

'Move Along, Move Along, Nothing to See Here'

Adrian Darbishire QC and Rachna Gokani consider the Government back down on extension of corporate criminal liability.

In one, short, little-heralded parliamentary answer, the Government appears to have sounded the death knell for the idea of a change to corporate criminal liability, at least for the foreseeable future. It transpires that, contrary to the sustained arguments of the SFO, Attorney General, the Solicitor General, HMRC, and indeed the promises of the 2015 Conservative Manifesto, there is no problem with the law as it stands. So that's that then.

In enacting section 7 of the Bribery Act 2010, Parliament acknowledged the inadequacy of the identification doctrine, at least in that sphere, and recognised that wider reform of the English law of corporate criminal liability was still some way off. Back in May 2012, the Ministry of Justice Consultation Paper on Deferred Prosecution Agreements, noted:

"In addition the law of corporate criminal liability poses some problems. Under the current law, in order to obtain a conviction a prosecutor must show that the "directing mind and will" of the commercial organisation had the necessary fault element or "mens rea" for the offence. However, this is often difficult to prove, especially in increasingly large and more sophisticated modern commercial organisations. While the new offence in connection with the failure of a commercial organisation to prevent bribery under section 7 of the Bribery Act 2010 will help, more needs to be done, especially in relation to other types of economic offending."

This is an idea close to the heart of the SFO. The Director, David Green CB QC, has long considered that the SFO is unfairly disadvantaged in prosecuting corporates, calling for an extension of the law of corporate liability back in 2013, noting: *"Only then would we be properly equipped to prosecute corporates rather than individuals"*.

At the Cambridge Symposium in 2014, Green commented: *"I will also continue to speak in favour of amendment of section 7 of the Bribery Act to create the offence of a company failing to prevent acts of financial crime by its associated persons. That would significantly increase our reach on corporate criminality, and is an idea that appears to be gaining traction."* At the same event, the Coalition Attorney-General, Jeremy Wright QC agreed: *"The evolving nature of economic crime means we need to continue to find and develop new ways to expose and combat it. The government is considering proposals for the creation of an offence of a corporate failure to prevent economic crime."*

And as recently as September this year, again at the Cambridge Symposium, David Green said of deferred prosecution agreements:

"There is, I suggest, one more step necessary to make DPAs mainstream. That involves moving away from the identification principle of corporate criminal liability in English law and embracing something closer to vicarious liability, as in the USA. Until that is done, a corporate might conclude that if the prosecution of a company is so difficult under our law, why should they agree to a DPA? On a broader front, if the public interest, in terms of public confidence, demands more prosecutions of corporates, then such change is surely necessary."

In its UK Anti-Corruption Plan, published in December 2014, the Government undertook, by June 2015, to *"examine the case for a new offence of a corporate failure to prevent economic crime and the rules on establishing corporate criminal liability more widely."* The rationale was that, *"in addition to bribery, there are likely to be other forms of economic crime for which it is appropriate to ensure that senior corporate actors are sufficiently accountable. The Government will therefore examine the case for a new offence of corporate failure to prevent economic crime and look at the rules on establishing corporate criminal liability more widely"*.

In its 2015 manifesto, the Conservative Party pledged to make it a crime *"if companies fail to put in place measures to stop economic crime, such as tax evasion, in their organisations"* and make sure that the penalties are *"large enough to punish and deter"*.

As recently as July 2015, HMRC launched a consultation on a potential new corporate criminal offence of failure to prevent the facilitation of evasion: *"The purpose of [the] consultation is to find an appropriate and proportionate means of ensuring corporations can be held accountable under the criminal law for failing to prevent their agents from criminally facilitating tax evasion"*. The end date for the consultation is 8 October 2015.

However, while a new corporate tax evasion offence remains at least a theoretical possibility, any wider reform to corporate criminal liability now appears to have hit the buffers at some speed. Yesterday (28 September) in answer to a question about the progress that has been made on Action 36 of the UK Anti-Corruption Plan, the Parliamentary-Under-Secretary (Ministry of Justice), Andrew Selous MP said:

"The UK has corporate criminal liability and commercial organisations can be, and are, prosecuted for wrongdoing. The UK Anti-Corruption Plan tasked the Ministry of Justice to examine the case for a new offence of a corporate failure to prevent economic crime and the rules on establishing corporate criminal liability more widely. Ministers have decided not to carry out further work at this stage as there have been no prosecutions under the model Bribery Act offence and there is little evidence of corporate economic wrongdoing going unpunished."

As long as the Government considers that there is "little evidence" that corporate economic wrongdoing is going unpunished, there can be no prospect of a change in the law. While such a position is in direct conflict with the calls for change from the SFO and law officers made over several years, it undoubtedly represents the end of the line for this proposal, at least for the foreseeable future. Whatever traction the Director thought the idea had back in 2014, the wheels now appear to have come off.

QEB Hollis Whiteman
1-2 Laurence Pountney Hill London EC4R 0EU
020 7933 8855 barristers@qebhw.co.uk