Criminal liability in regulatory contexts
Response of the Law Society of England and Wales
January 2011
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Response of the Law Society of England and Wales to the Law Commission Consultation Paper No. 195

Introduction

The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others.

We welcome the opportunity to respond to the Law Commission's consultation paper ‘Criminal liability in regulatory contexts' published on 25 August 2010.

This response has been prepared on behalf of the Law Society by members of its specialist Criminal Law and Company Law Committees. Membership of the Criminal Law Committee is drawn from a wide range of backgrounds, including a number of prosecution and defence solicitors, together with a member of the Justice’s Clerks Society, and an academic lawyer. Some members of the Committee hold part-time judicial office. The Company Law Committee is made up of senior and specialist corporate lawyers.

General Comments

The Criminal Law Committee has long been concerned about the expansion of the criminal law into new areas of human activity, with the considerable increase in complexity and lack of clarity that has occurred as a result. It has been felt that criminal law has been too quickly resorted to by parliament and regulators, leading to the inappropriate criminalisation of conduct.

This has resulted in an overly criminalised society. It has had the effect of making the criminal law far more complicated than it should be. It is in this area of the law that it is perhaps most important that the law-abiding citizen and company can ascertain easily and precisely what it is that they are permitted, and are not permitted, by law to do. Lawyers should be able to advise on this with certainty.

Therefore, it is to be applauded that the consultation paper proposes that behaviour that is not, strictly speaking, criminal and should not be dealt with by the criminal justice system be taken out of the criminal law.

However, this support depends upon the proposed approach for civil penalties being satisfactory and providing appropriate safeguards. We think more information on what would be proposed is needed before a final view can be reached. It is important that any regime for imposing civil penalties (i) requires the same burden of proof before liability is established where the civil penalty replaces an existing criminal offence (i.e. the burden of proof before imposing a civil penalty should be the same as for the criminal offence it replaces) (ii) offers appropriate protections in relation to evidence (iii) ensures that the decision to seek a civil penalty is kept separate from other regulatory decisions (iv) requires a clear approach to determining any penalty to be imposed and (v) provides for full rights of appeal to the courts. We are also concerned about the speed with which action is taken and decisions are made and the inter-relationship between any civil penalty proceedings and any
criminal prosecution. We are also concerned that sufficient resources are available for such an approach to work in practice.

We note, however, that it is important that certain conduct, the proscription of which may be defined as regulatory in nature, is properly deterred. Society is entitled to say if people are engaged in a particular sort of business, they should take steps to avoid consequences X, Y and Z, because these have serious and harmful consequences, and it is therefore right that failure to take these steps attracts a criminal sanction.

In the main, the proposals are good in principle, but when applied to a specific offence it will be necessary to look at the detailed effect of applying them and the potential consequences of removing any existing criminal offences.

The theory of deterrence is important in the regulatory context. If a person wishes to engage in a particular sort of business, which creates environmental or consumer risks, it is not unreasonable that they should be expected to take steps to mitigate or avoid these risks. As some are serious risks, failing to mitigate or avoid them may properly attract a criminal sanction.

Conversely, we acknowledge that where too many offences are created and the law becomes too complex, the law may be ignored, and its deterrent effect is diluted. We agree that if there are too many regulatory offences this is undesirable, not least as it means that there will be offences which are never prosecuted.

There are already historical examples: the criminal offence of insider trading was rarely used and a more realistic alternative of market abuse was established when the Financial Services Authority was set up to address the same conduct. Therefore a precedent has been set for finding alternative civil methods and sanctions for covering activity which was previously only governed by the criminal law.

The Bribery Act 2010 is an example of legislation where Parliament has decided that corruption is a serious form of criminality which requires commercial organisations to take positive steps to avoid committing the offence of failure to prevent bribery (section 7). This new criminal offence has been widely publicised and it is likely that it will cause a wide scale change in corporate behaviour and procedures.

If it is intended that regulatory breaches should be dealt with by regulators rather than being subject to inappropriate criminalisation, it is essential that there are organisations with sufficient resources to be able to prioritise this activity and enforce the law. We are not sure how this sits with the Coalition Government’s desire to reduce the numbers of Quangos and regulatory bodies and would want to be sure that any changes will not have a negative impact in the active enforcement of regulation, or the appropriate safeguards for those subject to regulatory enforcement.

We agree there are too many detailed regulatory offences, and many of them overlap with other criminal offences or are inappropriately detailed when dealing with a particular subject matter.

General principles: the limits of criminalisation

**PROPOSAL 1:** The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.
We agree with this as a general proposition. We have long been concerned with the creep of the criminal law as a method of promoting regulatory objectives. We agree that the criminal law should only deal with those wrong-doers who properly deserve the stigma associated with a criminal conviction and the consequences which flow from this, because they have engaged in seriously reprehensible conduct. We believe also that it is not always necessary to use criminal law as the sanction for failure to meet a requirement imposed by a European Directive or Regulation.

PROPOSAL 2: Harm done or risked should be regarded as serious enough to warrant criminalisation only if,

(a) in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or

(b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences (putting aside factors such as whether the individual has previous convictions for other offences, and so on.)

We do not agree with this proposal. We do not think the way to judge whether harm done or risked is sufficiently serious to warrant criminalisation is to look at the penalties to be imposed. In part, we think this is to be judged by whether the person knew or intended the harm caused and, in part, by the seriousness of the harm for the person who suffers it. This is easier to determine in cases of physical harm to individuals. However, it is harder to find an appropriate test where it is society more generally that is harmed – for example by bribery or market abuse. In some cases which are currently criminal offences e.g. financial assistance by companies, insider dealing and market abuse, it can be very difficult to determine in advance whether a particular action will or will not be a criminal offence. We do not think it is generally desirable for criminal liability to be imposed unless it is clear what action does or does not constitute a criminal offence.

However, the fact that conduct may give rise to a criminal prosecution does not mean that it will necessarily follow. We believe that the public interest test in the Code for Crown Prosecutors allows for the proper balancing of the competing factors which may weigh for or against a prosecution.

The proposal does not acknowledge the fact that the Crown Prosecution Service, for example, may apply a flexible Code criterion of the public interest test, which can be applied in the context of any particular example of criminality and in the context of the offender.

The Code for Crown Prosecutors additionally contains a criterion that a prosecution is of significant positive influence on community confidence. This may justify the decision to prosecute an individual or company, and may warrant the criminalisation of certain behaviour even where the person would not necessarily be sent to prison for a first offence, or where an unlimited fine is not necessary. Whether an individual is sent to prison also depends on their personal mitigating circumstances. Given the many different factors that influence sentencing it is hard to see how this test could be applied practically.

Further, it is considered that this proposal does not acknowledge that the criminal law, and criminal processes, can provide remedies other than sanctions and punishments; for example, compensation orders and confiscation of criminal property. It does not sufficiently recognise all of the consequences of criminal prosecution (and potentially conviction). There is also the potential for an effect on a convicted company in not being able to apply for public tenders or public procurement contracts in the future or finding it difficult to successfully do this. There is also the issue of adverse publicity and stigma attached to a conviction. Whilst
it is true that in some cases these can be overcome or ameliorated by liquidating a company, changing its name or changing the country in which it is located, these are all costly and difficult exercises to undergo. It is also no different to the case of an individual who can change their name, change their location or change their occupation in order to try to distance themselves from any conviction but this does not minimise the affect of the conviction on their lives. We note the observations in this regard at Paragraph 4.12 - 4.13. This is another reason why it is not appropriate to focus only on the potential custodial sentence or fine when assessing whether conduct should be subject to criminal sanction.

Therefore, we think that there may be criminal offences which are appropriate which do not carry the potential sentences set out in (a) and (b) above but which would be prosecuted when the public interest required this. The ordinary operation of the Code for Crown Prosecutors would allow this although of course some of the specific factors set out would be inappropriate for corporate defendants.

We agree that the harm risked should also be taken into account.

PROPOSAL 3: Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure) is likely to do as much to secure appropriate levels of punishment and deterrence.

While we agree that low level criminal offences should be repealed in these circumstances, and that Proposal 3 sets out a common sense test, we would sound a note of caution. There will be a need for great care when considering the repeal of each particular low level criminal offence, to ensure that repealing it will not have the effect of removing the desirable and warranted deterrent effect obtained by that particular activity remaining criminal.

Our only concern is that in order to apply this principle there will need to be an element of judgement applied as to what is a low level offence and whether a civil penalty will do as much to secure appropriate levels of punishment and deterrence. Therefore, we suggest that if this proposal is taken forward then there is consultation on the list of criminal offences which it is proposed will be repealed.

However, as a matter of principle we agree that many low level criminal offences are unnecessary and their repeal would result in the law becoming more certain and more clear.

General principles: avoiding pointless overlaps between offences

PROPOSAL 4: The criminal law should not be used to deal with inchoate offending when it is covered by the existing law governing conspiracy, attempt, and assisting or encouraging crime.

It is eminently sensible, in our view, that the criminal law should not be used to deal with inchoate offending when the behaviour is covered by existing law, and agree in principle that pointless overlaps between offences should be avoided. This would go some way to avoid the undesirable duplication of offences, as the consultation paper so graphically illustrates. There are too many situations where there are many possible offences in relation to the same behaviour, which is unnecessary and creates confusion and lack of clarity.

However, we can see also the benefits of trying to clarify what actions amount to “attempt”, “assisting” and “encouraging” in some cases particularly where offences may be committed by companies or bodies other than individuals. Where clarity is provided perhaps the more general law should be excluded.
**PROPOSAL 5:** The criminal law should not be used to deal with fraud when the conduct in question is covered by the Fraud Act 2006.

We agree with this proposal in principle. We agree that the Fraud Act 2006 works well in practice, is flexible and covers the variety of different situations in which fraud may be committed. It is also ‘future proof’, in that it can be adapted to frauds committed by using new technology. Where there is a generic Fraud Act offence the prosecution should, as a rule, rely on that rather than any other discrete example of a dishonesty offence.

The only drawback that using a generic Fraud Act offence could cause is that specific offences (for example, making a false declaration in an firearms application) may not show up in a future Criminal Record Bureau check, where it may be useful that more specific information concerning what the offence actually was about was apparent. Again, we agree that the proposal is a good principle, but there may be some situations where it is more appropriate to rely upon a specific offence directed towards a particular type of harm, or modus operandi, so that it is flagged up in the future. This is particularly important when looking at areas that require tight regulation and the firearm offence is a good example. In this jurisdiction firearms are very tightly regulated, for good reason, and it could be argued that engaging in fraudulent activity in this area should be properly dealt with under the firearms legislation to reflect the overall gravity of the situation.

**General principles: structure and process**

**PROPOSAL 6:** Criminal offences should, along with the civil measures that accompany them, form a hierarchy of seriousness.

We agree that criminal offences, and accompanying civil measures, should generally form a hierarchy of seriousness.

We think that it may be quite difficult to apply this proposal in practice. As stated above, we think it is generally undesirable for the same actions to be subject to both a civil penalty and criminal prosecution.

The proposal raises a practical issue concerning the need for regulatory organisations to maintain proper records of findings and convictions against their regulatory ‘targets’. If one element of the hierarchy of seriousness is the number of previous breaches that an individual or company has committed, the regulatory organisation will need to maintain appropriate records so that this may be determined. If there is to be a hierarchy of seriousness it will be necessary to know what the individual or company may have done in the past.

It is noted that there are a number different prosecuting services, and over 60 national regulators, as well as local authority and other local organisations which may prosecute or regulate. We do not think there is a central database of regulatory sanctions and this could be problematic in allowing for a proper consideration of past conduct when deciding where a particular case falls on the hierarchy of seriousness.

At a minimum, it is important that there is a record kept of the civil penalties that are imposed. The appropriate regulatory body must be able to keep a record of the civil penalties as this will allow the regulator to make sensible decisions to prosecute.
**PROPOSAL 7:** More use should be made of process fairness to increase confidence in the criminal justice system. Duties on regulators formally to warn potential offenders that they are subject to liability should be supplemented by granting the courts power to stay proceedings until non-criminal regulatory steps have been taken first, in appropriate cases.

Particular conduct can give rise to different legal outcomes that may be characterised as criminal or regulatory. There is perhaps an implicit assumption in Proposal 7 that regulatory and criminal outcomes are mutually exclusive for the same conduct.

We think it is important that process fairness applies both to a civil penalty regime and criminal offences. If it is possible to avoid overlap between matters covered by civil penalties and matters covered by criminal offences this should help. However, where the same actions could give rise to both civil penalties and criminal prosecution, we are concerned about the interplay of the two and the effect on rules of evidence and the presumption of innocence if there is a requirement that non-criminal regulatory steps must be taken before a criminal prosecution. We agree that regulators should have duties to warn potential offenders that they may be subject to prosecution, where that is the case. If there is an overlap between a civil penalty and a criminal offence it would be helpful for there to be guidance as to the sorts of factors that should be taken into account in deciding which approach to pursue.

However, where a set of facts can give rise either to regulatory action or a criminal prosecution, the decision to prosecute has been made by a regulatory body or prosecutor, on the basis that the matter under consideration is so serious that it warrants a prosecution, and there is evidence that will satisfy each element of the offence to the required standard of proof, we are not convinced that courts should have the power to take the view that other regulatory action should occur, and then as a result stay the proceedings. To allow a court this discretion would undermine the prosecutor’s discretion to institute the prosecution and may build unnecessary delay into the process. If it has been decided that certain conduct warrants the case proceeding down the criminal track, then, in our view courts, should accept that decision rather than stay proceedings to allow non-criminal regulatory steps to be taken.

Heath and safety prosecutions are a good example. Currently the process is that the case is viewed in order to see whether the criminal standard is met; if not, then the HSE can consider whether there are offences which they would wish to prosecute. It is difficult to see how this proposal would have worked in the recent Potters Bar rail crash HSE prosecution. It could also be argued that it is unfair on defendants as the threat of the more serious criminal sanction remains for longer.

**PROPOSAL 8:** Criminal offences should be created and (other than in relation to minor details) amended only through primary legislation.

We agree that criminal offences should be created and amended only through primary legislation. This principle respects the constitutional power of Parliament to make law, and would ensure that there be can proper debate by both Houses of Parliament in relation to the creation of any criminal offence. Limiting criminal law creation to primary legislation would, hopefully, reserve the use of criminal law for serious offences and would help to create a more orderly, accessible and clear criminal statute book.

We think it may be difficult to determine what is a minor detail which can be amended in some other way. We also have doubts as to whether this exception is appropriate. Many European Directives are implemented by statutory instruments under the European Communities Act. We do not believe it is always necessary to impose criminal offences to
ensure Directives are properly implemented and we think a requirement that criminal offences can only be created by primary legislation would help to reduce the number of criminal offences created. We think also it would be worth considering something like the German and French approach to administrative offences.

It is observed that where people work in a particular regulatory field (or are involved in prosecuting a particular type of crime) there is a tendency for the person involved to think that any behaviour that offends that regulatory regime (or type of offence) is necessarily very serious and deserving of criminalisation (or prosecution). This is perhaps an understandable and natural tendency, but one that should be resisted in the interests of a rational and effective regulatory regime.

We agree that what is required is centrally created, necessary and clear criminal law, made on the basis that the behaviour in question really does warrant the full force and associated opprobrium of the criminal law.

**PROPOSAL 9: A regulatory scheme that makes provision for the imposition of any civil penalty, or equivalent measure, must also provide for unfettered recourse to the courts to challenge the imposition of that measure, by way of rehearing or appeal on a point of law.**

We agree with this proposal as we think it is very important to provide for unfettered recourse to the courts. We do not think it would be enough, however, for this to be limited to a judicial review of a decision or an appeal only on a point of law – it is important that it is possible to have a full re-hearing in all cases.

The use of civil measures, with a full right of rehearing or appeal to allow access to a court to challenge the imposition of that measure, and Proposal 1 - that the criminal law should only be employed to deal with wrongdoers who deserve criminal stigma and not be used as the primary means of promoting regulatory objectives - taken together, provide a neat solution to the problem of removing many regulatory offences from the criminal law.

There is a concern that by removing offences from the criminal jurisdiction, with its due process guarantees, and turning them into civil offences, would allow regulators to become ‘judge, jury and executioner’. However by allowing someone accused of regulatory offence recourse to the courts preserves the rule of law, and provides an essential safeguard against the oppressive or overzealous regulator.

**General principles: fault in offences supporting a regulatory structure**

**PROPOSAL 10: Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate. This means that the more remote the conduct criminalised from harm done, and the less grave that harm, the more compelling the case for higher-level fault requirements such as dishonesty, intention, knowledge or recklessness.**

As a general concept we agree that proposal 10 makes a great deal of common sense, but we feel that it is necessary to take care in applying it in some specific contexts.

We agree that the mere fact that conduct is to be deterred or punished in some way is not sufficient to warrant it being made a criminal offence. We also agree that criminal offences should be used where the conduct is morally wrong. We do not agree that a criminal conviction for a company does not have the same effect as for an individual and it is not always open to a company to re-form or re-brand its operations to diminish the impact of a conviction. `
We think criminal liability should only be imposed on the basis of strict liability where the harm suffered or risked is so serious that the need for deterrence is necessary. In order to maintain this level of deterrence strict liability should be used very sparingly.

The test of whether a company has taken a risk that is unjustified to take, that has been appreciated but ignored, is likely to be a difficult test to apply. This is not only because of the difficulties of deciding who, in the company, must have appreciated the risk but ignored it and to what extent the directors must have known this but also because, for some offences that may be committed by companies it is difficult to determine the “risk” that needs to be appreciated. If all legislation included specific provisions setting out what needs to be shown for a company to be liable, some of the concerns about the difficulty of applying the recklessness test to companies would disappear. Specific legislative provisions would make it both easier to advise companies how to avoid committing an offence, and to prosecute where the relevant elements of the offence were present.

Of the approaches to recklessness set out in Appendix C we think the approach adopted in Canada (where it must be shown that either a director or senior officer in the organisation had the relevant knowledge or mental state) is preferable and the approach adopted in Australia (which provides that bodies corporate are liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of their employment or within their actual or apparent authority where the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence) is not appropriate as we think the test of tolerating a corporate culture or having a corporate culture that led to non-compliance does not apply a sufficiently high test of knowledge or intent.

We have commented further on another particular concern in our observations below on Proposal 11.

**PROPOSAL 11:** In relation to wrongdoing bearing on the simple provision of (or failure to provide) information, individuals should not be subject to criminal proceedings – even if they may still face civil penalties – unless their wrongdoing was knowing or reckless.

We agree, but as noted above, in some, exceptional, cases it may be appropriate for a situation to demand the provision of correct information, and make it an offence of strict liability not to supply the correct information, where the risk of harm is high. This may be so in the context firearms offences and offences relating to motor vehicles. In some contexts, particularly where the sanction of criminal law is to be used as a deterrent to promote public safety, it may be so important that accurate information is provided that there should be a strict liability element, rather than knowledge or recklessness as to their wrongdoing. This together with publicity of these offences may help to ensure that the public take care not to provide inaccurate information in these situations.

**PROPOSAL 12:** The Ministry of Justice, in collaboration with other departments and agencies, should seek to ensure not only that proportionate fault elements are an essential part of criminal offences created to support regulatory aims, but also that there is consistency and clarity in the use of such elements when the offence in question is to be used by departments and agencies for a similar purpose.

We agree that fault elements should be proportionate and consistent when the offence in question is used by departments and agencies for a similar purpose, and across the various regulatory areas, and we therefore support this in principle. However, the devil is in the detail and there needs to be a detailed analysis of the practical application of this principle.
Doctrines of criminal liability applicable to businesses

The doctrine of identification

PROPOSAL 13: Legislation should include specific provisions in criminal offences to indicate the basis on which companies may be found liable, but in the absence of such provisions, the courts should treat the question of how corporate criminal liability may be established as a matter of statutory interpretation. We encourage the courts not to presume that the identification doctrine applies when interpreting the scope of criminal offences applicable to companies.

We agree that there are difficulties with the identification doctrine and that this can make it difficult to prosecute companies. We feel strongly that legislation should include specific provisions to indicate the basis on which companies may be found liable. It would be helpful if there were a broad consensus on this so that a different approach is not taken from one statute to another. Leaving this to the courts as a matter of statutory interpretation is undesirable as it means companies cannot know in advance what action to take or avoid in order to avoid committing an offence.

If it is decided not to include specific provisions in legislation to indicate the basis on which companies may be found liable, we suggest that, to ensure consistency, predictability of the application of the law and assistance to the courts, there should be some guidance provided on how to interpret statutes to determine whether the identification doctrine applies or not and if it does not apply then how liability would be established. This guidance should be consulted on before being finalised.

A general defence of due diligence

PROPOSAL 14: The courts should be given a power to apply a due diligence defence to any statutory offence that does not require proof that the defendant was at fault in engaging in the wrongful conduct. The burden of proof should be on the defendant to establish the defence.

PROPOSAL 15: If proposal 14 is accepted, the defence of due diligence should take the form of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence.

However, we recognise that consultees may prefer this defence to have the same wording and to impose the same standards as the most commonly encountered form of the defence. Accordingly, we ask the following questions:

QUESTION 1: Were it to be introduced, should the due diligence defence take the stricter form already found in some statutes, namely, did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence?

QUESTION 2: If the power to apply a due diligence defence is introduced, should Parliament prevent or restrict its application to certain statutes, and if so which statutes?

It is unclear to the Law Society whether the strict liability offences referred to are co-extensive with the offences referred to that do not require proof of fault or, if not, the Law Commission is proposing that the due diligence defence should apply in cases that are not strict liability offences but are offences that do not require proof of fault - and what cases would fall in this category. The Law Society is happy for the defence to apply in cases of strict liability but in view of the uncertainty about whether the intention is that the defence
should also apply in cases that are not strict liability cases but do not require proof of fault, it would like to understand if there is intended to be a difference and, if so, to consider the position further in relation to those cases.

If it is intended that this defence apply only to businesses then we suggest there would need to be further consideration of how widely it would apply given that this would obviously introduce a distinction between businesses and individuals.

It is not clear whether it is suggested that this due diligence defence is to be a defence that will only be applied at the discretion of the court or whether it is proposed that statute will introduce such a general due diligence defence that can be applied by the courts to both existing and future offences that do not involve fault.

One potential concern if this is to be a defence that is only applied in the discretion of the court is that a defendant would not necessarily know in advance whether the defence would apply which raises issues in terms of the certainty and predictability of the law. As explained above, in many cases it is hard for companies to be sure whether a particular course of action will involve an offence. Judicial decisions about whether a due diligence defence applies in a particular case are likely to be very important to companies in determining the action they must take or avoid. We suggest that, if it is proposed that the defence should only be applied in the court's discretion (rather than applying in all cases or where specified in a particular statute), general guidance should be issued as to when it would be appropriate to allow such a defence. The guidance should be consulted on before it is finalised.

If the defence is to be introduced by statute to all offences, including retrospectively, there are some strict liability offences that are so serious that it may be arguable that such a defence should never apply. Examples are those that relate to the handling of nuclear material or some road traffic act offences. We recommend that there is full consultation on the scope of any such statutory defence before it is introduced.

In the case of future legislation, we believe the due diligence defence should apply by default in all cases unless Parliament expressly states in legislation that it should not.

We agree that where a defendant seeks to rely on a defence of due diligence, the burden of proof falls on the defendant.

We strongly agree that a defence of due diligence to a criminal offence should be on the basis of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence. A defence formulated on the basis of 'did the defendant take all reasonable precautions and exercise all due diligence to avoid commission of the offence' risks a “counsel of perfection” approach.

It will also be necessary to consider in much greater detail how the standard of due diligence is to be interpreted. Should a court take into account the resources of the defendant, the cost of any measures that could have been taken, the industry in which the defendant operates, the standard practice of other similar persons or companies, guidance issued by professional or other bodies? Section 9 of the Bribery Act 2010 allows for the issuing of Guidance to assist companies seeking to avoid an offence under section 7. Again, we suggest that some form of guidance should be available if this discretion is given to the court and that it should be consulted on before being finalised.
The consent and connivance doctrine

PROPOSAL 16: When it is appropriate to provide that individual directors (or equivalent officers) can themselves be liable for an offence committed by their company, on the basis that they consented or connived at the company’s commission of that offence, the provision in question should not be extended to include instances in which the company’s offence is attributable to neglect on the part of an individual director or equivalent person.

We agree with this proposal. One of the difficulties here is what action by a director amounts to consent or connivance? The case law seems to suggest that there is presently a differing approach depending on the particular offence and the distinctions between consent, connivance and neglect are not clear cut. In some cases, it seems that consent may be established by inference - where the director knew the relevant facts and turned a blind eye. If it were clear that an individual must know that wrongdoing is taking place or will do so, to be shown to be consenting or conniving, that would be very helpful. However, that may not go far enough and it may also be necessary to make it clear that an offence cannot be committed unless the director is able to prevent the offence from taking place. There will be cases where a director will be aware of what is proposed but will be unable to prevent it taking place. It would be helpful to make it clear that consent or connivance will not be established just because a director participates in a board meeting where a decision is taken. Directors will be concerned to understand whether, to show they did not consent or connive at an offence, it is enough to show that they voiced their opposition, even if this is not recorded in the minutes (typically minutes only record the decision, which is usually taken on a majority basis, and not anyone who dissented and a director may not be able to insist on how the minutes are recorded). Directors may also wish to understand whether they must resign in order to show they did not consent or connive. A director may feel that it would be better not to do this to try to protect the shareholders’ interests. Another grey area is the extent to which directors (particularly non-executive directors) can rely on information provided to them.

QUESTION 3: When a company is proved to have committed an offence, might it be appropriate in some circumstances to provide that an individual director (or equivalent officer) can be liable for the separate offence of ‘negligently failing to prevent’ that offence?

We feel strongly that a director should not be liable for negligently failing to prevent the commission of an offence by the company. Liability should only be imposed if the director could have taken action to prevent the commission of an offence and did not do so. As explained above, it is not always clear what action a director can take to prevent a company committing an offence. We do not think mere awareness that an offence will be committed should be a ground for liability as a single director may not be able to prevent the conduct.

The delegation doctrine

QUESTION 4: Should the doctrine of delegation be abolished, and replaced by an offence of failing to prevent an offence being committed by someone to whom the running of the business had been delegated?

We are not entirely clear how the delegation principle applies and how it applies to companies. We do not think criminal liability should be imposed for failing to prevent an offence being committed by someone to whom the running of the business has been delegated. If someone has delegated to a person who appears to be suitable and has appropriate procedures in place to check if the delegation is working appropriately, liability should not be imposed merely because the person to whom the delegation was made...
committed an offence. We do not think the argument that the stigma attaching to such an offence would be less is a good one.

We note that there are also other general criminal law offences, such as conspiracy in the case of a criminal agreement, which could also be used to prosecute a person who fails to prevent an offence by someone to whom the business has been delegated, where there is a positive agreement.
Law Commission consultation paper no 197
‘Unfitness to plead’
Law Society response to the Law Commission’s
Summary of provisional proposals and questions
January 2011
LAW COMMISSION CONSULTATION PAPER No 197 ‘UNFITNESS TO PLEAD’

LAW SOCIETY RESPONSE TO THE LAW COMMISSION’S SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

Introduction

The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. It welcomes the opportunity to respond to this consultation paper.

This response has been prepared on behalf of the Law Society by members of its specialist Criminal Law, and Mental Health and Disability Committees. The Criminal Law Committee is drawn from a wide range of backgrounds, including a number of prosecution and defence solicitors, together with a member of the Justice’s Clerks Society, and an academic lawyer. Some members of the Committee hold part-time judicial office. The Mental Health and Disability Committee is made up of lawyers practising in the fields of disability discrimination, mental health, mental capacity and community care on both the claimant and respondent side and also has members from other professions. The diversity of the Committees’ compositions is intentional.

The Law Society welcomes the Law Commission’s consultation paper in relation to unfitness to plead. We agree that the law as it presently stands is out of date, and in need of reform. We welcome the paper’s emphasis on ensuring that people who suffer from a mental illness or impairment are treated fairly by the criminal justice system, that the test for unfitness should be one centred around decision making capacity, and that the issue of whether they are able to effectively participate in criminal proceedings is paramount. We also welcome the fact that the proposals aim to make the test for capacity to participate in a criminal trial mirror the test applicable in the civil context.

Here follows our view of the provisional proposals and consultation questions.

Provisional Proposal 1: The current Pritchard test should be replaced and there should be a new legal test which assesses whether the accused has decision-making capacity for trial. This test should take into account all the requirements for meaningful participation in the criminal proceedings. (Paragraph 3.41)

The Law Society agrees that the current Pritchard test is outdated, does not ask the right questions and is generally unfit for purpose. We agree that a new test which assesses the accused decision-making capacity for trial, and which takes into account the need for the defendant to meaningfully participate in the criminal proceedings, would be far preferable.

In the case of R v John M [2003] EWCA Crim 3452 the Court of Appeal approved the trial judge’s directions to the jury that the defendant must be capable of doing 6 things, namely:
(1) understand the charges
(2) be capable of deciding whether to plead guilty or not
(3) exercise his right to challenge jurors
(4) instruct his/her solicitors and counsel
(5) follow the course of proceedings; and
(6) give evidence in his own defence

The Society would recommend that the Law Commission consider the inclusion of some or all of these criteria when considering the criteria for any new test of unfitness to plead in the criminal context. Further, any new test should rest firmly on the assumption that a person has capacity unless it can be established otherwise, in accordance with the principle contained in Part 1 of the Mental Capacity Act 2005.

Provisional Proposal 2: A new decision-making capacity test should not require that any decision the accused makes must be rational or wise. (Paragraph 3.57)

We agree that a new test should not require that any decision the accused makes must be rational or wise.

Provisional Proposal 3: The legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings. (Paragraph 3.99)

We agree with this proposal. The assessment should take into account decision-making capacity of the accused by reference to the entire spectrum of trial decisions that may be required. We further agree that the person will be found to either have or lack decision-making capacity for the criminal proceedings.

Provisional Proposal 4: In determining the defendant's decision making capacity, it would be incumbent on the judge to take account of the complexity of the particular proceedings and gravity of the outcome. In particular the judge should take account of how important any disability is likely to be in the context of the decision the accused must make in the context of the trial which the accused faces. (Paragraph 3.101)

We agree that the determination must be case specific and take account of the complexity of the particular proceedings and gravity of the outcome. We further agree that particularly the judge should take account of how important any disability is likely to be in the context of the decisions that the accused will have to make in the context of the trial. Importantly, the judge should also be guided by the advice of experts.
Provisional Proposal 5: Decision-making capacity should be assessed with a view to ascertaining whether an accused could undergo a trial or plead guilty with the assistance of special measures and where any other reasonable adjustments have been made. (Paragraph 4.27)

We have concerns in relation to this proposal, which would take into account the use of special measures in assessing decision-making capacity. It would seem to require consideration of whether the individual has decision-making capacity, but if not, further consideration of whether the provision of special measures may alleviate that difficulty. In our view this would create a risk that somebody who is not truly able to participate properly in their trial, on the basis they lack decision-making capacity, is subject to criminal proceedings. There is a danger that the issue of unfitness to plead could be glossed over.

We would suggest that assessing the decision-making capacity is one distinct issue, which should be decided on a yes or no basis. If it is decided that the person does not have decision-making capacity, the availability of special measures will not alleviate that lack of capacity. In our view, special measures are about ensuring the participation by vulnerable people in their trial in a fair way, and are therefore not relevant to the issue of whether or not the person is unfit because they lack decision-making capacity. In our view, a clear distinction should be maintained between the two issues.

Provisional Proposal 6: Where a defendant who is subject to a trial has a mental disorder or other impairment and wishes to give evidence then expert evidence on the general effect of that mental disorder or impairment should be admissible.

We agree that expert evidence on the general effect of the person’s mental disorder or impairment should be admissible when the person wishes to give evidence.

Provisional Proposal 7: A defined psychiatric test to assess decision-making capacity should be developed and this should accompany the legal test as to decision-making capacity. (Paragraph 5.17)

We agree with the Commission’s view that the role of “psychiatric tests” should be to provide a validated and reliable means of assessing whether the accused has decision-making capacity in accordance with the legal test and that this test should inform the court as to whether the legal test as to decision-making incapacity is satisfied in the case at hand.

However, we believe that the test adopted should clearly be a legal test, albeit informed by expert evidence, including expert evidence that might well properly include use of validated and reliable psychiatric or psychological instruments. Whether the test of incapacity is satisfied may not be susceptible solely to expert evidence but may also be informed by ordinary evidence, and this emphasises further why the test of capacity should clearly be a legal test and not in any way apparently a psychiatric or psychological test.

It follows also that we would prefer the test to be referred to as the “capacity test”, as the use of the phrase “psychiatric test” implies both that the test is a medical rather than legal test and that those who lack the required capacity will be suffering from a mental disorder, which is not necessarily the case.
Further, given that some clinicians appear to have difficulty in applying the relatively straightforward test of capacity set out in sections 2 and 3 of the Mental Capacity Act 2005, we believe it would be unwise to adopt an overly complex test of capacity.

It follows from our concern about reliance upon any one psychiatric or psychological instrument, or instruments, that we also agree with the Commission that in most cases the test would be accompanied by a clinical interview.

We do not agree with the Commission’s proposal that the decision making capacity of the accused can only be determined on the evidence of two medical practitioners, one of whom must be approved under section 12 of the Mental Health Act 1983. An assessment of mental capacity should be undertaken by professionals who are skilled and experienced in assessing disabilities relevant to capacity. Experience has shown that the fact that a psychiatrist is approved under s.12, for example, does not necessarily imply that he or she has such skills, and there is little evidence also to support the contention that medical practitioners who are not psychiatrists possess such skills.

Further, some psychologists do possess such skills. Given that we believe that both psychologists and psychiatrists should be able to provide the court with evidence of capacity, it follows that we agree with the Government’s view that the concern of the Joint Committee on Human Rights that the use of evidence from psychologists is misplaced (para.5.35).

Provisional Proposal 8: The present section 4A hearing should be replaced with a procedure whereby the prosecution is obliged to prove that the accused did the act or made the omission charged and that there are no grounds for an acquittal. (Paragraph 6.140)

We agree with the Commission’s analysis of the problems surrounding the Section 4A hearing, which although designed to ascertain whether a person who is unfit to plead did the act, cannot adequately take into account cases where the offence charged does not lend itself readily to a neat division of the conduct and fault elements. We agree that the problem with the case of Antoine is that it requires a strict division between the conduct and fault elements of the offence, and that the reality is that it is not always possible to disregard the mental state of the accused for the purpose of ascertaining whether he or she had done the ‘act’.

Like the Commission, we prefer option 5. We agree that the procedure should be such that, in so far as is possible, all the elements of the offence are considered, with the prosecution having the burden of proof in this regard. We agree that in determining whether all elements of the offence are proved, it should be possible to consider any defence/s that may be open, in so far as this is consistent with the fact that decisions about the section 4A hearing are made by the accused’s appointed legal representative.

However, we query whether ‘sufficient evidential basis’ is too narrow a test, and that the advocate should be able to explore any possible defence that may be open on the facts of the case. This could perhaps be formulated as ‘any reasonable defence’ possibly open on the facts of the case. In our view, the test needs to be wider than a sufficient evidential basis to enable the possibility of a defence to be explored, given that the advocate will not have the advantage or assistance of their client’s instructions.
Provisional Proposal 9: If the accused is acquitted provision should be made for a judge to hold a further hearing to determine whether or not the acquittal is because of mental disorder existing at the time of the offence. (Paragraph 6.140)

We agree that if the accused is acquitted there should be provision for the judge to hold a further hearing to determine whether or not the acquittal was because of a mental disorder existing at the time of the offence.

Provisional Proposal 10: The further hearing should be held at the discretion of the judge on the application of any party or the representative of any party to the proceedings. (Paragraph 6.152)

We agree with this proposal.

Provisional Proposal 11: The special verdict should be determined by the jury on such evidence as has been heard or on any further evidence as is called. (Paragraph 6.152)

We agree with this proposal.

Provisional Proposal 12: Where the Secretary of State has referred a case back to court pursuant to the accused being detained under a hospital order with a section 41 restriction order and it thereafter becomes clear beyond doubt (and medical evidence confirms) that the accused is still unfit to plead, the court should be able to reverse the decision to remit the case. (Paragraph 7.21)

We agree with this proposal.

Provisional Proposal 13: In the event of a referral back to court by the Secretary of State and where the accused is found to be unfit to plead, there should not be any need to have a further hearing on the issue of whether the accused did the act. This is subject to the proviso that the court considers it to be in the interests of justice. (Paragraph 7.21)

We agree with this proposal.

Provisional Proposal 14: In circumstances where a finding under section 4A is quashed and there has been no challenge to a finding in relation to section 4 (that the accused is under a disability) there should be a power for the Court of Appeal in appropriate circumstances to order a re-hearing under section 4A. (Paragraph 7.59)

We agree with this proposal.
In addition to the above proposals, we also ask the following questions:

**Question 1:** Do consultees agree that we should aim to construct a scheme which allows courts to operate a continuum whereby those accused who do not have decision-making capacity will be subject to the section 4A hearing and those defendants with decision-making capacity should be subject to a trial with or without special measures depending on the level of assistance which they need? (Paragraph 4.27)

Yes, we agree. We submit that the question of whether somebody has decision-making capacity should be an either yes or no decision and if the person has decision-making capacity they should be subject to trial, with or without special measures, depending on the level of assistance which they need. Please see our answer to proposition 5 in this regard.

**Question 2:** Can consultees think of other changes to evidence or procedure which would render participation in the trial process more effective for defendants who have decision making capacity but due to a mental disorder or other impairment require additional assistance to participate? (Paragraph 4.31)

A particular stumbling block, especially for clients with learning disabilities, is the overall language used in the court setting. Words and expressions which are in everyday usage in the Crown Court can be quite alien to those with no experience of criminal justice system, as well as other difficulties. Consideration could be given to reviewing legal terms and language used in criminal trials, perhaps in conjunction with the Plain English campaign. In this regard we note in that the very opening words of criminal trials, “you are charged on an indictment containing 3 counts”, the words “indictment” and “counts” are likely to be foreign to most people unfamiliar with the courts.

It is also the case that the nature of adversarial questioning, albeit inherent to our criminal justice system, can fail to take account of levels of understanding of impaired defendants. There should be provision to recognised this in individual cases, including as advised to the court by relevant expert evidence, such that the nature of questioning, and not just terminology, should be adjusted to match the defendant’s particular cognitive impairments.

**Question 3:** Do consultees agree that we have correctly identified the options for reform in relation to the section 4A hearing? If not, what other options for reform would consultees propose? (Paragraph 6.153)

Yes, we consider that all the possible options have been correctly identified.

**Question 4:** If consultees do not agree that option 5 is the best option for reform, would they agree with any other option? (Paragraph 6.153)

Not applicable.
Question 5: Should a jury be able to find that an unfit accused has done the act and that there are no grounds for acquittal in relation to an act other than that specifically charged? (Paragraph 6.159)

Yes. If option 5 is adopted it will be sensible to allow the jury to find that an unfit accused has done the act and that there are no grounds of acquittal in relation to an act other than the specifically charged offence. We agree this would probably be most relevant in relation to a charge of murder reduced to manslaughter by reason of diminished responsibility. Obviating the need for a hearing that the acquittal was because of mental disorder at the time of the offence would be a sensible way to proceed. The court would then be able to proceed to a disposal in the same way as if there had been a finding that the accused did the act and there were no grounds for acquittal in relation to any other offence. We agree that it may well have no practical effect outside this specific example.

This would also mean that that defence would have to consider defences to all possible offences that may be open on the indictment.

Question 6: Are there circumstances in which an accused person who is found to have done the act and in respect of whom there are no grounds for an acquittal should be able to request remission for trial? (Paragraph 7.26)

We agree that there may be circumstances where a person found to have done the act and where there were no grounds for acquittal should be able to request remission for a trial, but we would suggest that this is not likely to happen often.

Question 7: Should an accused who is found to be unfit to plead (or to lack decision-making capacity) be subject to the section 4A hearing in the same proceedings as co-defendants who are being tried? (Paragraph 7.44)

No. We believe that there should be separate hearings in relation to an accused who is found to be unfit to plead. Notwithstanding the fact that witnesses will have to give evidence twice, potentially, we consider it would be simply too confusing and difficult for juries to be able to distinguish the types of findings that they would be required to make in relation to co-defendants in such circumstances. Additionally, in our opinion a decision to order a joint hearing would conflict with Part III 30.4 of the Consolidated Criminal Practice Direction which states as follows:

‘If a vulnerable defendant, especially one who is young, is to be tried jointly with one who is not, the court should consider at the plea and case management hearing, or at a case management hearing in a magistrates’ court, whether the vulnerable defendant should be tried on his own and should so order unless of the opinion that a joint trial would be in accordance with Part 1 of the Criminal Procedure Rules (the overriding objective) and the interests of justice’.

Question 8: Do consultees think that the capacity based test which we have proposed for trial on indictment should apply equally to proceedings which are triable summarily? (Paragraph 8.37)

Yes.

The lack of a test of unfitness to plead and a tailored procedure in summary proceedings has proved problematic in the experience of our members. It is our view...
that defendants with mental health problems are at a distinct disadvantage in the Magistrates’ Court in comparison to being dealt with in the Crown Court.

Whilst the procedure for establishing insanity in the Magistrates’ court is different from that in the Crown Court, it is helpful that a procedure exists. This is not the case however for those Defendants who are unfit to plead. The piecemeal and inadequate nature of Magistrates’ court procedures has been highlighted by Taylor and Krish in ‘Advising Mentally Disordered Offenders’ (Law Society Publishing, 2nd Edition, Chapter 7).

We consider that a similar test for establishing fitness to the decision making capacity test, should be used in the Magistrates’ court. Further, we are not convinced that ‘it may take considerably more time for matters to be resolved and there might be an undesirable delay in securing treatment for those accused who need it’ (para 8.32). In fact, the existence of a duty psychiatrist scheme (rarely available in the Crown court) in some Magistrates’ courts will mean that solicitors have quicker access to expert advice and a greater possibility of hospital admission if required for their clients.

We urge the Law Commission to make specific proposals in relation to summary proceedings and, that, as far as possible, these should mirror the proposals for the Crown Court. It is clear that equally vulnerable defendants appear in the Magistrates’ court as in the Crown Court and they should be entitled to the same standard of safeguard. Our comments apply equally to the position in the Youth Court.

Question 9: Do consultees think that if an accused lacks decision-making capacity there should be a mandatory fact-finding procedure in the magistrates’ court? (Paragraph 8.37).

Yes.

Question 10: If consultees think that there should be a mandatory fact-finding procedure, do they think it should be limited to consideration of the external elements of the offence or should it mirror our provisional proposals 8 and 9? (Paragraph 8.37)

We believe that the mandatory fact-finding procedure should mirror the provisional proposals 8 and 9.

Question 11: Do the matters raised in questions 8, 9 and 10 merit equal consideration in relation to the procedure in the youth courts? (Paragraph 8.68)

Yes, we firmly believe that the matters raised in questions 8, 9 and 10 merit equal consideration in relation to procedure in the youth courts.

Question 12: How far if at all, does the age of criminal responsibility factor into the issue of decision-making capacity in youth trials? (Paragraph 8.69)

We believe that the age of criminal responsibility is a very considerable factor in relation to the issue of decision-making capacity in youth trials. The Law Society is of the view that the age of 10 years is far too low, and that there is a strong case to be made for raising it to 14 years, with a system in place for diverting those under that age from the criminal justice system entirely. However, there would still have to continue to be a court system in place to decide whether those under the age of 14
years were guilty or not, and where a child lacked decision-making capacity the same procedure should apply as in an adult court.
Response of the Law Society of England and Wales to the Sentencing Council’s Professional Consultation on the Assault Guideline

January 2011
Response of the Law Society of England and Wales to the Sentencing Council's Professional Consultation on the Assault Guideline

Introduction

The Law Society is the representative body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. It welcomes the opportunity to respond to this consultation paper.

This response has been prepared on behalf of the Law Society by members of its specialist Criminal Law Committee. The Committee is drawn from a wide range of backgrounds, including a number of prosecution and defence solicitors, together with a member of the Justice’s Clerks Society, and an academic lawyer. Some members of the Committee hold part-time judicial office.

The Law Society agrees that the current guideline is too prescriptive in its effect and, as a result, is not followed on some occasions because sentencers find the prescribed scenarios which define the levels within each offence difficult to relate to some individual cases which come before them. The Society therefore welcomes the revision of the guideline and approves of the new structure.

However, there is a concern that until the whole of the existing sentencing guidelines are subject to the same process of revision, there will be two different approaches to sentencing and two different guideline structures applicable for different offences. A defendant may be sentenced for offences with different sentencing guideline structures at the same time. Without very clear guidance as to how this is to be addressed, there is a potential for confusion among sentencers and practitioners. We trust that guidance will be provided on how to address this possibility.

Answer to consultation questions

1. Do you agree that the proposed structure of the guideline incorporating an individually tailored sentencing process for each offence is the right approach?

It is considered that the proposals do provide a transparent and logical process for arriving at an appropriate sentence for offences of assault. The existing guidelines are too prescriptive. It can be very difficult to place real-life situations into the boxes constructed in the existing guidelines. We agree with the Council’s concern, as set out in the Introduction to the consultation, that sentencers have not followed the existing guideline because they have felt the need to distinguish the case before them and state that it does not fit into any of the pre-defined categories, which are difficult to relate to some individual cases. The proposed structure is a reasonable compromise between the need for consistency and the requirement to dispense justice in individual cases. It reduces the problem of fitting untidy real-life scenarios into a ‘neat box’.
2. Do you agree that compensation and ancillary orders should not be included in the new assault guideline or any future offence specific guideline?

We agree with this proposal for the reasons set out in the draft guideline.

3. Do you agree with the Councils recommendation that there should be three offence categories for all assault offences? If not, how many would be appropriate?

The recommendation that there be three categories is reasonable. It is agreed that the distinction between categories 2 and 3 in the second model is likely to be a very fine one. A profusion of categories would inevitably detract from the overall purpose of consistency.

4. Are there any other factors determining harm and culpability that should be taken into account at step 1 of the decision making process?

We suggest that it should be open to a court, perhaps in exceptional cases, to take into account other factors in determining harm and culpability. We are concerned that there should be some flexibility and that this list should not be perceived as exhaustive, in the same way as the list of further aggravating and mitigating factors is not exhaustive.

5. Do you agree with the revised approach to premeditation as an aggravating factor proposed to be included in the revised guideline?

Yes. In real life situations premeditation can arise at a number of points during the course of an incident. It is appropriate that, for example, an offender who embarks on a course of action with a fully formed intention to commit an offence is regarded as more culpable than an offender who forms that intention at a very late stage of an incident.

6. Do you agree that consideration for mental illness should be included at stage 1 of the process and/or do you think that it should be built into the guideline in any other way?

We agree that it is appropriate to include consideration of mental illness at the initial stage of the decision-making process. The existence of a mental illness or disability wholly or partly responsible for the commission of an offence does directly affect the level of a defendant’s culpability.

This should not, however, have the unfortunate effect of preventing such a consideration being a feature of personal mitigation at the second stage of the process, in suitable cases. At first sight this may have the appearance of double accounting. However, there will be many occasions where the presence of an illness or disability could, for example, amount to a serious medical condition requiring treatment.

7. Do you agree with the level of guidance and the extent of discretion that is proposed in step 1 for determining the offence category?

We agree that the level of guidance and the extent of discretion for determining the offence category is correct, although we would suggest that the sentencing court should have the ability to identify other factors not included in the list, provided such factors are clearly identified at this stage.
In addition, we agree that competing factors will not carry equal weight. In our view, the Council’s concern that the selection of levels should not be a numerical exercise - as not all factors carry the same weight and such an approach would result in too prescriptive a guideline - is surely correct, and we are heartened that such an approach is disparaged.

8. Do you agree that the starting point and category ranges should be applicable to all offenders, not just first time offenders, and regardless of plea entered?

Yes. We agree that the presumption that starting points and offence ranges apply to a first time offender who pleaded not guilty is prescriptive and not useful. It is agreed that the majority of offenders who come before the courts are not first time offenders, and that the defendant’s character, good or otherwise, is more appropriately considered as a mitigating or aggravating feature.

The previous approach of assuming a first time offender was unrealistic. It was on occasions not then clear as to how mitigation for a previous good record would apply. Conversely, an offender with a previous record of relevant offences might well feel aggrieved that those previous offences unduly weighted the sentence. This is always a difficult part of the sentencing exercise. On the one hand, the offender has already received a sentence for those previous matters. They may not have formed a pattern of offending. On the other hand, they would then undoubtedly affect the final sentence.

The proposal allows a previous good character to be considered at a more appropriate stage of the process.

9. Do you agree that starting points should be set out in the assault guideline?

Yes. The adoption of a starting point at this stage will make the process more explicable to the public. It is likely that the wider public will largely focus upon two simple factors, namely, a clearly defined starting point fixed at the start of the process and a clear explanation for a deviation from the same. As is recognised in the consultation paper, public understanding of, and confidence in, the process is crucial.

10. Are there other additional aggravating and mitigating factors that should be included at stage 2 of the process?

The Sentencing Council may wish to consider the inclusion of the following factor as indicating lower culpability, namely ‘an initial reluctance to engage in the offence or conduct complained of’.

In relation to the factor of seriousness expressed as ‘Offence committed against those working in the public sector or providing a service to the public’, we would suggest that it be amended to include the following wording, ‘provided that this is known, or readily apparent, to the offender’. It does appear to be unfair that an offence could be aggravated by a factor which is unknown to, or not readily apparent, to the offender.

The Council has identified as a possible aggravating factor the following, namely ‘Commission of offence whilst under the influence of alcohol or drugs’. It is submitted that the consumption of alcohol or drugs prior to the commission of an offence should not, per se, be an aggravating factor.
The offender who commits an offence whilst fully sober may not be less culpable than an offender who has consumed alcohol. The consumption of alcohol or drugs may not have any discernable effect on the actions of the offender. He or she may have committed the offence anyway.

We accept that there is justification for an implied assertion that the voluntary consumption of alcohol or drugs cannot amount to a mitigating factor, to rebut the often held belief of offenders that this is so.

Further, we accept there may be justification for an offence committed under the influence being an aggravating factor in certain situations. For example, assaults which take place against a background of excessive drinking in town centres late at night may need to be deterred by heavier than normal sentences. We agree that the application of this factor in those circumstances would then be appropriate.

The Council may wish to expand the factor reducing seriousness or reflecting personal mitigation of ‘Youth/lack of maturity or age’, to include ‘a mental or psychological condition which would hamper the offenders appreciation of the seriousness of the offence’. Many offenders do suffer from such conditions, for example adults and youths who suffer from ADHD or impulsive/compulsive disorders.

We agree with the Council’s proposal that the list of factors provided should not be regarded as exhaustive. If other factors are properly established then they should be operative at this stage. In our experience, real life situations are often not amenable to a supposedly comprehensive list established beforehand. It would, of course, always be incumbent on the court to announce with clarity and precision its reasoning in such circumstances.

11. Do you agree that the court should take account of an assault offence covered by section 29 having been racially or religiously aggravated, and increase the severity of the sentence accordingly, only after having reached an initial view on the sentence for the offence?

Yes. However, there should always be caution about the potential for the double accounting of this factor earlier in the process. For example, a victim may have been regarded as particularly vulnerable as a component of the offence being aggravated.

12. Do you agree with the Council’s proposed change to include lack of maturity and/or is there any further role for the guidance to play in addressing the specific issue of offenders aged 18-24?

The guideline appears to be organised primarily to establish an appropriate sentence in relation to the first of the statutory factors set out in s142 of the Criminal Justice Act 2003, namely the punishment of offenders. A number of the factors can be weighted to take into account one or more of the other purposes. For example, as set out above, the factor referring to alcohol or drugs may only be properly applicable in relation to the reduction of crime (including its reduction by deterrence).

The third statutory purpose set out in s142, the reform and rehabilitation of offenders, has particular importance in relation to youths and young people. In addition, of course, the court has to have due regard to s 37 of the Crime and Disorder Act 1998, namely that it shall be
the principal aim of the youth justice system to prevent offending by children and young persons.

It is further noted that the court will still have to take into account the ‘Overarching Principles-Sentencing Youths’ guideline, published by Sentencing Guidelines Council in 2009.

However, in practice many courts may merely apply the adult guideline with a notional reduction for the youth of the offender applied as a final stage. Such an approach would not properly take the above matters into account.

In what is perhaps the most obvious point of comparison, this is the formula applied in youth courts when going through the grave crimes procedure; inevitably the only available sentencing guidelines for such offences relate to the Crown Court sentencing of adults. Many youth courts take that as a starting point, and then apply a reduction of perhaps up to one half to arrive at a notional sentence. If the figure arrived at is a sentence of more than two years in custody then the youth court will commit to the Crown Court for trial.

It is submitted that the guidelines should reflect the self-evident special position of the young offender and that the way in which the current proposals treat youth or lack of maturity may not be sufficient to do so.

There is a respectable argument that a youth court should not be obliged to adhere to a particular guideline in the same way as an adult court is obliged to do.

It is suggested that courts should be especially sensitive to mitigating factors for offenders in the 18 – 24 year age range. They are still particularly able to change their attitudes and behaviour. It may not be appropriate to ascribe other aggravating factors to such a person as for a fully mature adult offender. For example, offenders of this age are more easily influenced when acting in a group. This factor, which is recognised as an aggravating factor, should not be given the same weight for an offender of 18 as for a much older and more mature person.

13. Do you agree with the eight-step proposed decision making process?

Yes.

14. Do you think that the range for category 3 GBH (section 20) cases should include custody at its upper limit or recommend only non custodial disposals?

It is recognised that in establishing a range there is always a tension between a number of competing factors. Public confidence in the guideline is surely of paramount importance. A serious dislocation between the general views of the public and a particular guideline would undermine confidence in the whole of the guidelines. It would be ‘a step too far’ for many members of the public to wholly preclude custody from any level of this serious offence.

15. Do you agree that the starting point for common assault should be a community order?

Yes, we agree that this is appropriate. It is recognised that the guideline starting point should not be wholly out of step with the expectations of the general public. As indicated above, the attention of the general public is likely to focus to a great degree upon the starting
point. We do not consider that a community order would be wholly out of step with public opinion.

16. **Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guideline?**

Yes

17. **Do you agree with removing the distinction between a high, medium and low community order from the offence ranges?**

Yes. A community order typically addresses the full range of the sentencing purposes as set out in s142 of the Criminal Justice Act 2003. A custodial sentence generally does not do so. For example it would not generally be regarded as addressing the purposes of reform and rehabilitation. The form of the community sentence should be more flexible than the distinction of high, medium and low orders would allow.

18. **Do you think that the aggravating/mitigating factors of harm within the draft guideline sufficiently allow the court to take into account consideration of victims, or are there other ways in which victims could be considered?**

The guideline recognises the particular circumstances of the victim as being important. It is noted that, for example, an aggravating factor is the particular vulnerability of the victim.

It is recognised that victims of assault are likely to be particularly traumatised by being a victim of crime. Injury can often extend beyond the immediate physical consequences of an assault. To take an extreme example, an elderly person subject to an assault which did not cause any physical injury might nonetheless be frightened to go out again from their own home. This behaviour might well not fall within any category of injury. The guideline recognises this in the factor described as `ongoing effect upon the victim’.

19. **Do you agree that the proposed decision making process will increase transparency and therefore public confidence in the sentencing process? Are there other ways in which the proposed guideline could increase public understanding and confidence?**

The proposals, in our view, do provide a transparent and logical process for arriving at an appropriate sentence in cases of assault. Members of the public who appraise themselves of this process are likely to be reassured that there is a fair and uniform system in place.

In practice, it is hoped that media reports of sentencing under these, or indeed any other, guidelines, and especially in controversial cases, are accompanied by an accurate summary of the court’s reasons. It may very well be the case that the public’s confidence in any set of guidelines is heavily dependent on this important explanatory material.