neutral'.<sup>136</sup> Furthermore, they aim to alter behaviour before trial is contemplated, in contrast to being predicated on enforcement through prosecution and conviction.<sup>137</sup> Thus, our evaluation of indirect corporate liability could be determined by whether we view the core of criminal law as the prevention of harm, or as relating to

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<sup>132</sup> H. Carvalho *The Preventive Turn in Criminal Law* (Oxford: Oxford University Press 2017).

<sup>133</sup> SFO, 'Guidance, policy and protocols: Deferred Prosecution Agreements', available at <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> (last visited 18 December 2017).

<sup>134</sup> SFO Speech, 'The future of Deferred Prosecution Agreements after Rolls-Royce' (n 97).

<sup>135</sup> Celia Wells, *Corporations and criminal responsibility* (Oxford: Oxford University Press 2001) 8; Horder (n 91).

<sup>136</sup> cf S. Green 'Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1536.

<sup>137</sup> Ashworth, 'Is the Criminal Law a Lost Cause?' (n 102) 288.

censuring primarily. Though failure to prevent liability gives precedence to the former, the provisions still retain the capacity to convey moral condemnation.

Beyond this, I suggest we should move away from viewing the issue through the prism of criminal law only to look at the harm involved also. State legal measures, such as criminal law, are one component of a 'smart mix' that seeks to incentivise and ensure human rights protection and responses by corporate actors.<sup>138</sup> Rather than this being a matter of criminal law solely, with analysis centring on its meaning, boundaries, and purported consistency or internal logic, our focus should extend to how best to prevent and address corporate misdeeds within the existing criminal law framework, with attendant stigma and protections. The question is how best to give effect to the legitimate preventative aim of improving corporate practices rather than being constrained by the orthodoxy of criminal law and process, constructed with individual vulnerabilities and concomitant protections in mind. Our legislative and scholarly efforts should relate to the wrongs and harms to be addressed, namely corporate failure to prevent criminality and to construct adequate preventive procedures, and to interpret and assess indirect omissions liability as part of the response to this governance gap.

All that said, it is difficult to understand how a DPA can be justified for failure to prevent offences. From the point of view of the SFO, negotiating a DPA in respect of substantive bribery offences instead of prosecution sometimes is logical due to the difficulties in satisfying the requisite evidential burden, especially in some international cases. Moreover, the consequences that flow from bribery convictions, such as mandatory debarment under EU law, imply that a less punitive approach might be justifiable or

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<sup>138</sup> J.G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton 2013) xxiii.

arguably in the public interest in some instances.<sup>139</sup> However, unlike the direct bribery offences, a defence is built into the failure to prevent offences. The option of a DPA might be regarded as a second bite of the cherry, so to speak, in that the corporate entity can still negotiate away from prosecution after admitting the failure offence by virtue of not having adequate or reasonable procedures. This appears to be an incompatibility between DPAs and indirect omissions offences, or at least a duplicate means of circumventing criminal prosecution. Thus, despite their current interlinkage, I propose that DPAs should not be available in this context.

Whether prosecution is pursued or otherwise, the criminal law entails distinctive consequences and expression,<sup>140</sup> underlining why corporate criminal liability is key here as opposed to any civil approach.<sup>141</sup> I argue that indirect omissions liability provides both an adequate criminal law response with attendant stigma as well as involving a useful preventive dimension, and does not necessarily dilute the force or meaning of the criminal law. This represents an understandable shift in emphasis, not a wholesale reformulation. Regardless, it should not replace substantive criminal responsibility, insofar as it seems to both over-criminalise and under-criminalise corporate entities.<sup>142</sup> The aforementioned lower standards and the absence of a fault requirement leads to higher likelihood of success in terms of conviction or at least conclusion of DPAs,<sup>143</sup> though historical and present

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<sup>139</sup> See n 80 above.

<sup>140</sup> T. Isaacs, 'Corporate Agency and Corporate Wrongdoing' (2013) 16 *New Criminal Law Review* 241.

<sup>141</sup> For an argument rejecting corporate criminal liability see e.g. D. Fischel and A. Sykes, 'Corporate Crime' (1996) 25 *Journal of Legal Studies* 319, 350.

<sup>142</sup> Andrew Simester made a comparable remark in respect of the over- and understatement of strict liability convictions: Simester (n 95) 40-41.

<sup>143</sup> See C. Díez 'Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay Between Self-Regulation, Corporate Compliance, and Corporate Citizenship' (2011) 14 *New Criminal Law Review* 78.

practice suggest that there is no danger of over-criminalisation or enforcement in fact.<sup>144</sup>

Simultaneously, the potential for replacement of the substantive criminal law and direct liability might result in *de facto* under-criminalisation. This implies that the provisions are not sufficient alone, and should not replace the orthodox use of substantive criminal law, though there is no evidence of this in practice.<sup>145</sup>

A final dimension of these concerns relates to the absence of corresponding prosecutorial action against individual actors. There has been no prosecution in the UK of any individuals for criminal behaviour related to the same series of facts of the four section 7 cases, though investigation continues into the conduct of individuals in Rolls Royce PLC.<sup>146</sup> This state of affairs is comparable to the limited number of individual prosecutions arising from deferred and non-prosecution agreements reached with companies in the US,<sup>147</sup> which has drawn sharp criticism as being 'technically and morally suspect'.<sup>148</sup> Of course, there has been a very small number of cases in the UK, and the legal scheme is still nascent, so one must be wary of drawing decisive conclusions. Nonetheless, DPAs and indirect omissions liability for corporate entities cannot be allowed to replace the holding to account of individuals through the criminal law.

## E. Conclusion

Paradigmatically, failure to prevent offences, as executed currently by means of DPAs,

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<sup>144</sup> Almond, (n 79) 58.

<sup>145</sup> For instance, the indictment against Roll Royce PLC involved five counts of failure to prevent bribery, six counts of conspiracy to corrupt and one count of false accounting, situating section 7 with a broader set of substantive offences.

<sup>146</sup> <https://www.sfo.gov.uk/cases/rolls-royce-plc/> (last visited 26 February 2018).

<sup>147</sup> Garrett, *Too Big to Jail* (n 51); B. Garrett 'The Corporate Criminal as Scapegoat' (2015) 101 *Virginia Law Review* 1789.

<sup>148</sup> J. Rakoff 'Why Have No High Level Executives Been Prosecuted in Connection with the Financial Crisis?' (11 December 2013) 17, available at <https://im.ft-static.com/content/images/cb1e43f2-4be6-11e3-8203-00144feabdc0.pdf> (last visited 18 December 2017).

denote a shift from the binary of criminal law, from guilty/not-guilty to a more gradated notion centring on negotiation and compliance. A comparable opposition in the regulatory space sees advocates of punishment pitted against the compliance school, in what Laureen Snider describes as a binary of criminalisation and cooperative regulation,<sup>149</sup> though it has also been portrayed more constructively as a continuum.<sup>150</sup> I suggest that there is a move in respect of corporate criminal liability to what might be called cooperation *through* criminalisation.<sup>151</sup> Here the criminal law is used as leverage<sup>152</sup> to effect change in corporate behaviour, though contested prosecution for failure to prevent crime is unlikely. This is reminiscent of the hybridisation of criminal/civil and of punishment/regulation identified in other contexts.<sup>153</sup> Though often depicted negatively, there are positive dimensions and opportunities to this phenomenon,<sup>154</sup> which should not be dismissed here. In contrast to entities being '[k]icked and damned in the hope of inculcating a corporate conscience'<sup>155</sup> the developments outlined above indicate a more subtle preventive mode.

Failure to prevent crime represents another piecemeal development to corporate criminal liability, one that is combined closely with deferred prosecution agreements. There is an incremental move towards its further expansion, and away from direct liability, which

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<sup>149</sup> L. Snider 'Cooperative Models and Corporate Crime: Panacea or Cop-Out?' (1990) 36 *Crime & Delinquency* 373.

<sup>150</sup> See Almond (n 79) 61.

<sup>151</sup> A comparable shift was identified by Garry Gray in the area of workplace health and safety, where he argued that the classic dichotomy over how to regulate corporate violations has moved to 'regulation through individual responsibility': G. Gray, 'The Regulation of Corporate Violations: Punishment, Compliance, and the Blurring of Responsibility' (2006) 46 *British Journal of Criminology* 875.

<sup>152</sup> Leverage is an important dimension of Principle 19 of the UN Guiding Principles on Business and Human Rights: Office of the High Commissioner for Human Rights, *UN Guiding Principles on Business and Human Rights* (New York: United Nations, 2011).

<sup>153</sup> See A. Ashworth and L. Zedner, 'Prevention and Criminalisation: Justifications and Limits' (2012) 15 *New Criminal Law Review* 542; J. Hendry and C. King, 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids' (2017) 11 *Criminal Law and Philosophy* 733; R. Baldwin, 'The New Punitive Regulation' (2004) 67(3) *MLR* 351.

<sup>154</sup> Horder (n 91) 130.

<sup>155</sup> CMV Clarkson 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *MLR* 557, 557.

on a sympathetic reading is understandable, as otherwise change might not occur at all. Indeed, James Stewart observed that legislatures and courts have not adopted corporate criminal liability because of its philosophical coherence within the surrounding legal system; instead they do so practically as there is no other meaningful option.<sup>156</sup> Similarly, indirect corporate criminal liability is a reaction to intractable problems with the identification doctrine, and replicates systems of compliance and due diligence in the AML and financial worlds generally. That aside, there remains the inescapable problem of wider state ambivalence towards the regulation of capitalism and financial markets, and the encountering of a competing normative position regarding the need to address corporate crime robustly.<sup>157</sup> The political climate in the UK is such that deeper intervention and change in respect of corporate misconduct are neither feasible nor likely.<sup>158</sup>

Having considered four counterarguments to indirect corporate criminal liability, I advocate extension to other offences, but would remove the possibility of negotiating DPAs in conjunction with this. Moreover, it is hard to discern a rationale for addressing bribery and tax evasion only, and, beyond this, why any extension should be limited to economic crimes.<sup>159</sup> Rather than protecting certain interests above others, the transformative potential of omissions liability could be realised through its extension to non-financial crimes such as labour exploitation in foreign jurisdictions, and human rights abuses. Humanitarian issues and the harms caused are most pertinent in relation to corporate wrongdoing, and thus further expansion is warranted. That said, only a minority of

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<sup>156</sup> J.G. Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity' (2013) 16 *New Criminal Law Review* 261, 271.

<sup>157</sup> Celia Wells, *Corporations and criminal responsibility* (n135) 3.

<sup>158</sup> Almond (n 79) 190.

<sup>159</sup> See the list in Crime and Courts Act 2013, Schedule 17, Part 2.



corporate offenders ever is intercepted,<sup>160</sup> as criminality and harm may be diffuse or hidden, and the victims unknown, unaware, or unlikely to report. Regardless of its ultimate reach, indirect omissions liability is far from a panacea but nonetheless represents a useful tool in addressing corporate wrongdoing.

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<sup>160</sup> Wells, *Corporations and criminal responsibility* (n 157) 20.